

Notes on Equality and Social Welfare
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The timing of this conference could not be more appropriate. I sense a weariness in getting this issue onto the agenda in a meaningful practical way. You have to face arguments that quite a lot has been done in terms in particular of gender equality in Social Welfare already. While there has been some real change in a number of areas it is not at all clear that there has been significant institutional change.

An examination of the Social Welfare system gets to the very root of what is meant by equality, whether your definition of equality is one of equality of opportunity or equality of outcome. To what extent does the Irish Social Welfare deliver, contribute or fail to deliver equality of opportunity or outcome particularly in the area of gender equality? To what extent does the current equality legislation, the Constitution and EU measures including the European Convention on Human Rights have the capacity to impact on the Social Welfare system? A debate about equality and social welfare highlights in a very real way the interface of poverty and equality.

The 2005 Annual Report of Equality Authority will highlight the constant complaints that the Equality Authority receives from older women who had to leave the workforce because of the marriage bar and or childcare or other caring responsibility and who now do not qualify for certain social welfare payments. Older women are at a very high risk of living in poverty with 50.2% of older women living on incomes that fall below 60% of median income, and 40.4% of older women living in consistent poverty. The ongoing denial of recognition and remuneration as work of the caring/ childcare responsibilities undertaken largely but not exclusively by women has a high financial price particularly for older women particularly in relation to Social Welfare entitlements.

It is not possible to give a detailed and comprehensive analysis of the relevant national provisions on Social Welfare, Constitutional and EU provisions in the time available [for a detailed analysis see Social Welfare Law, Mel Cousins, Thomson Roundhall and Sex Discrimination Law, by Bolger and Kimber, Chapter Seven]

The current constitution and the interpretation that have been given to it does not provide much optimism for gender equality in Social Welfare issue.

Article 41 of the Constitution provides

“1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
- 2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
- 3 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
- 3.1 The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack...

The provisions of Article 41.2 in relation to women's "life within the home" have not been the subject of detail judicial consideration. There have been a number of cases on the recognition of the family based on marriage.

In *Hyland v Minister for Social Welfare*, the Supreme Court held that a provision of the Social Welfare Acts which treated an unmarried couple more favourably than a married couple was a breach of the positive obligations cast upon the State by Article 41.3.1. The Hyland case arose from a reform of the social welfare code resulting from the implementation of the EU Directive on equal treatment in social welfare (discussed in Chapter 9). Prior to the enactment of the Social Welfare (No 2) Act 1985, married women were generally not allowed to claim unemployment assistance unless their husbands were incapable of self-support. The EU Directive required the removal of this discriminatory provision. However, the 1985 Act imposed a limitation on the amount of social welfare which an unemployed married couple might receive. This limitation did not apply to an unmarried couple. The applicant argued that this limitation on the entitlements of a married couple constituted a failure by the State to carry out its obligations under Article 41.3.1. The Supreme Court agreed and held that the limitation was in breach of the Constitution.

However, in *Mhic Mathúna v Ireland*, the Supreme Court held that the provision of specific social welfare benefits for unmarried mothers was not in breach of the Constitution and that there were abundant grounds for distinguishing between the needs and requirements of single parents and those of married parents living and rearing a family together.

The Irish Courts have twice held that discrimination against deserted husbands was not unconstitutional. In *Dennehy Barron J – v – The Minister for Social Welfare* (unreported 26th July 1984) upheld the provisions discriminating against men on the ground that the schemes were validated by Article 41.2 which recognises that women, by her life within the home, gives to the State support which is essential to

achievement of the common good. More recently in *Lowth v Minister for Social Welfare*, [1993] I. R. 339 a deserted husband argued that the failure to provide a deserted husband's payment was in breach of Article 40.1, 40.3 and 41 of the Constitution. The Supreme Court held against the plaintiff on the basis that Article 40.1 did not require that all citizens be treated identically without recognition of differences in relevant circumstances. The Court was satisfied that there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify the legislation.

EU Measures

EC Directive 79/7 on the progressive implementation of the principle of equal treatment for Men and Women in matters of Social Security.

This Directive came into force in December 23 1984. The purpose of the Directive was to achieve equality in work related social welfare issues. It applies only to work-related social welfare schemes and to members of the working population. Family and Survivor benefits are excluded from the scope of the Directive. Judgements of the Court of Justice mean that general means tested payments (such as supplementary welfare allowance) are also excluded – Only persons at work and persons who are looking for work or whose work has been interrupted by one of the risks referred to in the Directive (sickness, invalidity, old age, occupational accidents and diseases and unemployment) are covered by the Directive. The Directive rules out all discrimination, direct and indirect, on grounds of sex, in relation to all aspects of social welfare within its scope, including the calculations of contributions and of benefits. People who give up employment in order to care for children are not covered.

While there had been a number of steps taken during the 1970's to remove discrimination against women, at the time of the adoption of the Directive, there remained several important areas where direct and indirect discrimination still continued.

These can be set out as follows:

- Married women received lower rates of unemployment benefit and other forms of benefit such as injury benefit, disablement benefit, and disability benefit, than married men and single persons.
- Married women received unemployment benefit for a shorter time – 12 months as opposed to 15 months.
- Married women were generally not allowed to claim unemployment assistance unless their husbands were incapable of self-support due to physical or mental disability, or they were separated and had at least one other dependant.

- A married man was entitled to an increase in his rate of benefit and assistance in respect of his wife and dependent children even if his wife was in paid employment. Married women received no such increase unless their husband was incapable of self-support because of physical or mental disability. Wives were assumed to be dependant on their husbands as long as they lived in the same house.

The exclusion of women from eligibility to unemployment assistance not only led to financial hardship and loss of independence, it also had implications for women's access to the job market. Many state sponsored employment and training schemes were, and indeed still are, aimed at long term recipients of unemployment assistance, and are only open to those who are in receipt of that welfare payment.

The implementation of the directive in Ireland was done in stages. First, the rate of benefit was simply raised and in the case of unemployment benefit, the period of payment also extended so that married women were entitled to receive the same rate of benefit for the same time. Thus married women became entitled to the same rates of benefits as men and for the same length of time. A cap was placed however on the total amount of unemployment assistance payable to a family, so that families where the wife claimed assistance would be no better off than families where the wife remained as an adult dependant. (The provisions were challenged in Ireland on constitutional grounds in *Hyland v Minister for Social Welfare*, as stated earlier. The Supreme Court found that these provisions were unconstitutional in so far as they limited the income of a married couple while the income of a cohabiting couple would not have been so limited. The response of the government was simply to extend the capping provision to cohabiting couples).

Secondly, the rules regarding payments for dependants were changed in order to remove discrimination in the third and fourth areas. It was much more costly, however, to remove those forms of discrimination. The adoption of a symmetrical approach would have required the payment of unemployment assistance to married women on the same basis as married men as well as a doubling of payment of dependency allowances. Ireland, chose to retain the concept of dependency but to require factual proof of it. Under the Social Welfare (No 2) Act 1985 dependency payments became payable to both sexes on the basis of a factual dependency. In practice this meant that dependency increases were payable only where the spouse was in receipt of earned income of less than £50 per week and was not in receipt of a welfare payment in her or his own right. Where a spouse was not dependent, any child dependency increases due were paid at half the full rate. This was implemented in November 1986 but also led to income losses in many low-income households as the husbands of wives in receipt of relatively low incomes (but over £40 per week) lost the dependency increases. Transitional payments were introduced to compensate such families. However, as these were paid to married men and not to married women, they continued to discriminate contrary to the terms of the equality directive. Thus, in this area the social welfare system arguably retained the notion of women's dependency, replacing the concept of notional with a more factual approach. While

one might argue that this is only a reflection of the factual situation, research has shown that the structure of dependency in the social welfare system made it difficult for women to take up anything other than low-paid employment and, in reflecting women's existing dependency, thereby also reinforced it. Efforts have been made to overcome this issue by introducing tapered increases for qualified adults where that person is in work over a certain weekly income [Cousins P180].

Difficulties also arose in relation to the entitlement of married women to unemployment assistance. A simple removal of the exclusion would have led to an increased number of women claiming assistance (with little opportunity of obtaining employment), leading to an increase in the level of recorded unemployment and extra costs for the system. While married women were allowed to claim assistance, a cap was placed on the amount of social welfare payable to a family, so that families where the wife claimed assistance would be no better off than families where the wife remained as an adult dependent. As there was no financial benefit in claiming (and, in some cases, financial disadvantages), not surprisingly many married women chose not to exercise their new-found right to claim assistance. Although these provisions obviously had the effect of continuing the existing exclusion of married women from the labour force, it would seem from decisions of the Court of Justice that such measures are not in breach of the Directive. [Commission v Belgium [1991] I – 2205]. However, in this area the implementing strategy chosen clearly reinforced the notion of women's dependency rather than creating an individual right to benefits (as mentioned earlier, a successful constitutional challenge to these provisions in the Hyland case led to the extension of the cap on payments to cohabiting as well as to married couples).

The delay in implementing the Directive and the manner of implementation led to a number of cases. [for a detailed analysis of the case law involved see G. Whyte, Social Inclusion and the Legal System [Institute of Public Administration, Dublin, 2002] PP 141-151]

- *Cotter and McDermott cases – case – 377/89 – Cotter v Minister for Social Welfare [1001] E.C.R. I-1155*
- *Hyland v Minister for Social Welfare [1989].I.R. 624*
- *Emnott v Minister for Social Welfare [1991] E.C.R I – 4269*
- *Tate v Minister for Social Welfare [1005] 1 I.R. 418*

Ultimately, after a campaign involving a range of Irish groups including the Free Legal Advice Centres (FLAC), and faced with a threat of legal action by the European Commission, the Government agreed to pay arrears of about £6- million to Irish women who were entitled to equal treatment in the period from 1984 to the dates of implementation of the Directive in 1986. Subsequently, in 1995, following further

ECJ decisions and a High Court decision, the Government accepted that it was liable for further payments in respect of, for example, transitional payments made from 1986 to 1992. A further £250 million was paid up to 77,500 women in final settlement of these claims. [Cousins page 181].

The Equality Legislation

The Equal Status Acts, 2000-2004 is the most relevant to the issue of Social Welfare.

The Employment Equality Act 1998-2004 seeks to implement Council Directive of 23rd September 2003 amending the earlier gender employment equal treatment Directive. The Equality Act 2004 extends the protection against discrimination to the self employed and partners (so farmers would be covered). A broader concept of work is now included so that any contract whereby an individual agrees with another person personally to execute any work or service for that person. This should open up the way for less traditional ideas of work to be brought within its protection.

The Equal Status Acts 2000 to 2004:

- Promote Equality
- Prohibit certain kinds of discrimination (with some exemptions) across nine grounds
- Prohibit sexual harassment and harassment
- Prohibit victimisation
- Require reasonable accommodation of people with disabilities
- Allow a broad range of positive action measures.

The Acts apply to people who:

- Buy and sell a wide variety of **goods**
- Use or provide a wide range of **services (including State services)**
- Obtain or dispose of **accommodation**
- Attend at or are in charge of **educational establishments**.

There are separate provisions on **discriminatory clubs**.

Both the Employment Equality Acts, 1998-2004 and the Equal Status Acts, 2000-2004 adopt a multi grand approach. This is particularly relevant in the area of social welfare as for example the Rights and Entitlements given to people with disabilities or older people, will have a direct bearing on the situation and experience and entitlements of people for example who provide care for people with disabilities and older people.

A number of the 9 grounds have particular relevance to the issue of social welfare.

Grounds:

The Equal Status Acts 2000 to 2004 prohibit discrimination on the following nine grounds: (There is no ground of socio economic status although the Equality Authority has recommended its inclusion).

The gender ground: A man, a woman or a transsexual¹ person; [the Equality Authority receives complaints in relation to payment of child benefit to women].

The marital status ground: Single, married, separated, divorced or widowed;

The family status ground: Pregnant, a parent of a person under 18 years or the resident primary carer or parent of a person with a disability;

The sexual orientation ground: Gay, lesbian, bisexual or heterosexual; (The definition of spouse gives rise to numerous complaints)

The religion ground: Different religious belief, background, outlook or none;

The age ground: This only applies to people over 18 except for the provision of car insurance to licensed drivers under that age;

The disability ground: This is broadly defined including people with physical, intellectual, learning, cognitive or emotional disabilities and a range of medical conditions. (The Equality Authority regularly receives complaints from people caring for people with disabilities about the inadequacies of the payments and supports for people with disabilities).

The race ground: A particular race, skin colour, nationality or ethnic origin;

The Traveller community ground: People who are commonly called Travellers, who are identified both by Travellers and others as people with a shared history, culture and traditions, identified historically as a nomadic way of life on the island of Ireland. (Travellers in Dublin still have to go to Castle Street to obtain supplementary welfare allowance). [The last 2 grounds have the protection of the Race Directive which takes precedence over domestic legislation].

Discrimination:

Discrimination has a specific meaning in the Acts and there are different types of discrimination covered including indirect discrimination, discrimination by imputation and discrimination by association. It is defined as the treatment of a person in a less favourable way than another person is, **has been or would be** treated in a *comparable* situation on any of the nine grounds which

- **Exists**

- **Existed**

- **May exist in the future, or**

¹The Court of Justice in *PvS* held that discrimination against a transsexual constituted discrimination on the grounds of sex. The Equality Authority has received a number of queries from transsexuals in relation to the practice of the Department of Social & Family Affairs regarding identifications.

- Is imputed to the person concerned.

It is comparator based.

• **Indirect Discrimination** – happens where there is less favourable treatment by impact or effect. It occurs where people are, for example, refused a service not explicitly on account of a discriminatory reason but because of a provision, practice or requirement which they find hard to satisfy. If the provision, practice or requirement puts people who belong to one of the grounds covered by the Acts at a particular disadvantage, then the service provider will have indirectly discriminated, unless the provision is **objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary**. Indirect discrimination is a concept that seeks to tackle institutional discrimination.

Does the failure to have individualised payments put women at a particular disadvantage? What is the legitimate aim for retaining the current system?

• **Discrimination by Association** – this happens where a person associated with another person (belonging to the discriminatory grounds) is treated less favourably because of that association.

Disability – Reasonable Accommodation:

A person selling goods or providing services, a person selling or letting accommodation or providing accommodation, educational institutions and clubs must do all that is reasonable to accommodate the needs of a person with a disability. This involves providing **special treatment or facilities** in circumstances where without these, it would be impossible or unduly difficult to avail of the goods, services, accommodation etc.

However, they are not obliged to provide special facilities or treatment when this costs more than what is called a nominal cost. What amounts to nominal cost will depend on the circumstances such as the size and resources of the body involved. If the State provides grants or aids for assisting in providing special treatment or facilities, there may be an onus on the service providers etc. to avail of these grants. The Labour Court in *Campbell Catering v Razaq* in effect required the employer to reasonably accommodate the needs of a migrant worker in terms of culture and linguistic diversity in relation to disciplinary proceedings. It is a concept that can usefully be applied across a number of grounds and in the area of Social Welfare.

Social Welfare Services must provide reasonable accommodation for people with disabilities.

Sexual Harassment and Harassment:

Sexual harassment and harassment in the provision of goods and services, accommodation and educational establishments is prohibited.

A person (“the harasser”) shall not harass or sexually harass another person (“the victim” regardless of their gender) in the following circumstances:

- (i) the victim uses goods or services provided by the harasser (or seeks to)....

What is harassment and sexual harassment?

Harassment is any form of **unwanted conduct** related to any of the **discriminatory grounds**. **Sexual harassment** is any form of **unwanted verbal, nonverbal or physical conduct of a sexual nature**. In both cases it is 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**.

In both cases the **unwanted conduct** may include **acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material**. A person’s rejection of, or submission to, sexual or other harassment may not be used by any other person as a basis for a decision affecting that person.

Responsible person – Liable for sexual harassment/harassment:

A person who is responsible for the operation of any place that is an educational institution or where goods, facilities or services are offered to the public or a person who provides accommodation must ensure that any person who has a right to be there, is not sexually harassed or harassed. The ‘responsible person’ will be liable for the sexual harassment or harassment unless he or she took reasonably practicable steps to prevent it.

It is strongly advisable that all Social Welfare/Health Boards have policies and procedures to deal with sexual harassment and harassment.

Positive Action:

The Acts allow preferential treatment or the taking of positive measures which are bona fide intended to:

- (i) **promote equality of opportunity** for disadvantaged persons;

- (ii) **cater for the special needs** of persons, or a category of persons who because of their circumstances, may require facilities, arrangements, services or assistance.

This allows the Social Welfare code to take target of action at specific disadvantages.

There are also provisions on vicarious liability, discriminatory advertising and victimisation.

The Provision of Services:

What is prohibited?

People cannot discriminate (subject to certain exemptions):

- When they are providing goods and services to the public (or a section of the public);
- Whether these are **free** or where the goods and services are sold, hired or rented or exchanged;
- **Access** to and the **use** of services is covered.

Services are very broadly defined in the Act. Services provided by the State including all types of welfare and health board services are covered (but subject to exemption).

There are two exemptions which are specific to the provision of goods and services which may have a particular relevance to welfare matters. The Acts allow people to be treated differently on any of the grounds in relation to the

- *Promotion of special interests*

Where services 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 a particular category, but only to the extent that the different treatment is reasonably necessary.

- *Special Needs*

Where goods and services are provided which can reasonably be regarded as being suitable only to the needs of certain persons.

Limits of Legislation

The capacity of the Equality legislation to have an impact on the social welfare code is limited by a number of matters. The most significant is the Statutory exemption contained in Section 14. This provides an exemption to the State (including the Department of Social & Family Affairs) in relation to the taking of any action that is required by or under:

“(i) any enactment”.

Therefore, any action that is required by for example a social welfare statute cannot be challenged by the Equal Status Acts, 2000-2004 (for example definition of spouse, provision for non-individualised payments etc.)

Another flaw with the legislation is the low level of potential compensation payable (the maximum payable is £6,350 which is difficult to describe as a proportionate, effective and dissuasive remedy. Current delays in hearings before the Equality Tribunal are also problematic.

The Equality Authority has argued consistently that one of the flaws of the equality legislation is the lack of a positive duty to promote equality. A positive duty would impose a requirement to promote equality via impact assessment and consulting, and also impose an enforceable duty to eliminate discriminatory structures by proactive and participative action, rather than waiting for retrospective based, fault based individual enforcement action.

Section 75 of the Northern Ireland Act, 1998 imposes a duty on specified public authorities to have “due regard to the need to promote equality of opportunity” across all of the protected grounds in carrying out their public function. Positive duties are particularly effective at dealing with institutional discrimination. A positive duty in the area of welfare would have great potential for dealing with gender and other inequalities.

New Gender Employment Directive

Directive 2002 – 73 of 23 September 2002 amending the earlier Gender Employment Equal Treatment Directive imposes an obligation on all Member States to actively take into account the objective of equality between men and women in employment matters. It also extends the scope of the protection to self employment and “occupation”. The Gender Employment Directive are therefore taking greater cognisance of more atypical work. This development should usefully be mirrored in the Social Welfare context.

The goods and Services Directive

Council Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

It has to be implemented in Ireland by 21st December 2007 at the latest. The purpose of the Directive is to lay down a framework for combating discrimination based on sex in access to and supply of services.

The scope of the Directive is somewhat unclear. The scope of the draft directive was far broader than the ultimate agreed version. Article 3 provides that

“Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.
2. This Directive does not prejudice the individual’s freedom to choose a contractual partner as long as an individual’s choice of contractual partner is not based on that person’s sex.
3. This Directive shall not apply to the content of media and advertising nor to education.
4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts”.

The Directive prohibits direct and indirect discrimination and harassment.

It allows differences in treatment, “if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

It also allows broad positive action measures to achieve full equality in practice. There is an emphasis on remedies and enforcement. Member States must introduce such measures as are necessary to “ensure real and effective compensation or reparation...for the loss and damage sustained by a person injured as a result of discrimination...in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation”.

In any event it is likely that the Equal Status Act 2000-2004 will have to be amended to implement this Directive. Amendments should include

- (a) the removal of the statutory exemption (in relation to the gender ground)
- (b) the removal of the current ceiling on compensation

The removal of the statutory exemption in the Equal Status Act 2000-2004 whether on foot of the Directive or otherwise would have a major impact in the area of welfare reform. The legislation would be greatly enhanced by the introduction of a positive duty to promote equality.

Conclusion

The current constitutional and EU requirements have limited capacity to tackle gender inequality in welfare matters. It is important to consider welfare issues in a multiground way to capture the diversity of the situations that will impact on gender issues. The removal of the statutory duty in section 14 along with the introduction of a positive duty would greatly increase the capacity of the equality legislation to tackle gender inequality in welfare issues. The current review of the social welfare code must bear in mind the provisions of the new Directive which will have to be implemented shortly.