

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

COUNTRY REPORT

Ireland

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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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These full reports are available on the European Commission's website:

http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm

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INTRODUCTION¹

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.

As stated above inferior sources of law such as legislation depend on the Constitution for their validity. A common law or a legislative rule that conflicts with a provision of the Constitution is invalid, and then has no legal effect. The Constitution states that the sole law making body in the State is the Oireachtas.² 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.³

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 In drafting this report regard was had to the following reports. Sexual orientation Summary of 29 September 2004 by Mark Bell, Sexual orientation report of 29 September 2004 by Mark Bell, Disability Summary of May 2004 by Shivaun Quinlivan, Disability Report of May 2004 by Shivaun Quinlivan, Religion Summary of June 2004 by Dave Ellis and Sue Gogan, Religion report of May 2003 by Dave Ellis, Race summary of June 2004 by Dave Ellis and the Race Report of November 2002 by Dave Ellis. There will not be further references to these reports, save where a specific reference is made to such report, that will be duly acknowledged.

² Article 15.2, the Oireachtas consists of Dail Éireann and Seanad Éireann and the President. 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 Dail Éireann and the second chamber consists of Seanad Éireann. This is broadly equivalent to the House of Commons and the House of Lords as exercised in the United Kingdom.

³ Byrne, Kennedy, Ni Longain and Shannon, *Employment Law*, Dublin 2003, at 1.

The Equality Act 2004⁴ amended the provisions of 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 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.

The areas where national law may be in breach of the Directives are as follows:

- Article 9 of GFD and Article 7 of RD provide that associations, organisations or other legal entities that have a legitimate interest should be in a position to enforce the equal treatment principle on behalf of complainants, with their approval. Under the Equal Status Act 2000-2004 and the Employment Equality Act 1998-2004 no provision is made for organisations such as Trade Unions and NGO's to initiate actions. The only body empowered to initiate proceedings in its own name and in limited circumstances is the Equality Authority. The Equality Act 2004 permits a complainant to seek representation by a body authorised by the complainant, these bodies have no right to initiate an action – section 77(11) Employment Equality Act 1998-2004.
- Article 9 of GFD and Article 7 of RD provide for national time limits. Section 21(1) of the Equal Status Act provides that a complainant must send a written notification to the respondent within two months of the most recent occurrence of the discriminatory act. There are issues in respect of literacy problems and in identifying the correct respondent and this may present great difficulties in attempting to come within this time limit. The Equality Authority have presented evidence that this is of particular difficulty for people with disabilities.⁸
- Article 17 of GFD and Article 15 of RD provide that sanctions must be effective, proportionate and dissuasive. Under both the Equal Status Act 2000-2004 and the Employment Equality Act 1998-2004 maximum levels of compensation are enforced. For example there is a ceiling of 104 weeks pay as compensation in relation to employment non-gender discrimination.
- The Equality Act 2004 amended the definition of employee, and that definition contains an exemption and that is that it does not include 'persons employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or personal life of those persons.'⁹ Personal services is defined within the Equality Act as "'personal services', in relation to such 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 at

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>

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 (RD), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD)' at 20.

⁹ Section 3 Equality Act 2004.

home.’ The broad nature of this exemption raises compliance questions for both the GFD and the RD.

- Article 3 of the RD includes a broad scope. It is questionable whether Article 3(1)(e), (f), and (g) are covered by the scope of the Equal Status Act 2000-2004. The scope of the Equal Status Act relates to the provision of goods and services and these articles are included only in so far as they fall within that definition. This situation is further impacted on by section 14 of the Equal Status Act which provides a statutory exemption to the Equal Status Act 2000-2004. Where an act is required by virtue of another piece of legislation then the Equal Status Act 2000-2004 does not apply, it is questionable whether this blanket exemption is in compliance with the Race Directive.
- Article 16 of the GFD requires that member states shall take necessary measures to ensure that any laws contrary to the principle of equal treatment are abolished. As highlighted in the report on religion,¹⁰ not all provisions containing possibly discriminatory measures have been abolished. An example is given of the Organisation of Working Time Act, 1997.¹¹
- Article 5 of GFD requires the provision of reasonable accommodation for people with disabilities. Further to that there is Recital 17 which refers to the ‘essential functions of the post concerned.’ The Employment Equality Act 1998-2004 does not refer to the important distinction between ‘essential’ and ‘non-essential’ functions of the job in the context of the requirement to provide reasonable accommodation.
- Section 35 of the Employment Equality Act 1998-2004 provides that it is permissible to pay less favourable rates of pay for disabled workers. The provision allows an employer to offer a lower rate of remuneration for a disabled person if ‘by reason of the disability, the amount of that work done by the employee during a particular period is less than the amount of similar work done, or which could reasonably be expected to be done, during that period by an employee without the disability.’ This provision does appear to be problematic when we consider the GFD.
- Harassment is not defined as discrimination within the terms of the Equal Status Act 2000-2004.
- Article 2 GFD and Article 2 RD refer to the concept of indirect discrimination, and the wording suggests that it is permissible to use hypothetical comparators. It is not possible to use a hypothetical comparator under either the Equal Status Act, or the Employment Equality Act and therefore there is a concern about compliance with both directives.

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:

¹⁰ Religion report of May 2003 by Dave Ellis

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 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.

- 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)

As the Equality Act 2004 was implemented in July of that year no cases relying on the new provisions have been reported to date. There is one case which is of interest in this regard and that is the case of *Citibank v. Massinde Ntoko*.¹² The deciding body was the Labour Court, the decision was made in early 2004. The Labour Court relied directly on the Race Directive, the date for implementation having passed, yet the provisions had not yet been transposed. The Employment Equality Act was interpreted in light of the Directive and therefore ensured that the burden of proof principles from the directive applied in this case.

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, at Article 40.1, 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.¹³ This provision has been interpreted by the Irish Supreme Court as not requiring identical treatment of all persons without recognition of differences in relevant circumstances.¹⁴ 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 physically handicapped people 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

¹² Case EED045 *An Employer v. A Worker*, ED/01/13.

<http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations>

¹³ Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.

¹⁴ *de Búrca and Anderson v. A.G.* [1976] IR 38 and *O'Brien v. Keogh* [1972] IR 144.

as not only different but as posing no such social problems.’¹⁵ 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.’¹⁶ 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.’¹⁷ It is not clear whether the equality guarantee may be enforced in actions between private parties.¹⁸

In the 1997 decision of *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.’¹⁹ 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,²⁰ 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.
- 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.

¹⁵ *Norris v. Attorney General*, [1984] IR 36 at 59

¹⁶ *Murphy v. Attorney General*, [1982] IR 241 at 284.

¹⁷ Government of Ireland, (1996) *Report of the Constitution Review Group*, at 228

¹⁸ Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.

¹⁹ *Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 at 347.

²⁰ *Attorney General v. Southern Industrial Trust*, (1960) 94 ILTR 161; *McGee v. A.G.*, [1974] IR 284

- 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. Earlier versions of the Irish Constitution did grant special privilege to particular religious denominations, these were removed by virtue of the fifth amendment to the Constitution.²¹ 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.²²

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 the Equal Status Act 2000-2004 both prohibit discrimination on nine grounds. Those grounds are: Marital Status, Family Status, Sexual Orientation, Religious Belief, Age, Disability, Gender, Race and Membership of the Traveller Community.²³ It is possible to take cases on the basis of multiple/double discrimination, under both of the anti-discrimination statutes. See for example *A Named Female v. A Named Company*,²⁴ where it was held that the complainant was discriminated against on the grounds of both gender and age; and *Maughan v. Glimmerman*,²⁵ where the complainant claimed discrimination on the grounds of his membership of the traveller community, his disability and his family status, the Equality Officer found that he had been discriminated against on the basis of his family status, but not on the other two grounds.

In addition to the Equality legislation 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 travelling community. These terms are not defined within the legislation.²⁶

²¹ Government of Ireland, (1996) *Report of the Constitution Review Group* at 368

²² Government of Ireland, (1996) *Report of the Constitution Review Group* at 369

²³ Section 3(2)(a-j) Equal Status Act 2000-2004 and section 6(2)(a-i) Employment Equality Act 1998-2004.

²⁴ DEC-E2002-014

²⁵ DEC-S2001-020

²⁶ The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.

The Prohibition of Incitement to Hatred Act of 1989 prohibits incitement to hatred on account of a person's race, colour, nationality, religion, ethnic or national origins, membership of the travelling 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?*
- 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)?*

The Employment Equality Act 1998-2004 defines the relevant terms as follows:

Racial or ethnic origin:

The ground of race relates to people who are of a different race, colour, nationality or ethnic or national origin.²⁷

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.

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

'disability' – means

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

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

²⁷ Section 6(2)(h) Employment Equality Act 1998-2004

Age

The age ground as set out in section 6(f) refers to people of different ages. This is subject to subsection (3) which states:

- (3) (a) The age ground applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.
- (b) Notwithstanding subsection (1) and section 37(2), an employer may set a minimum age, not exceeding 18 years, for recruitment to a post.
- (c) Offering a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees in that employment shall not be taken as constituting discrimination on the age ground.
- (d) Subsection (1)(b) of section 2 (exclusions) of the Unfair Dismissals Act 1977 is amended by deleting ‘or who on that date was a person to whom by reason of his age the Redundancy Payments Acts 1967 to 1973, did not apply’ and inserting ‘or who on that date had not attained the age of 16 years’.

Sexual Orientation

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

The Equal Status Act, 2000-2004 defines the relevant terms in a similar manner, the two differences relate to the Age ground and the Disability Ground which are defined as follows:

Age

The Equality Act 2004 amended the definition of age. Age is defined at section 3(2)(f) and defines the age ground as between any two persons, as subject to section (3) that they are of different ages (the age ground). Section 3(3) of the Equal Status Act 2000-2004 reads:

- (3) (a) Treating a person who has not attained the age of 18 years less favourably or more favourably than another, whatever that person’s age shall not be regarded as discrimination on the age ground.
- (3) (b) Paragraph (a) does not apply in relation to the provision of motor vehicle insurance to licensed drivers under that age.

Disability

‘disability’ means—

- (a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,
- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person’s body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, disease or illness which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour; (S.2(1) Equal Status Act 2000)

As stated above (paragraph 2.1) neither the Unfair Dismissals Act 1977 and 1993, nor the Prohibition on the Incitement to Hatred Act 1989 define the terms set out within the parameters of those Acts.

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

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.²⁸

The Employment Equality Act 1998 was amended by the Equality Act 2004 to include a prohibition on less favourable treatment on any of the discriminatory grounds which exist, existed but no longer exist, which may exist in the future,²⁹ or which is imputed to the person concerned and also prohibits discrimination by association.³⁰ While discrimination by association is now prohibited it must be noted that the Employment Equality Act is focused on discrimination against an individual employee. The Equality Authority does have legal standing to bring an action where ‘discrimination or victimisation is being generally practised against persons or that a practice referred to in section 8(4) is being applied or operated.’³¹ 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.’ This Act does not contain a provision which would permit an organisation other than the Equality Authority from initiating proceedings in their own name.

The Equal Status Act also prohibits discrimination which shall be taken to occur where the ‘discriminatory ground’ exists at present, previously existed but no longer exists or may exist in the future or which is imputed to the person in question.³² The legislation also prohibits discrimination by association with a person who is a member of one of the ‘discriminatory grounds.’³³ The issue of discrimination by association has been covered by the Equal Status Act since the inception of the Act. In the case of *Six Complainants v. a Public House*,³⁴ a groups 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 also refused admittance. This Act does not contain a provision which would permit an organisation other than the Equality Authority from initiating proceedings in their own name.

²⁸ Section 6(1) Employment Equality Act 1998-2004 and section 3(1) of the Equal Status Act 2000-2004.

²⁹ Section 6(1)(a) Employment Equality Act 1998-2004

³⁰ Section 6(1)(b) Employment Equality Act 1998-2004

³¹ Section 85(1)(a), Employment Equality Act.

³² Section 3(1)(a)(i)-(iv) Equal Status Act 2000-2004

³³ Section 3(1)(b)(i) Equal Status Act 2000-2004

³⁴ DEC-S2004-009-014

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'³⁵ on one of the discriminatory grounds. This prohibition includes discrimination by association, and discrimination on a discriminatory ground which exists, existed but no longer exists, may exist in the future, or is imputed to the person concerned. 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. In addition the provision has been held to incorporate the ECJ decision of *Finanzamt Koeln-Alstadt v. Roland Schumacker*, which held that:

It is also settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.³⁶

The Equality Officers have also taken on board the decision in *Gillespie & ors v. Northern Health and Social Services Board & ors* and have stated:

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.³⁷

While these European decisions initially related to discrimination based on nationality, and gender respectively, the Equality Courts have extended them to cover the new protected grounds, in this particular case it related to discrimination based on a person's disability.³⁸ 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 with a disability.³⁹

The legislation is silent on how a comparison is made in respect of age discrimination, that being said there are a number of noteworthy cases on this point. The first case *Perry v. Garda Commissioner*⁴⁰ related to a voluntary retirement scheme. The issue related to whether the 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 £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

³⁵ Section 6(1) Employment Equality Act 1998-2004

³⁶ Case C-279/93 [1995] ECR-I-225

³⁷ [1996] ECJ C342/93

³⁸ *Harrington v. East Coast Area Health Board*, DEC-E/2002/001

³⁹ *St. James Hospital v. Eng* EDA023, July 2002.

⁴⁰ *Perry v. Garda Commissioner*, DEC-E2001-029

a second case that of *Superquinn v. Freeman*⁴¹ 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*,⁴² it was held that a difference of 8 years between the complainant and the comparator was sufficient to maintain a claim of age discrimination.

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.'⁴³ This prohibition on less favourable treatment relates to a discriminatory ground which exists at present or previously existed but no longer exists or may exist in the future, or which is imputed to the person concerned this also covers discrimination by association. The prohibition on less favourable treatment applies equally to all nine discriminatory grounds.⁴⁴ The legislation does not specify how a comparison is to be made in the context of any of the nine grounds. A final point to note in respect of direct discrimination is that 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.⁴⁵

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?*

The issue of indirect discrimination under Irish Equality legislation is complicated. The Employment Equality Act 1998 contained four separate definitions of indirect discrimination. It depended both on the ground of discrimination as well as the area of employment to decide which definition applied to a case. This Act is divided into parts; Part III deals with gender discrimination and Part IV with the other eight discriminatory grounds, it is these grounds that are relevant in the context of the Directives. There are different definitions of indirect discrimination depending on whether the case is pay related or whether it is non-pay related (equal treatment) case. The Equality Act 2004, with a view to ensuring compatibility with the Directives, has amended these four definitions of indirect discrimination.

As the legislation differentiates between the areas of employment law, this part will set out both definitions of indirect discrimination. Section 29 Employment Equality Act 1998-2004 deals with pay related indirect discrimination. Indirect discrimination is deemed to occur where an apparently neutral provision puts a person belonging to a discriminatory ground at a 'particular disadvantage' in respect of remuneration compared with other employees of their employer.⁴⁶ 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.'⁴⁷ It is possible to use statistics in determining whether or not indirect discrimination has occurred. 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. It would appear from the

⁴¹ *Superquinn v. Freeman*, DEE0211, November 2002.

⁴² *Reynolds v. Limerick County Council*, DEC-E2003-032

⁴³ Section 3(1)(a) Equal Status Act 2000-2004

⁴⁴ See section 2.1 above.

⁴⁵ *Collins v. Bartra House Hotel*, DEC-S2001-015

⁴⁶ Section 29(4)(a) Employment Equality Act 1998-2004

⁴⁷ Section 29(4)(b) Employment Equality Act 1998-2004

wording of the provision that it is not possible to use a hypothetical comparator, therefore its compliance with the Directives is questionable.

Section 31 of the Employment Equality Act 1998-2004 deals with non-pay related indirect discrimination. 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.⁴⁸ 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.'⁴⁹ It is possible to use statistics in determining whether or not indirect discrimination has occurred. In the context of equal pay indirect discrimination cases, on any of the protected grounds, it is not possible to have a hypothetical comparator, therefore its compliance with both Directives is questionable.

There are no decided cases under the amended definition of indirect discrimination. The previous definition had different standards to determine whether indirect discrimination occurred and equally it had a different standard of justification. That being said there is a case on age discrimination which is instructive. In *McGarr v Department of Finance*,⁵⁰ the claimant and the respondent agreed that the statistical evidence established that a requirement for five years of service prior to promotion indirectly discriminated against Executive Officers under the age of 30. The respondent tried to claim objective justification, claiming that the five year period was necessary to evaluate these employees to ensure that they were suitable for promotion. The Equality Tribunal held that the respondent did not succeed in showing there was an objective justification, as the respondent had failed to provide evidence to support their position, further, due to difficulties in recruiting the five year period had been reduced to three years. The Equality Tribunal also applied the decision of *Hill and Stapleton v. Revenue Commissioners*⁵¹ as support for the proposition that an increase in costs does not in itself provide objective justification for a discriminatory practice.

The Equal Status Act 2000 prohibits indirect discrimination in the provision of goods and services. Indirect discrimination occurs where an apparently neutral provision puts a person belonging to one of 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.'⁵² There is no possibility of relying on a hypothetical comparator, as a result it would appear not to be in compliance with the Race Directive.

In relation to age discrimination, the legislation does not specify how a comparison is to be made. The cases of *Perry v. Garda Commissioner*,⁵³ *Superquinn v. Freeman*⁵⁴ and *Reynolds v. Limerick Country Council*,⁵⁵ discussed in section 2.2 above would be instructive as to how comparisons on the age ground will be determined.

2.4 Harassment (Article 2(3))

⁴⁸ Section 31(1)(a) Employment Equality Act 1998-2004.

⁴⁹ Section 31(1)(b) Employment Equality Act 1998-2004.

⁵⁰ *McGarr v. Department of Finance*, DEC-E2003-36

⁵¹ *Hill and Stapleton v. Revenue Commissioners*, Case C-243/95

⁵² Section 3(1)(c) Equal Status Act 2000-2004

⁵³ *Perry v. Garda Commissioner*, DEC-E2001-029

⁵⁴ *Superquinn v. Freeman*, DEE0211, November 2002.

⁵⁵ *Reynolds v. Limerick County Council*, DEC-E2003-032

- 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.⁵⁶ The employer may be held vicariously liable for the harassment of the victim, if the harassment is by a person other than the employer.⁵⁷ 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.’⁵⁸ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.⁵⁹ Harassment constitutes discrimination within the terms of the Act. A Code of Practice under the Employment Equality Act also exists, 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.⁶⁰ 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.⁶¹ There is a statutory defence available for such a person and that is that they took such steps as are reasonably practicable to prevent harassment.⁶² 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.’⁶³ This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.’⁶⁴ 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 the incitement to hatred on the basis of a person’s race, religion, nationality or sexual orientation. This Act does not strictly relate to discrimination, but a prohibition on the incitement to hatred. 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 travelling 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

⁵⁶ Section 14A(1)(a) Employment Equality Act 1998-2004.

⁵⁷ Section 15 Employment Equality Act 1998-2004

⁵⁸ Section 14A(7)(a) Employment Equality Act 1998-2004

⁵⁹ Section 14A(7)(b) Employment Equality Act 1998-2004

⁶⁰ Section 11(1)(a)-(c) Equal Status Act 2000-2004

⁶¹ Section 42 Equal Status Act 2000-2004

⁶² Section 11 (3) Equal Status Act 2000-2004

⁶³ Section 11 (5)(a) Equal Status Act 2000-2004

⁶⁴ Section 11 (5)(b) Equal Status Act 2000-2004

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. Also the provisions do not cover the same groups as protected under the Directives.

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. This provision is interesting in that it is a criminal offence to procure discrimination, but the actual conduct of discrimination is not criminal under the legislation.⁶⁵ The new 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 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.⁶⁶

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. 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?

In 1996 the predecessors to the current Equality legislation were referred to the Supreme Court for a decision as to their constitutionality. The Supreme Court held that the provisions in respect of reasonable accommodation were unconstitutional – see *Re the Employment Equality Bill 1996*⁶⁷ and *Re the Equal Status Bill 1996*.⁶⁸ The Supreme Court in a single judgment declared that three aspects of the 1996 Employment Equality Bill were repugnant to the Constitution, including that on reasonable accommodation. The provision in question required employers to bear the cost of any special facilities or treatments for people with disabilities unless the employers could show that this caused them an ‘undue hardship.’ The Supreme Court in its decision recognised the ‘laudable aim of making provision for such of our fellow citizens as are disabled,’ however the cost of this could not be placed on employers because of the Constitutional recognition given to private property. Writing for the Court, Hamilton CJ stated:

⁶⁵ O’Connell, D., ‘Equality NOW: The SIPTU Guide to the Employment Equality Act, 1998, *SIPTU 1999*.

⁶⁶ Section 13 Equal Status Act 2000-2004

⁶⁷ [1997] 2 IR 321

⁶⁸ [1997] 2 IR 387

the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group. The difficulty the Court finds with the section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work unless the cost of the provision of such treatment or facilities would give rise to 'undue hardship' to the employer.⁶⁹

This decision paved the way for the restrictive provisions on 'reasonable accommodation' that were finally introduced in section 16 of the Employment Equality Act 1998 and section 4 of the Equal Status Act 2000. Section 16 of the Employment Equality Act 1998 was amended by virtue of the Equality Act 2004 to ensure compliance with the Directives. The definition of reasonable accommodation provided within the Equal Status Act 2000 remains unchanged as the Framework Directive did 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 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'⁷⁰ 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.⁷¹ An appropriate measure is defined 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. 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.⁷² 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.⁷³ 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*,⁷⁴ 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 Equal Status Act 2000-2004 also contains a provision on reasonable accommodation, this provision is still subject to the Supreme Court decision as the Framework Directive does not

⁶⁹ *Re the Employment Equality Bill 1996*, [1997] 2 IR 321.

⁷⁰ Section 16(b)(iii), the legislation specifically refers to the concept of 'disproportionate burden.'

⁷¹ Section 16(c)(i),(ii) and (iii).

⁷² *A Complainant v. Bus Éireann* DEC E2003-04

⁷³ www.ihrc.ie Irish Human Rights Commission, 'Observations on the Equality Bill 2004'

⁷⁴ ED/00/8

relate to the provision of goods and services and therefore the doctrine of supremacy does not apply. Section 4 of states:

- 4(1) For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.
- (2) A refusal or failure to provide the special treatment or facilities to which *subsection (1)* refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.

The issue of reasonable accommodation has been litigated, albeit to a limited extent, under the Equal Status Act 2000-2004. The case law really relates to differentiations made on the grounds of characteristics closely related to a disability. In *Roche v. Alabaster Associates Limited t/a Madigans*,⁷⁵ 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. Equally in *Forrestal v. Hearn's Hotel, Clonmel*,⁷⁶ it was held to be discrimination not to allow a wheelchair user access to a nightclub. In *Six Complainants v. a Public House*,⁷⁷ 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 and that the respondent failed to reasonably accommodate all six complainants. The case related to non-admittance to 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 all six complainants.

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, both relate to 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 refers to 'grants' these refer to financial assistance to persons in education. And the relevant section states:

- 7(5)(b) The Minister for Education and Science does not discriminate where he or she –
- (i) requires grants to be restricted to persons who are nationals of a member state of the European Union, or
 - (ii) requires such nationals and other persons to be treated differently in relation to the making of grants.⁷⁸

⁷⁵ DEC-S2002-086

⁷⁶ DEC-S2001-018

⁷⁷ DEC-S2004-009-014

⁷⁸ Section 7(5)(b) Equal Status Act 2000-2004

A further distinction is made in section 14 of the amended Equal Status Act 2000-2004 which was amended to include the following provision:

- ‘(aa) on the basis of nationality –
- (i) any action taken by a public authority in relation to a non-national -
 - (I) who, when the action was taken, was either outside the State or, for the purposes of the Immigration Act 2004, unlawfully present in it, or
 - (II) in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State,
 - (ii) any action taken by the Minister in relation to a non-national where the action arises from an action referred to in subparagraph (i).’

In these sections a non-national has the same meaning as that used in the Immigration Act of 1999. In effect certain elements of the Equal Status Act 2000-2004 do not apply to non-nationals. The Immigration Act 1999 relates to issues in respect of immigration, right to residency in the State where a person has not been granted refugee status. This appears to come within the exception in the Race Directive in respect of Member States immigration policies.

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?

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 Act does not define the term ‘person,’ so it is unclear whether it would encompass both natural persons and legal persons.

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:

‘person’, as that term is used in or in relation to any provision of this Act that prohibits that person from discriminating or from committing any other act or that requires a person to comply with a provision of this Act or regulations made under it, includes an organisation, public body or other entity;

The terms of this Act 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 1998-2004⁷⁹ and the Equal Status Act 2000-2004⁸⁰ contain identical provisions on vicarious liability. These provisions set out that the employer is the addressee of the prohibition of discrimination. No distinctions are made on the basis of the size of the employer. Effectively these provisions ensure that the employer 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.⁸¹ 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.

Section 11 of the Equal Status Act 2000-2004 also prohibits harassment, that is, harassment in relation to the provisions of goods, services, disposal of accommodation and also in education. 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 1998-2004.⁸² The Equal Status Act 2000-2004 clearly provides that an individual may be liable for acts of discrimination or harassment.⁸³

⁷⁹ Section 15, Employment Equality Act 1998-2004

⁸⁰ Section 42, Equal Status Act 2000-2004

⁸¹ See section 2.4 above.

⁸² See section 3.1.2 above.

⁸³ Section 2(1) Equal Status Act 2000-2004

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. The Act defines the term ‘employee’ as:

‘employee’, subject to subsection (3), means a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and, where the context admits, includes a member or former member of a regulatory body, but, so far as regards access to employment, does not include a person employed in another person’s home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons;⁸⁴

The term ‘personal service’ is further defined and means:

‘personal services’, in relation to such 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;⁸⁵

This exception to the definition of employment amends the broad exception that existed prior to the Equality Act 2004 which covered every form of employment in private households. This new exception is narrower, and is framed in terms of a fundamental right to privacy. There is no equivalent exception within the terms of the Framework Directive it is questionable whether this provision is in compliance.

The Employment Equality Act 1998-2004 at section 13A includes business partnerships as coming within the terms of the legislation. There is a new concept of contract of employment and that is now defined as including contract where ‘an individual agrees with another person personally to execute any work or service for that person.’⁸⁶ It is assumed that this definition includes people who are self-employed, however, it would be preferable had it been expressly provided for.

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.⁸⁷ 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.⁸⁸ 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

⁸⁴ Section 2(1) Employment Equality Act 1998-2004

⁸⁵ Section 2(1) Employment Equality Act 1998-2004

⁸⁶ Section 2(1) Employment Equality Act 1998-2004

⁸⁷ There are different rules in respect of religious organisations, organisations of certain religious values, emergency services, the Garda Síochána and the Defence Forces.

⁸⁸ Section 37(1) Employment Equality Act 1998-2004

be preserved.’ This provision appears to rule out the possibility of an employee with a disability being deemed fully competent and capable of undertaking the ‘essential functions’ of the post with or without a reasonable accommodation. 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))

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. 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 for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons.’⁸⁹ This limitation only 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. It enables employers to discriminate against prospective employees who are applying for such work.⁹⁰ 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.⁹¹

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.⁹² This should under Irish law cover many forms of work that would otherwise be classified as self-employment.⁹³

Discrimination in access to employment includes ‘any arrangements the employer makes for the purpose of deciding to whom employment should be offered,’⁹⁴ 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.’⁹⁵ Section 8(8) prohibits discrimination in respect of opportunities of access for promotion. Section 13(c) prohibits discrimination in relation to a body which controls entry to or the carrying on of, ‘a profession, vocation or occupation.’

⁸⁹ Section 2(1) Employment Equality Act 1998-2004

⁹⁰ http://www.inou.ie/press/index.tmp?secid=20030311152957&_eqRIDdatarg=20040505101625

⁹¹ http://www.iccl.ie/minorities/bill/04_equalitybill.html

⁹² Section 2(1) Employment Equality Act 1998-2004

⁹³ Sexual orientation Summary of 29 September 2004 by Mark Bell

⁹⁴ Section 8(5)(a) Employment Equality Act 1998-2004

⁹⁵ Section 8(5)(b) Employment Equality act 1998-2004

Section 16(5) Employment Equality Act 1998-2004 contains an exception in respect of access to employment. The section states that ‘nothing in 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*.⁹⁶ 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’.⁹⁷

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

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.

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.⁹⁸ 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.⁹⁹ 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.’¹⁰⁰ This definition specifically excludes pensions from its ambit. The Pensions Act 1990 and 2004 prohibits discrimination in respect of occupational pensions schemes and other occupational benefits.

These general statements in sections 7 and 29 should be read in light of section 35 of the Act. Section 35 allows employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work, or the same hours as a person who does not have a disability. 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. Concern has been expressed about this provision, as is evidenced by the comments of the Irish Human Rights Commission.¹⁰¹

The Unfair Dismissals Acts 1977-1993 prohibits discrimination in respect of union membership, religious or political opinions, for taking an action against the employer, the

⁹⁶ [1997] 2 IR 321

⁹⁷ *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

⁹⁸ Section 7 Employment Equality Act 1998-2004 defines the concept of like work.

⁹⁹ Section 7 Employment Equality Act 1998-2004.

¹⁰⁰ Section 2(1) Employment Equality Act 1998-2004

¹⁰¹ www.ihrc.ie Irish Human Rights Commission, ‘Observations on the Equality Bill 2004’

race, colour sexual orientation, age or membership of the travelling community. The protection also extends to cover a number of statutory protections, interestingly however, disability is not among the protected groups under this statute.¹⁰²

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.

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. 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, this section prohibits discrimination in vocational training. Vocational training is 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 section is addressed at educational and training bodies offering courses of vocational training. 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 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.’¹⁰³ Effectively in order to protect the religious ethos of certain hospitals or places of vocational training where the relevant Government Minister certifies that it is necessary 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 any of the following:

- (a) in the terms on which any such course or related facility is offered,
- (b) by refusing or omitting to afford access to any such course or facility, or
- (c) in the manner in which any such course or facility is provided.¹⁰⁴

¹⁰² The Unfair Dismissal Act does not apply to most civil servants and to some members of the public sector: Gardai and the Defence Forces.

¹⁰³ Section 12(4) Employment Equality Act 1998-2004

¹⁰⁴ Section 12(1) Employment Equality Act 1998-2004

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 arguably this provision also includes vocational training.¹⁰⁵

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 which 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.

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 in the Equal Status Act 2000-2004 on discrimination in relation to social protection for religion or belief, age, disability or sexual orientation.

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 in determining whether Ireland is in compliance with this element of the Directive.¹⁰⁶ In the decision of *Donovan v. Donnellan*¹⁰⁷ 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.’ While this interpretation is positive, the question of whether article 3 of the Race Directive is included is completely dependent on future judicial interpretation. This situation is further impacted by section 14 of the Equal Status Act which provides a statutory exemption to the Equal Status Act 2000-2004. Where an act is required by virtue of another piece of legislation then the Equal Status Act 2000-2004 does not apply, it is questionable whether this blanket exemption is in compliance with the Race Directive. It is not definitive whether this provision is or is not in compliance with the Race Directive. If the Equal Status Act 2000-2004 is read alongside the Ombudsman Act 1980¹⁰⁸ and the Constitutional guarantee¹⁰⁹ to equality Ireland may be in compliance.¹¹⁰ The overall difficulty is the lack of clarity in this regard.

¹⁰⁵ See section 3.2.8 below for more on this provision.

¹⁰⁶ Race Report of November 2002 by Dave Ellis

¹⁰⁷ DEC-S2001-011

¹⁰⁸ Section 4(2), Ombudsman Act 1980

¹⁰⁹ Article 40.1 Irish Constitution

¹¹⁰ Race Report of November 2002 by Dave Ellis

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, for example, 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. That being said it is thought that the prohibitions on discrimination in relation to ‘social protection’ would apply to ‘social advantages.’¹¹¹

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

This covers all aspects of education, including all types of schools.

The Equal Status Act, 2000 refers to educational establishments, these are broadly defined as:

- 7 (1) In this section ‘educational establishment’ means a pre-school service ... primary or post-primary school, an institution providing adult, continuing or further education, or a university or any other third-level or higher-level institution, whether or not supported by public funds.

This definition is very broad and ensures that any body in the business of education be they public or private are covered by this legislation. This clearly relates to all forms of education including third-level education. The Equal Status Act 2000-2004 prohibits discrimination on the nine protected grounds in relation to:

- (a) the admission to the terms or conditions of admission of a person as a student to the establishment
- (b) the access of a student to any course, facility or benefit provided by the establishment
- (c) any other term or condition of participation in the establishment by a student, or
- (d) the expulsion of a student from the establishment or any other sanction against the student.

The Employment Equality Act 1998-2004 also has relevance by virtue of section 12 in relation to vocational training.¹¹² There are a number of exceptions to the general prohibition of discrimination, those exceptions permit the existence of single sex schools,¹¹³ the provision of training for religious purposes to one gender only or to a particular belief,¹¹⁴ the promotion of a religious ethos,¹¹⁵ different fee arrangements for nationals and European Union members,¹¹⁶ different access arrangements to third level institutions for mature students,¹¹⁷ and also it permits distinctions to be made in relation to the organisation of sporting events.¹¹⁸ A specific exception in relation to students with disabilities exists. It is permissible to

¹¹¹ Race Report of November 2002 by Dave Ellis

¹¹² See section 3.2.4 above.

¹¹³ Section 7(3)(a) Equal Status Act 2000-2004

¹¹⁴ Section 7(3)(b) Equal Status Act 2000-2004

¹¹⁵ Section 7(3)(c) Equal Status Act 2000-2004

¹¹⁶ Section 7(3)(d) Equal Status Act 2000-2004

¹¹⁷ Section 7(3)(e) Equal Status Act 2000-2004

¹¹⁸ Section 7(4)(a) Equal Status Act 2000-2004

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.¹¹⁹

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.’¹²⁰ The issue of concern in respect of education is the lack of recognition of diverse cultures within the curriculum.¹²¹ There is also a concern in relation to the exception on the promotion of a ‘religious ethos,’ this provision is not limited by the safeguards included within the GFD. 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.¹²²

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.’¹²³

There is one area of concern in this regard and that relates to section 15 of the Equal Status Act 2000-2004 and also sections 19 and 25 of the Intoxicating Liquor Act 2003. 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 ‘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.’¹²⁴ The Equality Tribunal has extensively considered this section.¹²⁵ This provision was amended in 2003 by the Intoxicating Liquor Act 2003 which provided that cases involving discrimination in respect of

¹¹⁹ Section 7(4)(b) Equal Status Act 2000-2004

¹²⁰ Summary of June 2004 by Dave Ellis and Sue Gogan

¹²¹ 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.

¹²² *O’Donoghue v. Minister for Health* [1996] 2 IR 20.

¹²³ Section 5(1) Equal Status Act 2000-2004

¹²⁴ Section 15(1) Equal Status Act 2000-2004

¹²⁵ 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.

licensed premises should be heard in the District Court as opposed to at the Equality Tribunal. This change of venue has implications for the cost of litigation which would be greatly increased, and also for the delay in enforcement of the equality provisions. The statistics for the end of year for 2003 establish that members of the Travelling 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 on members of the Traveller community. 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.

The Equal Status Act 2000-2004 also contains a number of other exclusions:

- Differences in treatment of persons is permitted in relation to 'annuities, pensions, insurance policies' or other matters related to the assessment of risk. The difference in treatment should relate to actuarial or statistical data or other relevant underwriting or commercial factor and should be reasonable.¹²⁶
- Difference in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose.¹²⁷
- 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.¹²⁸
- 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.'¹²⁹
- Having an age requirement for persons to be either an adoptive or foster parent.¹³⁰
- Differences in the treatment not otherwise specifically provided for in the treatment of persons in respect of the disposal of goods, or the provision of a service, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.¹³¹
- A club shall not be considered to be a discriminating club by reason only that its principal purpose is to cater for the needs of persons of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin, membership of the traveller community, or persons who have no religious beliefs.¹³²
- Where the club confines access to membership to people of a particular gender, or age where it is not practicable for members outside of this category to enjoy the benefit or privilege at the same time as members within the category, and where arrangements have been made for reasonably equivalent benefit for members outside of the category.¹³³

¹²⁶ Section 5(2)(d) Equal Status Act 2000-2004

¹²⁷ Section 5(2)(e) Equal Status Act 2000-2004

¹²⁸ Section 5(2)(f) Equal Status Act 2000-2004

¹²⁹ Section 5(2)(i) Equal Status Act 2000-2004

¹³⁰ Section 5(2)(k) Equal Status Act 2000-2004

¹³¹ Section 5(2)(j) Equal Status Act 2000-2004

¹³² Section 9(1)(a) Equal Status Act 2000-2004

¹³³ Section 9(1)(b) Equal Status Act 2000-2004

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.¹³⁴ 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 person's private or family life or that of any other person residing in the home.'¹³⁵ Another such exception relates to accommodation which 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.¹³⁶ There is also an exception in respect of housing authorities, and that nothing they do pursuant to the Housing Acts, 1966 to 1998 or the Housing (Miscellaneous Provisions) act, 1992 shall be prohibited by virtue of the Equal Status Act 2000-2004. This has relevance in the context of housing for members of the travelling community, on the grounds of age, disability, family status and marital status there is no clarification of this provision as to how they may be treated differently.¹³⁷ The Equal Status Act 2000-2004 also permits different treatment in the provision of housing accommodation by the Minister for Justice, Equality and Law Reform to a person on the basis of nationality, gender, family size, family status, marital status, disability, age or membership of the Traveller community. Nothing within the Act states that such a difference in treatment should be to the advantage of the particular category of people named.

The Housing (Traveller Accommodation) Act 1998 provides 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.¹³⁸ A further provision relevant in this context is the Housing (Miscellaneous Provisions) Act, 2002. Section 21 of the 2002 Act criminalizes trespass on public and private land. While this provision applies equally to all persons it has a disproportionate impact on members of the travelling community.¹³⁹ The Act permits the Gardaí to move Travellers with no notice on foot 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.'¹⁴⁰

¹³⁴ Section 6(1) Equal Status Act 2000-2004

¹³⁵ Section 6(2)(d) Equal Status Act 2000-2004

¹³⁶ Section 6(5) Equal Status Act 2000-2004

¹³⁷ Flash report race and religion 02-02-2004

¹³⁸ Race Report of November 2002 by Dave Ellis

¹³⁹ 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.

¹⁴⁰ The Irish Traveller Movement Traveller Legal Unit, Strategic Plan of 2003-2006.

4. EXEPTIONS

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.¹⁴¹ This necessity for legitimacy and proportionality is in line with Article 4 of both the Race Directive and the Framework Employment Directive. The 2004 amendments to the Employment Equality Act removed the exception which permitted distinctions to be made on the grounds of gender, race and religion when the employment involved, as an occupational qualification, the performance of duties outside the State in a place where the laws or customs are such that those duties could not reasonably have been performed by a person who had / had not a particular characteristic in relation to those grounds.

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 excludes discrimination on the basis of the maintenance or the reasonable prevention of any undermining of the religious ethos of an institution. The section states:

37.—(1) A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this Part or *Part II* if—

- (a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
- (b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

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*,¹⁴² the court held that it would 'appear that it is constitutionally permissible to make distinctions or 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....'¹⁴³ Equally it can be contended that the concept of

¹⁴¹ Section 37(2) Employment Equality Act 1998- 2004.

¹⁴² [1997] 2 I.R. 321

¹⁴³ Religion report of May 2003 by Dave Ellis

legitimacy is also contained in Irish law.¹⁴⁴ By not ensuring that the words ‘legitimate’ and ‘proportionate’ are not included in this sphere is a cause for concern, the courts have a broad discretion open to them,¹⁴⁵ it would be preferable if the language of the Act expressly required all actions to be ‘legitimate’ and ‘proportionate.’ It would appear 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 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).¹⁴⁶

A second exception to the general non-discrimination rule is contained within section 12(4) of the Employment Equality Act 1998-2004 and this relates to the provision of vocational training. This exception reflects the exception contained in section 37(1) of that Act and 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)?

Article 3(4) of the Framework Directive gives member states the option to exclude the application of the Directive, as it relates to discrimination on the grounds of disability and age, to members of the armed forces. 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 there are some restrictions in this regard. Section 37(3) provides that:

(3) It is an occupational requirement for employment in the Garda Síochána, prison service or any emergency service that persons employed therein are fully competent and available to undertake, 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.

This section ensures that it is an occupational requirement that those employed in the Garda Síochána be 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 states:

¹⁴⁴ *Flynn v. Sr. Power and the Sisters of the Holy Faith*, [1985] ILRM 336, and see Religion report of May 2003 by Dave Ellis.

¹⁴⁵ *Re Article 26 and the Employment Equality Bill 1996*, [1997] 2 IR 321 at 359.

¹⁴⁶ Sexual orientation report of 29 September 2004 by Mark Bell

(4) If —

(a) the Minister is of opinion that the age profile of members of the Garda Síochána, prison service or any emergency service is such that its operational capacity is or is likely to be adversely affected, and

(b) he or she by order so declares,

the age ground shall not apply in relation to such competitions for recruitment to that service as are specified in the order.

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)?

The Equality legislation (both the Employment Equality Act, 1998-2004 and the Equal Status Act 2000-2004) which are the main provisions for combating discrimination cover the grounds of racial or ethnic origin and membership of the Travelling community. The definition of race includes nationality, or ethnic or national origin.¹⁴⁷ Equally the Constitutional Courts have held that the some of the protections of the Constitution can be extended to non-citizens.¹⁴⁸

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.

There are a number of relevant exceptions under the Employment Equality Act 1998-2004 which relate to race and nationality. Section 12(7) EEA provides for different treatment on the race ground. This refers to the race ground as defined under Irish law which includes people who are ‘of a different race, colour, nationality or ethnic or national origin.’¹⁴⁹ The exceptions specifically refer to nationality, but are defined as an exception to the race ground. 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 is permitted by the terms 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.

¹⁴⁷ Section 6(2)(h) Employment Equality Act 1998-2004

¹⁴⁸ *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.

¹⁴⁹ Section 6(2)(h) Employment Equality Act 1998-2004

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. Section 5(2)(i) similarly excludes from discrimination differential treatment on the race ground, when the difference is reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment. 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 Family benefits

Work-related benefits include, for example, survivor's pension entitlements, free or discounted travel for certain family members, free or discounted health insurance, parenting leave to care for the child of a partner, etc.

a) How does the law treat work-related family benefits that are restricted to opposite-sex couples (whether married or unmarried)?

b) Is there an exception in the national law, particularly in relation to sexual orientation discrimination, for national laws on marital status and work-related benefits dependent thereon (Recital 22, Directive 2000/78)?

c) In states where other forms of legally-recognised partnership exist (e.g. registered partnership), does the law permit restrictions on work-related family benefits that exclude such couples?

What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

The Employment Equality Act 1998-2004 does provide some specific '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) a benefit to an employee in respect of events related to members of the employee's family or any description of those members;
- (b) a benefit to or in respect of a person as a member of an employee's family;
- (c) 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.¹⁵⁰ This definition clearly excludes same-sex partnerships. This means that the employer is permitted to limit all 'family benefits' to married partners, and to those children which are legally or biologically associated with that employee.

There are other 'family benefits' provided under other legislative enactments 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.¹⁵¹

¹⁵⁰ Section 2(1) Employment Equality Act 1998-2004

¹⁵¹ Section 6 Parental Leave Act 1998.

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.¹⁵² 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. This section does not appear to afford this form of leave to partners in same sex relationships.

The Pensions Act 1990-2004¹⁵³ contains an exception to the principle of non-discrimination on the grounds of sexual orientation. Section 72(3) states:

It shall not constitute 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 provided that it does not result in a breach of the said principle on the gender ground.

This ensures that pensions schemes, which provide a survivor pension to married partners, will not be deemed to amount to discrimination. Equally the social welfare survivor’s pensions are payable only to spouses of the deceased contributor.¹⁵⁴

Same sex couples will 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. This position is currently under challenge, the High Court granted a same-sex couple that were married in Canada the right to challenge the taxation system that would not permit them to file as a married couple rather than as two single people.¹⁵⁵ Married couples receive a number of benefits, including: a higher tax band to married single income families; double the rate bands of tax available to single people where both spouses are working, a home carer’s allowance for single income families, double the mortgage interest relief available to single people, double tax relief for payment of rent, tax relief for the spouse for health insurance and other qualifying payments made for the other spouse among others.¹⁵⁶

4.6 Health and safety

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

¹⁵² Section 6(1) Parental Leave Act 1998

¹⁵³ This Act relates to occupational pensions, personal retirement savings accounts, and other occupational benefits.

¹⁵⁴ http://www.equality.ie/stored-files/PDF/Partnership_Rights_of_Same_Sex_Couples.pdf - See this publication for more detailed information about pension rights.

¹⁵⁵ <http://www.irishexaminer.com/text/story.asp?j=287804893034&p=z878x4893963&n=287804894017> and <http://www.queermarriage.com/index.php?content=showNews&nID=96> and

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

¹⁵⁶ http://www.equality.ie/stored-files/PDF/Partnership_Rights_of_Same_Sex_Couples.pdf

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)?

This provision can be reviewed in two ways: firstly it could be argued that this provision allows Member States to use health and safety legislation as a ground for derogation from equal treatment; secondly, the provision could be interpreted as allowing the adaptation of health and safety legislation to the situation of people with disabilities. This interpretation is more consistent with the other provisions in the Directive and in other health and safety legislation. In Ireland the main legislative provision in this area is the Safety, Health and Welfare at Work Act 1989.¹⁵⁷ 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 General Applications Regulations (S.I. 44/93) 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:

1. General Provisions Regulations 1993 (Part II);
2. Workplace Regulations 1993 (Part III);
3. Work Equipment Regulations 1993 and 2001 (Part IV);
4. Personal Protective Equipment Regulations 1993 (Part V);
5. Manual Handling of Loads Regulations 1993 (Part VI);
6. Display Screen Equipment (VDUs) Regulations 1993 (Part VII);
7. Electricity Regulations 1993 (Part VIII);
8. First Aid Regulations 1993 (Part IX);
9. Notification of Accidents and Dangerous Occurrences Regulations 1993 (Part X).

Irish legislation doesn't contain specific exceptions 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 Safety Health and Welfare at Work (General Application) Regulations state that although employers must adapt workplaces to the individual, they are entitled to give collective protective measures priority over individual protective measures.

As for the equality legislation 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.¹⁵⁸ 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, what is the standard to be imposed in relation to such actions. These provisions are quite unclear.

The Employment Equality Act 1998-2004 introduced a new provision in 2004 and that relates to section 33 which 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

¹⁵⁷ <http://acts.oireachtas.ie/zza7y1989.1.html>

¹⁵⁸ Section 4(4) Equal Status Act 2000-2004

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?*
- b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

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 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.¹⁵⁹ (See section 4.9 below for a further discussion on this issue).

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.’¹⁶⁰ It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory.¹⁶¹ 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.¹⁶² These exceptions do appear to come within Article 6 of Directive 2000/78.

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.

The Protection of Young Persons (Employment) Act 1996¹⁶³ 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

¹⁵⁹ Section 34 Employment Equality Act 1998-2004

¹⁶⁰ Section 34(3A) Employment Equality Act 1998-2004

¹⁶¹ Section 34(4) Employment Equality Act 1998-2004

¹⁶² Section 34(5) Employment Equality Act 1998-2004

¹⁶³ <http://acts.oireachtas.ie/zza16y1996.1.html>

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.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment and training?

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.¹⁶⁴ The legislation is clear as regards minimum recruitment ages, the Act applies to all people over the age of 16, with an exception allowing minimum recruitment ages of eighteen in some circumstances. (See also section 4.9 below).

4.7.4 Retirement

a) What is the retirement age? Have there been recent changes in this respect or are any planned in the near future?

b) Does national law require workers to retire at a certain age?

c) Does national law permit employers to require workers to retire because they have reached a particular age? In this respect, does the law on protection against dismissal apply to all workers irrespective of age?

For both of the above questions, please indicate whether the ages different for women and men.

¹⁶⁴ Information provided by Age Action Ireland.

Ireland does not have a single fixed retirement age for employees. Generally retirement age is provided for in the contract of employment. Contracts of employment may provide for a mandatory retirement age, many will also contain provisions for early retirement. The usual retirement age is 65; this is because this generally correlates with pension schemes, and also most statutory protections for employees. There is no set retirement age for the self-employed.

Some jobs that are established by law do set a maximum age of staff, for example 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 Gardai, fire-fighters and the Defence Forces. The Gardai and Fire Service have a minimum retirement age of 55 and the compulsory retirement age for Gardai 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 unfair dismissal legislation a number of basic requirements must be satisfied. The employee must have one year's continuous service with the employer; the employee is required to work for at least eight hours per week, and employees who have not reached the normal retirement age for the employment in question.¹⁶⁵ Therefore if the normal retirement age is reached then the employee may not rely on the unfair dismissal legislation. Where there is no normal retirement age specified by the employer in question, then employees become excluded from the protections of this legislation on reaching 66. 66 represent the age at which the social welfare pension is payable.¹⁶⁶ (See section 4.9 below).

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'
- Employer uses a selection process or processes which have been used before.
- The custom in the particular trade or occupation
- The contract of employment sets out a selection process

¹⁶⁵ Section 2(1) Unfair Dismissals Act 1977-1993

¹⁶⁶ Redmond, *Dismissal Law in Ireland*, 1998 at 426

- 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.

Under 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. If a person is entitled to statutory redundancy payments, with effect from May 23rd 2003, then they may receive two weeks statutory redundancy payment for every year of service, regardless of age, and then one further week's pay. If a person is entitled to statutory redundancy and the formal notice was sent prior to the 25th of May 2003 then the entitlement was calculated as half a week's pay for each year of employment between 16-41, and one week for each year of employment over 41 and then one further week. This provision has been amended. Pay refers to the current normal weekly pay prior to deductions.¹⁶⁷

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?

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.'¹⁶⁸ This section then provides that any action taken in 'good faith' by or on behalf of a 'publican/hotel'¹⁶⁹ for the purpose of complying with the Licensing Acts 'shall not constitute discrimination.'¹⁷⁰

4.9 Any other exceptions

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

The Employment Equality Act 1998-2004 contains the following exceptions to the prohibition of discrimination. Section 2(1) defines 'employee' as including 'a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons.' Personal services are also defined within the section, they are services provided in a person's home and include services such as caring. The Employment Equality Act 1998-2004 does not cover access to this form of employment.

¹⁶⁷ <http://www.redcalc.entemp.ie/> Online redundancy calculator

¹⁶⁸ Section 15(1) Equal Status Act 2000-2004

¹⁶⁹ The term used in the legislation is the 'holder of a licence or other authorisation which permits the sale of intoxicating liquor.'

¹⁷⁰ Section 15(2) Equal Status Act 2000-2004

Sections 25 and 37 of the Employment Equality Act 1998-2004 provide that it shall not be considered discrimination to treat a person of a different gender or characteristic differently where that gender or characteristic is a genuine and determining occupational requirement for the post and the objective is legitimate and the requirement proportionate. Section 26 ensures that nothing within the Act, which confers a benefit on women in connection with pregnancy, maternity, breastfeeding or adoption, could be considered unlawful under the Act.

Section 34 provides for a number of exceptions primarily on the age ground. The first relates to benefits that may accrue to members of an employee's family as provided by the employer.¹⁷¹ It is not deemed to amount to discrimination on the age ground for an employer to treat persons differently in respect of an occupational benefit scheme. The employer may fix ages for admission to the scheme, fix different ages for all employees or a category of employees, use actuarial evidence, provide different rates of severance pay taking account of the period between the age of the employee on leaving employment and compulsory retirement age.¹⁷² 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.'¹⁷³ It is permissible for employers to fix different ages for the retirement of employees whether voluntary or compulsory.¹⁷⁴ 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.¹⁷⁵ 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 in question. The final exception contained within this section relates to collective agreements, and again this Act will not invalidate any 'term in a collective agreement, whenever made, to the effect that in particular circumstances, where length of service would otherwise be regarded as equal, seniority in a particular post or employment may be determined by reference to the relative ages of employees on their entry to that post or employment.'¹⁷⁶

Section 35 permits employers to pay employees with disabilities different rates of pay if they are restricted in their capacity to do the same amount of work, or the same hours as a person who does not have a disability. This section contains only one limitation 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 paid at a proportionate level to the employee without the disability.

There are a number of exceptions to the non-discrimination rule contained in section 36 of the Employment Equality Act 1998-2004. This section 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

¹⁷¹ Section 34(1) Employment Equality Act 1998-2004

¹⁷² Section 34(3) Employment Equality Act 1998-2004

¹⁷³ Section 34(3A) Employment Equality Act 1998-2004

¹⁷⁴ Section 34(4) Employment Equality Act 1998-2004

¹⁷⁵ Section 34(5) Employment Equality Act 1998-2004

¹⁷⁶ Section 34(7A) Employment Equality Act 1998-2004

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.

Section 37 contains exceptions in respect of religious, educational or medical institutions,¹⁷⁷ and also exempts the entire workings of the Act to discrimination on the age ground or disability ground as it applies to employment in the Defence Forces.¹⁷⁸

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. 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 the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk where the treatment is effected by reference to actuarial or other statistical data on which it is reasonable to rely, or to other relevant underwriting factors and it is reasonable to have regard to those factors.
- differences in the treatment of persons on the religion ground in relation to goods or services provided for a religious purpose,
- differences in the treatment of persons on the gender, age or disability ground or on the basis of nationality or national origin in relation to the provision or organisation of a sporting facility or sporting event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event, can reasonably be expected to result from the presence of a person of another gender,
- differences in the treatment of persons in a category of persons in respect of services that are provided for the principal purpose of promoting, for a *bona fide* purpose and in a *bona fide* manner, the special interests of persons in that category to the extent that the differences in treatment are reasonably necessary to promote those special interests,
- differences in the treatment of persons on the gender, age or disability ground or on the ground of race, reasonably required for reasons of authenticity, aesthetics, tradition or custom in connection with a dramatic performance or other entertainment,
- an age requirement for a person to be an adoptive or foster parent, where the requirement is reasonable having regard to the needs of the child or children concerned,¹⁷⁹

¹⁷⁷ See section 4.2 above.

¹⁷⁸ See section 4.3 above.

Another problematic exception relates to section 15 of the Act which 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.’¹⁸⁰ This section then provides that any action taken in ‘good faith’ by or on behalf of a ‘publican/hotel’¹⁸¹ for the purpose of complying with the Licensing Acts ‘shall not constitute discrimination.’¹⁸²

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 6(6) provides that public housing authorities and voluntary housing associations in providing accommodation may give ‘different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community.’ Nothing within the provisions states that such difference of treatment should be to the advantage of the groups specified.

Section 7 contains a general non-discrimination provision in respect of educational establishments, there are a number of exceptions contained within this section. They include:

- It will not amount to discrimination to have a single-sex school, this exception does not relate to third level institutes.¹⁸³
- It will not amount to discrimination to provide training to one religious belief, or where the training is for the purpose of educating ministers of a religion.¹⁸⁴
- It is discrimination for a primary or post-primary education body to admit people of certain religious denominations in preference to others, where that educational body is established with a view to provide education in an environment which promotes certain religious values.¹⁸⁵
- The legislation provides that it is not discrimination for a difference in treatment in respect of fees, allocation of places, and assistance in respect of third level education. The distinction is based on nationality.¹⁸⁶
- 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).¹⁸⁷
- It will not amount to discrimination to organize sporting facilities or events where distinctions are made on the basis of age, gender or disability.¹⁸⁸

¹⁷⁹ Section 5(2) Equal Status Act 2000-2004

¹⁸⁰ Section 15(1) Equal Status Act 2000-2004

¹⁸¹ The term used in the legislation is the ‘holder of a licence or other authorisation which permits the sale of intoxicating liquor.’

¹⁸² Section 15(2) Equal Status Act 2000-2004

¹⁸³ Section 7(3)(a) Equal Status Act 2000-2004

¹⁸⁴ Section 7(3)(b) Equal Status Act 2000-2004

¹⁸⁵ Section 7(3)(c) Equal Status Act 2000-2004

¹⁸⁶ Section 7(3)(d) Equal Status Act 2000-2004

¹⁸⁷ Section 7(3)(e) Equal Status Act 2000-2004 – The term mature students refers to students that are over the age of 23.

¹⁸⁸ Section 7(4)(a) Equal Status Act 2000-2004

- It will not amount to disability discrimination to the extent that compliance with the non-discrimination rule with regard to education would, ‘by virtue of the disability, make impossible, or have a seriously detrimental effect on, the provision by an educational establishment of its services to other students.’¹⁸⁹
- It will not amount to race discrimination for the Minister for Education and Science to require that third level educational grants be restricted to nationals and members of the European Union, or that different rules apply in the making of grants.¹⁹⁰

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.’¹⁹¹

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

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?

Do measures of positive action exist in your country? Which are the most important?

Refer, in particular, to the measures related to disability and any quotas for access of disabled persons to the labour market.

The Employment Equality Act 1998-2004 is permissive of positive action. Section 33 provides:

- 33 – Nothing in this Part or Part II shall render unlawful measures maintained or adopted with a view to ensuring full equality in practice, being measures -
- (a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than the gender ground),
 - (b) to protect the health or safety at work of persons with a disability, or
 - (c) to create maintain facilities for safeguarding or promoting the integration of such persons into the working environment.

This new definition brings an additional element to the positive action provisions, namely, the section relating to the health and safety of person with a disability. The inclusion of this provision relates to Article 7(2) of the Framework Directive.

The Equal Status Act 2000-2004 is permissive of positive action. Section 14(b) of that Act provides that preferential treatment or positive action is permitted where they are *bona fide* intended to ‘promote equality of opportunity’ for disadvantaged persons, and also to ‘cater for the special needs of persons, or a 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.’ This ensures that where a measure is intended to promote equality, positive action is permissible.

¹⁸⁹ Section 7(4)(b) Equal Status Act 2000-2004

¹⁹⁰ Section 7(5)(a) Equal Status Act 2000-2004 – This provision was added by virtue of the Equality Act 2004.

¹⁹¹ Section 16(2)(a) and (b) Equal Status Act 2000-2004

There is a government policy in respect of the civil and public service, known as the 3% quota requirement, recently renamed the 3% target.¹⁹² 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.¹⁹³ The Department of Finance retains responsibility for monitoring the 3% quota/target in the Civil Service and the Department of Justice Equality and Law Reform monitor compliance in the Public Service. The Partnership 2000 agreement also contains a commitment that the quota/target will be met in the Public Service during the lifetime of the Partnership. The Disability Bill, 2004 attempts to place the quota/target on a statutory footing, and to give the National Disability Authority the function of monitoring compliance with this provision. The Disability Bill is currently being debated in the Oireachtas.

Furthermore, there are a number of public support scheme's in operation to encourage employment of people with disabilities. FÁS, Ireland's national training and employment authority administer these schemes on behalf of the Department of Enterprise, Trade and Employment. A brief overview of the schemes follows:

- Employment Support Scheme (ESS), this scheme provides a wage subsidy to employers who recruit a person with a disability on a full time basis, if that person's productivity is 20% - 50% lower than the average productivity levels of other employees. FÁS measures productivity and provides an ESS grant to employers to cover any productivity shortfall. The employee is therefore paid the normal rate of pay for the job.¹⁹⁴
- Work Place Equipment Adaptation Grant (WEAG), this is a grant offered by FÁS to people with a disability who have been offered employment or are in employment and who require a more accessible workplace or adapted equipment to do the job. The grant may also be provided to the employer. Funding may be provided for minor building modifications, alarm systems, equipment adaptation. The maximum grant available is €6,348.
- Personal Reader Grant, this is available from FÁS for blind or visually impaired people in employment who need assistance with job related reading. FÁS will normally pay a fee of €6.35 per hour it will be paid on a short term basis, up to a maximum of 16 weeks.
- Job Interview Interpreter Grant, FÁS will pay for an interpreter to attend a job interview with a person who has a hearing or speech impairment in order to facilitate communication. FÁS will normally pay a fee of €7.50 for a three-hour period. Travel costs are also paid.
- Employment Retention / Retraining Grant, through a new grant available from FÁS, employers may apply for funding to retrain an employee who acquires a disability while in employment or through sickness or work. Stage I of this scheme is for the development of a retention strategy, €2,500 is available for this, per employee. Stage II is the implementation of this strategy which there is a maximum funding of €12,500 available, per employee.
- Disability Awareness Training Grant, this is also provided through FÁS and the purpose of this is to assist in the integration of people with disabilities into the

¹⁹² 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.

¹⁹³ The Civil Service have achieved 2.78% 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%

¹⁹⁴ It would appear that this scheme is not well advertised as there has been minimal take up.

workforce and to eliminate mistaken perceptions about people with disabilities and their capacity to be productive and effective colleagues and employees. There is a maximum of €20,000 available in a given calendar year. This is not available to public service organisations.

- Employer's PRSI¹⁹⁵ exemption scheme, this scheme is available from the Department of Social, Community and Family Affairs to employers who recruit a person with a disability for at least 4 days work per week for a minimum of 20 hours per week. The scheme exempts the employer from his or her share of PRSI contributions in respect of the additional worker for the first two years of employment.¹⁹⁶

There are other supports which are relevant to people with disabilities. These supports are provided through a variety of government departments and agencies, these schemes are focused on assisting a person with a disability into the work environment. While not strictly within the scope of the Framework Employment Directive, they are relevant in that they demonstrate State commitment to the employment of people with disabilities.

- Income disregard – Persons who are in receipt of Disability Allowance can work while in receipt of that allowance but income is assessable as means. The first €120 of weekly earnings from employment or self-employment of a rehabilitative nature are disregarded for means purposes. Any other earnings in excess of this amount are means tested and the Disability Allowance is reduced accordingly. Permission must be sought from the Department of Social and Family Affairs for the employment to be considered rehabilitative.
- Back to Work Allowance – this was introduced to encourage long term unemployed to take up employment opportunities by entitling them to retain a reducing proportion of their social welfare payments over a three year period. This scheme was extended in 1997 to people on Disability Allowance and also the Blind Person's Pension. In 1999 the scheme was extended to those in receipt of an Invalidity Pension, and in 2001 it was extended, on a pilot basis, to those in receipt of Long Term Disability Benefit.
- Back to Work Enterprise Allowance – this is similar to the above allowance but aimed instead at the self-employed.
- The Revenue Commissioners have developed a Job Assist scheme which provides people who take up a job after having been unemployed for one year or more with a special tax allowance. People with a disability who have been receiving Disability Allowance or Blind Person's Pension for 12 months or more are eligible for Job Assist.¹⁹⁷

The Housing (Traveller Accommodation) Act 1998 provides 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.¹⁹⁸

There are also positive action measures which target members of the Traveller community. These 'Senior Traveller Training Centres' were established in 1974 to provide what was described as compensatory education for Travellers between the ages of 15 and 25, the upper

¹⁹⁵ P.R.S.I. refers to pay related social insurance - In general, PRSI contribution classes are decided by the nature of the employment and the amount of the employee's gross reckonable earnings in any week. Most workers pay some level of PRSI contributions, as do Employer's. Employer's PRSI Exemption Scheme means that when an eligible worker is employed they employer will not have to pay their share of the their PRSI contributions for the first two years of their employment.

¹⁹⁶ http://www.oasis.gov.ie/employment/employment_and_disability/ Information on Public Services including all disability schemes, see also Gandon Enterprise, and the National Disability Authority.

¹⁹⁷ Information provided by the National Disability Authority.

¹⁹⁸ Race Report of November 2002 by Dave Ellis

age limit has been removed. There are twenty nine centres throughout the country, which aim to provide Travellers with knowledge and skills with a view to participating in work and adult life, and to participate fully in their communities. These programmes are the responsibility of the Government Department of Education and Science.¹⁹⁹

6. REMEDIES AND ENFORCEMENT

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

What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)? Are these binding or non-binding?

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 public and private employees with the exception of certain public sector employees.²⁰⁰ Complaints under either the Employment Equality Act 1998-2004 or the Equal Status Act 2000-2004 may be brought before the Equality Tribunal.²⁰¹ 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.²⁰² 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.²⁰³

The Labour Court,²⁰⁴ 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.²⁰⁵ 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.²⁰⁶

The Circuit Court is a court of local and limited jurisdiction,²⁰⁷ with jurisdiction over a range of criminal and civil matters.²⁰⁸ Gender discrimination cases falling under the Employment

¹⁹⁹ <http://www.education.ie/robots/view.jsp?pcategory=10815&language=EN&ecategory=14930>

²⁰⁰ Different rules apply for the Defence Forces

²⁰¹ http://www.equalitytribunal.ie/php/database_previous_cases.php Equality Tribunal cases are available at this site.

²⁰² Section 46 Equality Act 2004.

²⁰³ Section 91(2), Employment Equality Act 1998-2004

²⁰⁴ <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations> All Labour Court recommendations are available at this site.

²⁰⁵ Section 83(1), Employment Equality Act 1998-2004

²⁰⁶ Section 90(3), Employment Equality Act 1998-2004

²⁰⁷ Article 34.4.3, Bunreacht na hÉireann, Constitution of Ireland, 1937.

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.²⁰⁹ Final decisions of the Equality Tribunal and the Labour Court can be enforced through the Circuit Court.²¹⁰

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.²¹¹ 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).²¹²

Complaints of dismissal due to discrimination²¹³ 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.²¹⁴

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 cause²¹⁵ prevented the complainant from sending the notification within the normal time period.

A recent amendment to the Equal Status Act 2000-2004 now requires complaints under that Act involving licensed premises (i.e. pubs etc) to be brought to the District Court rather than as previously to the Equality Tribunal. The District Court may provide for an order for compensation, an order that the holder of the licence specified take a course of action which is specified by the Court or an order for temporary closure of the licensed premises. A person who considers that discrimination has been directed against him or her in any licensed premises may make a request to the Equality Authority for assistance in taking the proceedings. Assistance can be given on the same basis as already allowed for in the Equal

²⁰⁸ Hogan and Whyte, *JM Kelly: The Irish Constitution*, 4th Edition, 2003 at 921

²⁰⁹ S. 90(2) Employment Equality Act, 1998-2004

²¹⁰ S. 91 Employment Equality Act, 1998-2004

²¹¹ Section 104, Employment Equality Act 1998-2004

²¹² Department of Justice, Equality and Law Reform, 2003.

²¹³ Not all the grounds are covered, see section 2.1 above.

²¹⁴ <http://www.labourcourt.ie> , <http://equalitytribunal.ie>

²¹⁵ Section 54, Equal Status Act 2000-2004

Status Act 2000, namely importance of case or not reasonable to expect the person to take the case without assistance from the Authority. 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.²¹⁶ This amendment was controversial and was strongly opposed by the Equality Authority and the Human Rights Commission.²¹⁷

The Employment Equality Act 1998-2004 requires cases to be brought within six months of the matter complained of occurring. In a case where the complaint involves a series of actions then the complaint should be brought within six months of 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.²¹⁸

There is no legislative provision requiring public buildings to be accessible, this position is due to be legislated for in the Disability Bill 2004, which aims to provide rules in respect of both communications and infrastructure accessibility. This Bill was published in September 2004 and is currently being debated in the Oireachtas. The Bill has received considerable criticism from the Disability Sector, and in a public meeting held in February, there were calls for the withdrawal of the Bill. The criticism relate to the extremely narrow definition of disability, the fact that the legislation is not rights based, everything within the Bill is dependent on finances been available. As for the provision of sign language, the Disability Bill was supposed to address this issue but fails to do so. As regards the provision of sign language interpretation in the court system, the position is that such interpretation is required in the context of criminal actions, but there is no corresponding provision in respect of civil actions. A further difficulty that has emerged in the context of court interpretation relates to the qualifications of the interpreters, the courts do not have a requirement that the interpreters are qualified, and the anecdotal evidence available suggests that there have been difficulties in the regard in the past. Both Equality Bodies are fully accessible.

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

What are the criteria for an association to engage in judicial or other procedures?

a) in support of a complainant?

b) on behalf of one or more complainants?

Section 77(11) of the Employment Equality Act 1998-2004 permits representation by an individual or body as authorised by the individual complainant. This section provides that 'any party to any proceedings under this Act before the Director or the Labour Court may be represented by any individual or body authorised by the party in that behalf.' These provisions apply to proceedings before the Equality Tribunal and the Labour Court. This amendment does not, however, clarify whether such legal standing could be enjoyed before the courts of law (i.e. High Court) if appeal proceedings ensued. No provision is made for an NGO or other body to bring a claim on behalf of a complainant. The Equality Authority enjoys legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement.²¹⁹ The Authority can also provide legal assistance and representation to an individual complainant.²²⁰

²¹⁶ Intoxicating Liquor Act 2003.

²¹⁷ Irish Times, 28th May 2003.

²¹⁸ Section 77, Employment Equality Act 1998-2004

²¹⁹ Sections 85 and 86, Employment Equality Act 1998-2004.

²²⁰ Section 67, Employment Equality Act 1998-2004.

Section 67 of the Employment Equality Act 1998-2004 provides that a person who considers that s/he has been discriminated against or that s/he has been adversely affected by the failure or refusal to comply with an equality clause or an equal remuneration term or to implement a decision under the Act may make a request to the Authority for assistance in taking proceedings in respect of which redress is provided under the Act.²²¹ In determining whether to assist a party the Authority must be ‘satisfied that the case to which the request relates raises an important matter of principle, or it appears to the Authority that it is not reasonable to expect the person making the request adequately to present the case without assistance.’²²²

Section 85 of the Employment Equality Act 1998-2004 allows the Equality Authority itself to refer a case to the Director of Equality Investigations where:

- (a) there is instance of general discrimination or victimisation;
- (b) it is not reasonable to expect the potential complainant to make the referral him/herself.

Section 100(3) of the same Act allows the Equality Authority or the Minister for Justice, Equality and Law Reform to institute summary proceedings for an offence under the Act.

The Equality Act 2004 amended the Equal Status Act 2000 to provide a new section 25(A) which states ‘a party (whether complainant or respondent) to proceedings under section 24 or 25 may be represented by any individual or body authorised by the party in that behalf.’ This does not provide for an organisation or body to take an action on their own behalf, such as a gay, lesbian and bi-sexual organisation.

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 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. The amendments to the Employment Equality Act 1998-2004 made explicit the shifting of the burden of proof.²²³

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). This 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

²²¹ Section 67(1) Employment Equality Act 1998-2004

²²² Section 67(2) Employment Equality Act 1998-2004

²²³ In *O’Brien v. Scruffy’s Bar* DEC-S2001-027 and *Flexco Computer Stationery Ltd., v. Coulter*, ED/03/10 and other cases establish that the Equality Tribunal and the Labour Court were willing to provide for the shifting of the burden of proof in non-gender cases. That being said look at *A Company (Respondent) v. A Worker (Complainant)* ED/01/27 for a different position taken by the Labour Court.

accommodation. The shift in the burden of proof is now explicitly provided for in the Equal Status Act 2000-2004 with the insertion of a new section; section 38(a). This provides: ‘where in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.’

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, religious opinions, or membership of the travelling 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)

The Employment Equality Act 1998-2004 prohibits victimisation, which is defined at section 74(2) as:

- (2) For the purposes of this Part victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to—
- (a) a complaint of discrimination made by the employee to the employer,
 - (b) any proceedings by a complainant,
 - (c) an employee having represented or otherwise supported a complainant,
 - (d) the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act,
 - (e) an employee having been a witness in any proceedings under this Act or the Equal Status Act 2000 or any such repealed enactment,
 - (f) an employee having opposed by lawful means an act which is unlawful under this Act or the said Act of 2000 or which was unlawful under such repealed enactment, or
 - (g) an employee having given notice of an intention to take any of the actions mentioned in the preceding paragraphs.

The sanctions available for other acts of discrimination are also to acts of victimization, with a number of significant differences. Firstly, 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 discrimination²²⁴ or where the victimisation amounts to dismissal then it is an offence.²²⁵ Secondly, 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 victimisations cases have resulted in significant compensation awards.²²⁶ In *A Complainant v A Department*

²²⁴ Section 14 Employment Equality Act 1998-2004

²²⁵ Section 98 Employment Equality Act 1998-2004

²²⁶ See *Dublin City Council v McCarthy*, EDS022

*Store*²²⁷ 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 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.²²⁸ This may be extended to a maximum of twelve months in certain circumstances.²²⁹

Victimisation is also prohibited in the Equal Status Act 2000-2004 by means of section 3(2)(j), this provision states that discrimination is prohibited on the grounds:

- (j) that one—
- (i) has in good faith applied for any determination or redress provided for in *Part II* or *III*,
 - (ii) has attended as a witness before the Authority, the Director or a court in connection with any inquiry or proceedings under this Act,
 - (iii) has given evidence in any criminal proceedings under this Act,
 - (iv) has opposed by lawful means an act which is unlawful under this Act, or
 - (v) has given notice of an intention to take any of the actions specified in *subparagraphs (i) to (iv)*, and the other has not (the “victimisation ground”).

This provision is amended by virtue of the above cited provisions in the Employment Equality Act, and they cover situations where an employee was a witness, or where an employee opposed by lawful means an unlawful act. 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*²³⁰ 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 ...

The Equality Officer held that in this instance the complainant had not succeeded in establishing that victimisation had occurred. This case does however give guidance on how the Equality Tribunal determined when victimisation occurs.

²²⁷ DEC-E2002-017

²²⁸ Section 77(5), Employment Equality Act 1998 - 2004.

²²⁹ Section 77(6)(a), Employment Equality Act 1998-2004.

²³⁰ DEC-S2004-002

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

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.

Are there any ceilings on the maximum amount of compensation that can be awarded?

Is there any information available concerning 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.²³¹ 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.²³² There are 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.²³³ Where the complainant was not an employee (discriminatory interview for example) then the maximum award is €12,697.²³⁴ 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.²³⁵ 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.²³⁶ In the Circuit Court compensation for unequal pay may cover a period of a maximum of six years,²³⁷ and interest may be paid on compensation in gender discrimination cases.²³⁸ 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.²³⁹ It is questionable whether the remedies available in the context of non-gender discrimination could be described as 'effective, proportionate and dissuasive' sanctions.²⁴⁰

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.'²⁴¹ The potential of this remedy should not be underestimated it has been used as a means of ensuring employers create an equal opportunities policy,²⁴² re-training of staff,²⁴³ reviewing recruitment procedures.²⁴⁴

²³¹ Section 30 Employment Equality Act 1998-2004

²³² Section 9 Employment Equality Act 1998-2004

²³³ Section 82(4) Employment Equality Act 1998-2004

²³⁴ Section 82(4) Employment Equality Act 1998-2004

²³⁵ Section 82(1)(a) Employment Equality Act 1998-2004

²³⁶ Section 82(3) Employment Equality Act 1998-2004

²³⁷ Section 82(3)(a) Employment Equality Act 1998-2004

²³⁸ Section 82(5) Employment Equality Act 1998-2004

²³⁹ Case C-271/91 *Marshall No. 2*, ECJ.

²⁴⁰ Article 17 General Framework Directive.

²⁴¹ Section 82(1)(e) Employment Equality Act 1998-2004

²⁴² *Nevin v. Plaza Hotel*, DEC-E2001-033

²⁴³ *Mr. O v. A Named Company* DEC-E2003-052

²⁴⁴ *Equality Authority v. Ryanair*, DEC-E2000-014

As regards dismissal cases, the Labour Court,²⁴⁵ and now the Equality Tribunal can make orders for re-instatement or re-engagement of the employee that can occur with or without compensation.²⁴⁶ 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,²⁴⁷ or where the victimisation amounts to dismissal, or the giving of a false statement in response to an Equality Authority inquiry,²⁴⁸ these actions can amount to a criminal offence.

A final point in respect of the Employment Equality Act 1998-2004 relates to the Equality Authority. The Equality Authority is the only independent body permitted to instigate litigation under the Acts, 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 its funding, this unwillingness to permit the Equality Authority to receive compensation would appear to stifle its ability to litigate. The purpose of any litigation by the Equality Authority on its own must be questioned, if successful, the employer cannot be required to pay compensation to the Equality Authority, this can not be described as effective, proportionate and dissuasive. The Employer may be required to pay compensation directly to the victim, however, certain actions may have no 'victim,' such as actions taken under section 85(1)(d) on discriminatory advertising. The Equality Authority has jurisdiction to challenge such advertisements, as occurred in the case of *Equality Authority v. Ryanair*,²⁴⁹ and where such a challenge is successful there is no possibility of the Equality Authority receiving compensation.

The Equal Status Act 2000-2004 also has maximum award limits. The awards are linked to limits set on the jurisdiction of the District Court and the current limit is €6,348.69, that being said it appears the average compensation under the Equal Status Act to date has been held to be less than €900.²⁵⁰ While the limit of the District Court is said to change to €20,000 this legislation was passed over three years ago and there appears little movement towards making this provision law.²⁵¹ 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.

As a final point it is questionable whether either Act could be said to comply with the requirement for the sanctions to be proportionate and dissuasive.

²⁴⁵ Prior to the amendments of jurisdiction.

²⁴⁶ Section 82(2)(b) Employment Equality Act 1998-2004

²⁴⁷ Section 14 Employment Equality Act 1998-2004

²⁴⁸ Section 60(3) Employment Equality Act 1998-2004

²⁴⁹ *Equality Authority v. Ryanair*, DEC-E/2000/14

²⁵⁰ Race Summary of June 2004 by Dave Ellis

²⁵¹ Courts and Court Officers Act 2002

7. SPECIALISED BODIES

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

Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin? 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.

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.

Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

Is the work undertaken independently?

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.

The Employment Equality Act 1998-2004 established two national institutions with enforcement functions under the Equality legislation.²⁵² The Act established a body known as the Equality Authority: an independent body. This body is required under the legislation to work towards the elimination of discrimination, to promote equality of opportunity, to provide information to the public on a number of matters and to review various legislative enactments.²⁵³ The Equality Authority may fulfil these functions by means of research and awareness-raising,²⁵⁴ review of the legislation²⁵⁵ and the drafting of statutory Codes of Practice.²⁵⁶ The Equality Authority also has the power to instigate litigation on its own behalf or to assist a litigant. The figures in respect of cases taken by the Equality Authority for the year 2004 as set out on February 21st 2005 are available in the table set out below.²⁵⁷

Equal Status Act 2000 – 21st February 2005

Grounds	No.	%
Gender	21	8
Marital Status	2	1
Family Status	1	0.5
Sexual Orientation	2	1
Religious Belief	5	2
Age	18	7
Disability	72	28
Race	32	12
Traveller Community	88	34
Mixed	20	8

²⁵² The Equality Authority and the Equality Tribunal.

²⁵³ Section 39 Employment Equality Act 1998-2004. The nine grounds are those of gender, race, religion, disability, age, sexual orientation, membership of the Traveller community, marital status and family status.

²⁵⁴ Section 57 Employment Equality Act 1998-2004.

²⁵⁵ Sections 39 and 73 Employment Equality Act 1998-2004.

²⁵⁶ Section 56 Employment Equality Act 1998-2004.

²⁵⁷ Figures and information provided by the Equality Authority.

Employment Equality Act 1998, Employment Equality Act 1977, Anti-Discrimination (Pay) Act 1974 – 21st February 2005

Grounds	No.	%
Gender	38	19
Marital Status	2	1
Family Status	0	
Sexual Orientation	0	
Religious Belief	3	1
Age	22	11
Disability	22	11
Race	90	44
Traveller Community	3	2
Mixed	22	11
Outside Scope	3	1

In response to the question asked, about whether the Equality Authority has money to take cases, I was unable to get information in respect of the Authorities finances, but there is much anecdotal evidence to suggest that the Authority is under funded.

The Equality Authority is also authorised to 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.’²⁵⁸ 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.²⁵⁹ 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.²⁶⁰

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.²⁶¹ 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.²⁶² 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.²⁶³ Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.²⁶⁴

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 Department of Justice, Equality and Law Reform, under the direction of the Minister fund the Equality Authority.

²⁵⁸ Section 62 Employment Equality Act 1998-2004.

²⁵⁹ Section 66 Employment Equality Act 1998-2004

²⁶⁰ Section 65 Employment Equality Act 1998-2004

²⁶¹ Section 69 Employment Equality Act 1998-2004.

²⁶² Section 69 Employment Equality Act 1998-2004.

²⁶³ Section 70 Employment Equality Act 1998-2004.

²⁶⁴ Section 72 Employment Equality Act 1998-2004.

The second body established under the Employment Equality Act 1998-2004 is the Office of the Director of Equality Tribunal.²⁶⁵ 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. 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. The Equality Officers investigate complaints and issue a legally reasoned and public decision, this decision is binding.²⁶⁶ 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.²⁶⁷ A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court.²⁶⁸

The Equality Tribunal is a statutory body, and an independent and impartial forum to hear or to mediate alleged discrimination. The Department of Justice, Equality and Law Reform, under the direction of the Minister fund the Equality Tribunal. The Equality Tribunal publish annual reports, annual legal reviews, annual mediation reviews and statistics on their work.²⁶⁹

The Human Rights Commission²⁷⁰ was established under the Human Rights Commission Act 2000, which conferred wide ranging competence on the Commission to promote and to protect human rights as defined by the Irish Constitution and any international agreements to which Ireland is a party. Section 2 of that Act defines human rights as:

- (a) The rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
- (b) The rights, liberties or freedoms conferred on, or guaranteed to persons by any agreement treaty or convention to which the State is a party.

The functions of the Human Rights Commission include reviewing legislation, promoting human rights and supporting complaints of breaches of human rights. The Commission are required to 'promote understanding and awareness of the importance of human rights in the State and, for those purposes, to undertake, sponsor or commission, or provide financial or other assistance for, research and educational activities.'²⁷¹ The Human Rights Commission may also provide independent assistance to victims of discrimination in pursuing their complaints about such discrimination,²⁷² they also have full *locus standi*, and an *amicus curiae* brief.

The National Disability Authority (NDA) is an independent statutory agency established under the auspices of the Department of Justice, Equality & Law Reform by the National Disability Authority Act 1999. The National Disability Authority has several functions, including acting as a national body to assist in the coordination and development of disability policy, to undertake research and develop statistical information for the planning and delivery of disability services, advising the relevant Minister, preparing codes of practice and to monitor the implementation of those codes of practice. The National Disability Authority Act provides that the NDA shall comprise a chairperson and 20 ordinary members, all of whom are appointed by the Minister for Justice Equality and Law Reform. The term of office of a

²⁶⁵ Section 75 Employment Equality Act 1998-2004.

²⁶⁶ All cases may be found at www.equalitytribunal.ie

²⁶⁷ Section 78 Employment Equality Act 1998-2004.

²⁶⁸ Section 91(2) Employment Equality Act 1998-2004

²⁶⁹ http://www.equalitytribunal.ie/htm/about_us/stats_annual_report.htm All of which are available at this site.

²⁷⁰ www.ihrc.ie The official website of the Irish Human Rights Commission.

²⁷¹ Section 8(e) Human Rights Commission Act 2000

²⁷² Section 10 Human Rights Commission Act 2000

member of the Authority is not more four years, and this period was due to end in June 2004, the Minister has asked the current board to remain in their roles for a further twelve months with a view to ensuring the passage of the Disability Bill 2004.

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 2000-2004.²⁷³ To this end the Equality Authority has published extensively in respect of all nine grounds.²⁷⁴ The Equality Authority may prepare codes of practice in furtherance of the elimination of discrimination and the promotion of equality of opportunity.²⁷⁵ 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 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 IBEC²⁷⁶ 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.²⁷⁷ The Irish Congress of Trade Unions have also published a pack entitled ‘Lesbian, Gay and Bisexual Rights in the Workplace.’²⁷⁸ The Authority also host regular meetings with the Trade Union movement, and quarterly meetings with the National Disabilities Authority and Disabilities Organisations which focus on issues relating to reasonable accommodation. The requirement to provide reasonable accommodation only applies to the disability ground.

The Equality Authority have 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 numerous organisations (please see list of some of the

²⁷³ Section 39 Employment Equality Act 1998-2004

²⁷⁴ <http://www.equality.ie/php/workflow.php?queryType=1>

²⁷⁵ Section 56 Employment Equality Act 1998-2004

²⁷⁶ Irish Business and Employer’s Confederation.

²⁷⁷ 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

²⁷⁸ <http://www.ictu.ie/html/publications/ictu/Gay%20&%20Lesbian%20Leaflet.pdf>

organisations in footnote)²⁷⁹ assist the Authority in drafting their strategic plan. The Equality Authority have also published its second strategic plan, for the years 2003 to 2005²⁸⁰ 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 impacts 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 have 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.²⁸¹ 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.²⁸²

The Irish government also launched a National Disability Strategy which comprises four elements: The Disability Bill 2004; the Comhairle (Amendment) Bill 2004;²⁸³ 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 2004.²⁸⁴

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.²⁸⁵

²⁷⁹ 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.

²⁸⁰ http://www.equality.ie/cgi-local/search/doc_search.cgi?step=details&docid=58

²⁸¹ <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.

²⁸² 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.

²⁸³ 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.

²⁸⁴ 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=>

²⁸⁵ 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?
- b) Are any laws, regulations or rules contrary to the principle of equality still in force?

The legislation does not contain a mechanism aimed at a review of collective agreements, or other rules. The Equality Authority is charged with working towards the elimination of discrimination, and promoting equality of opportunity. To this end the Equality Authority has a number of powers. The Equality Authority is authorised to 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.'²⁸⁶ 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.²⁸⁷ 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.²⁸⁸

The Equality Authority is also permitted to carry out equality reviews. These are in effect an audit of the level of equality that exists in a particular business or industry.²⁸⁹ Based on this audit, which 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.²⁹⁰ 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.²⁹¹ Non-compliance with this notice may result in an order from either the High Court or Circuit Court requiring compliance.²⁹²

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.²⁹³ 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.²⁹⁴ While it is the case that discriminatory clauses are not valid, the reality is that this fact may only be established through litigation. Where the Equality Tribunal hold 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. 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.²⁹⁵ The major concern remains section 14(a)(i) of the Equal Status Act

²⁸⁶ Section 62 Employment Equality Act 1998-2004

²⁸⁷ Section 66 Employment Equality Act 1998-2004

²⁸⁸ Section 65 Employment Equality Act 1998-2004

²⁸⁹ Section 69 Employment Equality Act 1998-2004

²⁹⁰ Section 65 Employment Equality Act 1998-2004

²⁹¹ Section 70 Employment Equality Act 1998-2004

²⁹² Section 72 Employment Equality Act 1998-2004

²⁹³ Section 30 Employment Equality Act 1998-2004

²⁹⁴ Section 9 Employment Equality Act 1998-2004

²⁹⁵ See section 0.2 above.

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.

There is no legislative provision requiring information to be provided to disabled people in accessible forms, there is some movement towards this provision within the Disabilities Bill 2004. This Bill will contain provisions in respect of accessible information but this will not provide an enforceable right to such accessible information. It should be noted that the Disabilities Bill was published in September of 2004 and was itself not made available in an accessible format within a satisfactory timeframe.

9. OVERVIEW

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

There is a concern that a number of recent legislative enactments have weakened existing equality norms, one such example is the introduction of the Intoxicating Liquor Act of 2003. Prior to the enactment of the Intoxicating Liquor Act 2003 the Equality Tribunal heard all cases of discrimination in the provision of goods and services. This jurisdiction was removed from the Equality Tribunal by means of sections 19 and 25 of the Intoxicating Liquor Act 2003. Cases involving allegations of discrimination in respect of licensed premises must now be heard in the District Court. This change of jurisdiction has negative implications for the cost of litigation, which would be greatly increased. Also the forum of the District Court is a more formal setting, legal representation would be necessary, and costs may be awarded against the unsuccessful party. See section 3.2.9 above to see how this has negatively impacted on the number of cases taken by members of the Traveller Community.

The Equality Act 2004, which was introduced with the aim of transposing the directives was subject to criticism. The Irish Human Rights Commission stated in their observation:

‘However, concerns have been expressed by a number of interested bodies, including the Equality Authority, about a number of aspects of the present Bill and the level of transposition of the Directives that it effects. The Commission notes in particular, the many of the 51 recommendations made by the Equality Authority during the drafting of the Equality Bill, aimed at ensuring that Ireland correctly and effectively transposed the three directives and took the opportunity to address any outstanding weaknesses in our equality legislation, have not been reflected in the Bill.’²⁹⁶

The Irish Human Rights Commission also state:

The Commission believes that in a number of significant respects the Bill as presently drafted does not go far enough in transposing the three EU directives, leaving Irish anti-discrimination law at variance with EU standards. More significantly, some of the measures included in the present Bill may have the effect of undermining existing non-discrimination protections, by creating new categories of exemptions and retracting on decisions of the Equality Tribunal.²⁹⁷

²⁹⁶ <http://www.ihrc.ie/fileupload/banners/obs1.doc> at 2.

²⁹⁷ <http://www.ihrc.ie/fileupload/banners/obs1.doc> at 2.

The concerns expressed by the Irish Human Rights Commission are an example of concerns that have been expressed throughout the sector. Please see section 0.2 above.

10. COORDINATION AT NATIONAL LEVEL

Which government department/ other authority is responsible for dealing with or coordinating 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.²⁹⁸ 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 1998²⁹⁹
- Equal Status Act 2000³⁰⁰
- Equality Act 2004³⁰¹
- Pensions Act 1990-2004³⁰²
- Prohibition on the Incitement to Hatred Act 1989³⁰³
- Unfair Dismissals Act 1977 - 1993³⁰⁴
- Intoxicating Liquor Act 2003³⁰⁵
- European Convention of Human Rights Act 2003³⁰⁶

Other relevant legislation includes:

- Housing (Miscellaneous Provisions) Act 2002³⁰⁷
- Housing (Traveller Accommodation) Act 1998³⁰⁸
- Redundancy Payments Act 2003³⁰⁹
- Safety, Health and Welfare at Work Act 1989³¹⁰

²⁹⁸ <http://www.justice.ie/80256E01003A21A5/vWeb/pcNPOK5UHLCJ-en>

²⁹⁹ <http://www.gov.ie/bills28/acts/1998/a2198.pdf> - Throughout this report I have referred to the Employment Equality Act 1998-2004, this is the 1998 Act as amended by the 2004 Equality Act.

³⁰⁰ <http://www.oireachtas.ie/documents/bills28/acts/2000/a800.pdf> - Throughout this report I have referred to the Equal Status Act 2000-2004, this is the 2000 Act as amended by the 2004 Equality Act.

³⁰¹ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2004/0104/default.htm>

³⁰² <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2004/0704/default.htm> and <http://acts.oireachtas.ie/zza25y1990.1.html>

³⁰³ <http://acts.oireachtas.ie/zza19y1989.1.html>

³⁰⁴ <http://acts.oireachtas.ie/zza10y1977.1.html> and <http://acts.oireachtas.ie/zza22y1993.1.html>

³⁰⁵ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2003/a3103.pdf>

³⁰⁶ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2003/a2003.pdf>

³⁰⁷ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2002/a902.pdf>

³⁰⁸ <http://www.gov.ie/bills28/acts/1998/a3398.pdf>

³⁰⁹ <http://www.oireachtas.ie/documents/bills28/acts/2003/a1403.pdf>

³¹⁰ <http://acts.oireachtas.ie/zza7y1989.1.html>

- Education Act 1998³¹¹
- Education for Persons with Special Educational Needs Act 2003³¹²
- Disability Bill 2003³¹³

2. Table of international instruments

It should be noted here that Ireland is a dualist state, this means that where international treaties are ratified they do not have an impact on a national level unless transposed into Irish law. 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 the Elimination of All Forms of Discrimination Against Women
- Convention on the Nationality of Married Women
- International 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 on the Reduction of Statelessness
- 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 are signatories 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

³¹¹ <http://www.gov.ie/bills28/acts/1998/a5198.pdf>

³¹² <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2004/A3004.pdf>

³¹³ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2004/3904/document1.htm>

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Ireland

Date: January 2005

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 not more than 10 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 All website addresses are above.	October 1999	Gender, Age, Race, Religion, Disability, Marital Status, Family Status, Sexual Orientation and membership of the Travelling Community.	Civil Law	Public and Private employment with certain exceptions	Prohibits direct, indirect discrimination, harassment, victimisation, provides for reasonable accommodation and establishes the Equality Authority and the Office of the Director of the Equality Tribunal.
Equal Status Act 2000	2000	Gender, Age, Race, Religion, Disability, Marital Status, Family Status, Sexual Orientation	Civil Law	Access to goods and services	Prohibits direct, indirect discrimination, harassment, victimisation,

		and membership of the Travelling Community.			provides for reasonable accommodation.
Equality Act 2004	July 2004	Gender, Age, Race, Religion, Disability, Marital Status, Family Status, Sexual Orientation and membership of the Travelling Community.	Civil Law	Amends both the Equal Status Act and the Employment Equality Act with a view to ensuring compliance with the Directives	Redefines harassment, reasonable accommodation and indirect discrimination, also provides for discrimination by association among other changes.
Pensions Act 1990-2004	2004	Gender, Age, Race, Religion, Disability, Marital Status, Family Status, Sexual Orientation and membership of the Travelling Community.	Civil Law	Pensions including occupational pensions	Prohibits direct, indirect discrimination, harassment, victimisation, provides for reasonable accommodation.
Prohibition on the Incitement to Hatred Act 1989	1989	Race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.	Criminal law	Criminal legislation relating to incitement to hatred	Prohibits hate speech.
Unfair Dismissals Act 1977 - 1993	1993	Race, colour, sexual orientation, membership of the travelling 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, Disability, Marital Status, Family Status, Sexual Orientation and membership of the Travelling Community.	Civil Law	Discrimination complaints relating to licensed premises – provision of 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.
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ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country

IrelandDate **January**

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
Protocol 12, ECHR	Yes	No		No	No
Revised European Social Charter		Yes	Article 8(3), Article 21, Article 31(1), (2) and (3).	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

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	No		Yes	No
Convention on the Elimination of Discrimination Against Women		Yes	Article 13(b), (c), Article 15, Article 16, 1 (d) and (f), Article 11(1) and 13(a).		No
ILO Convention No. 111 on Discrimination		Yes		N/A	No