



National Women's Council Submission

Review of the Equality Acts: Equal Status Acts 2000-2018 Employment Equality Acts 1998-2015

November 2021

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1. National Women's Council

The National Women's Council (NWC) is the leading national representative organisation for women and women's groups in Ireland, founded in 1973. We have over 190-member groups and a large and growing community of individual supporters. The ambition of the National Women's Council is an Ireland where every woman enjoys true equality and no woman is left behind. This ambition shapes and informs our work, and, with our living values, how we work. We are a movement-building organisation rooted in our membership, working on the whole island of Ireland. We are also part of the international movement to protect and advance women's and girls' rights. Our purpose is to lead action for the achievement of women's and girls' equality through mobilising, influencing, and building solidarity.

The NWC welcomes the opportunity to make this submission and looks forward to participation in the wider consultation process of which this submission is part. It is critical that women's voices are heard and that their perspectives are considered on all areas of equality legislation review and development. This is particularly necessary for those communities which have been historically excluded and marginalised. A process of meaningful, supported and resourced engagement is necessary to ensure these experiences and voices are included.

NWC thanks our members for their insights and comments in preparing this submission. During 2021 NWC members and working groups have also participated in consultations on the National Action Plan against Racism for Ireland (NAPAR), the initial state report under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the development of the Third National Strategy on Domestic, Sexual and Gender-Based Violence (TNS DSGBV), NWC Paper on Women in Rural Communities "We want to live and work where we are" and NWC's new Strategic Plan, No Woman Left Behind 2021-2024. This submission contains learnings and feedback from those consultative processes too.

NWC thanks FLAC for their support in preparing this submission.

2. Introduction

Overview

NWC recognises the significant advances that have been made for women's equality in Ireland since its founding in 1973. However, despite the formal equality guarantee of the Irish Constitution, the Supreme Court has been slow to recognise this as having any substantive egalitarian content which could weigh against other provisions of the Constitution, including property rights. Overall, the equality guarantee in the Constitution has not provided significant protection for groups that come within the discriminatory grounds in equality legislation, as demonstrated by the 2009 Portmarnock case¹ and the

1 [2009] IESC 73 -Equality Authority v Portmarnock Golf Club and Others & Cuddy & Keane v Equality Authority and Others

absence by the majority in the Supreme Court judgement, of any consideration of the right to equality and the state interest in preventing discrimination.

In addition, as recognised by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) there is a [...] the persistence of traditional stereotypical views of the social roles and responsibilities of women and men in the family and in society at large which are reflected in article 41.2 of the Constitution and its male-oriented language, in women's educational choices and employment patterns, and in women's low participation in political and public life"².

The Citizens Assembly on Gender Equality highlighted these Constitutional impacts on gender inequality by including the recommendations;

- Insert a new clause into Article 40 to refer explicitly to gender equality and non-discrimination.
- Delete and replace the text of Article 41.2 (woman in the home) with language that is not gender specific and obliges the State to take reasonable measures to support care within the home and wider community.
- Amend Article 41 so that it would protect private and family life, with the protection afforded to the family not limited to the marital family³

Due to the marginal role afforded to the equality guarantee by the Irish judiciary, the continuing gender inequalities expressed through our constitution, this review is an important opportunity to reflect on the capacity of existing equality legislation to advance gender equality and to identify ways to strengthen its potential⁴.

The European Union (EU) sets the minimum requirements for member states through the Equality Directives setting. Equal treatment between women and men is rooted in the Treaties of the European Union, and EU Directives including the Recast Directive (2006/54/EC) on equal opportunities and equal treatment of women and men in employment and occupation, a prohibition of direct and indirect gender discrimination as it applies to statutory social security schemes (Directive 79/7/EEC); in access to and the supply of goods and services (Directive 2004/113/EC); the Pregnancy Directive (92/85/EEC); the Parental Leave Directive (2010/18/EU); the Part-time Work Directive (97/81/EC). Other important Equality Directives for Irish women include The Racial Equality Directive (2000/43/EC) prohibits discrimination on the ground of racial or ethnic origin in a broad range of fields, including employment, social protection and social advantages, education, and goods and services available to the public, including housing.

² CEDAW (2005) Concluding Observations Ireland's Combined Fourth & Fifth Reports, CEDAW/C/IRL/CO/4-5, para 24

³ <https://citizensassembly.ie/en/about-the-citizens-assembly/report-of-the-citizens-assembly-on-gender-equality.pdf>

⁴ For the purposes of this submission the Employment Equality Acts 1998- 2015 and the Equal Status Acts 2000-2015, will be referred to collectively as the Equality legislation or the EEA and the ESA when referenced on their own.

However, these directives set out only minimum requirements and it is up to member states to introduce more favourable measures. The majority of the provisions of the EEA and the provisions on gender and in respect of the race ground of the ESA are required by EU anti-discrimination directives. This means that the legislation has to be interpreted to give effect to these Directives. Knowledge of complex equality laws is required for a claimant to ask the Workplace Relations Commission, for example, to disapply domestic law to comply with the provisions of the EU Directive.

Although these Directives have provided strong protection and led to significant case law in areas like discrimination on grounds of pregnancy or in relation to maternity leave, remedies, equal pay, indirect discrimination, the Council of Europe's Commissioner for Human Rights, Dunja Mijatović, has cautioned that: 'we are witnessing stagnation and backward steps in gender equality'.⁵ This review is an opportunity to reverse the step backwards and to demonstrate strong leadership in the area of gender equality.

3. Overarching Principles

Gender Equality-A Horizontal Principle

Gender Equal treatment is consistently acknowledged to be one of the most fundamental of social rights of the EU and the UN. Non-discrimination is not only a central social right but also one of the core human rights.

The European Parliament has said

"Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities."⁶

Article 2 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires State Parties to

"(a) embody the principle of the equality of men and women in their national constitutions or other appropriate legislation (...) to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the

⁵Women's rights at the crossroads: strengthening international co-operation to close the gap between legal frameworks and their implementation'(2019)

⁶ DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

rights of women on an equal basis with men (...) (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”⁷

It has been widely documented that the COVID-19 pandemic has exacerbated existing inequalities between women and men in almost all areas of life in Ireland and globally⁸. The pandemic has disproportionately affected already marginalised groups at a heightened risk of discrimination. In Ireland for example, over a third of one parent families had to cut back on heating or had fallen behind on bills, and 25% had cut back on food due to costs. Increased expenditure on basics hit low-income families with children harder as they coped with the additional financial pressures associated with school closures.⁹

However, prior to the pandemic the advancement of gender equality in the European Union (EU) was already slowing to incremental, at best. The Gender Equality Index provides a comprehensive measure of progress towards gender equality in the EU. It scores the EU and its Member States on a scale of 1 to 100, where 100 represents full equality between women and men. The 2020 report with scores up to 2018 showed the EU-27’s score stands at 67.4 out of 100, representing an increase of only 4.3 points since 2010¹⁰. Although Ireland can be seen to be outperforming the average over this period, it is from a low base.

A robust, action- oriented equality architecture with an emphasis on duty-holders’ obligations to vindicate the rights of all women is crucial to address these persistent and long-standing inequalities and discriminations. While legally prohibiting discrimination is a necessary step to realising gender equality, it is insufficient in and of itself. With a long and continuing history of gendered discrimination, specific measures, such as significant positive action, are warranted to compensate and correct for the impact of those practices.

NWC believes that a reconceptualisation of gender equality as a fundamental, cross-cutting and horizontal principle and aspiration of Irish equality legislation is needed to address both the current roll back of women’s rights and equalities¹¹, but also the underlying systemic issues that are blocking the achievement of full equality for women and girls as evidenced in EIGE’s reports.

This formal recognition would ensure acceptance that gender inequality is a core structural and systemic injustice and inequality rather than one ground amongst nine (or more), and thus requires transformative political, social and economic actions, including:

- Legislative requirement for gender & equality national and local budgeting processes

⁷ <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

⁸ <https://eige.europa.eu/gender-equality-index/2021>

⁹ SVP (2021) Cutting Back and Falling Behind: <https://www.svp.ie/getattachment/a116ab93-1ba9-4f04-b5a2-bbad59dab050/Cutting-Back-and-Falling-Behind-Red-C-Report-March.aspx>

¹⁰ Eurofound and EIGE (2021), Upward convergence in gender equality: How close is the Union of equality? Publications Office of the European Union, Luxembourg

¹¹ <https://eige.europa.eu/news/covid-19-derails-gender-equality-gains>

- Legislative requirement for gender & equality impact assessments of national policy

NWC RECOMMENDS

Formally recognising gender inequality as a core structural and systemic injustice and inequality and define its eradication as fundamental, cross-cutting and horizontal principle and aspiration of equality legislation

Intersectionality- The Reality of Women's Lives

The women of Ireland are diverse and diversity for NWC includes – but is not limited to - disabled women, migrant women, women of colour, lone parents, women from Northern Ireland, women experiencing poverty, addiction and homelessness, women from working class communities and the LGBTQI+ community, women of all faiths and none, Traveller and Roma women, women from other ethnic minorities, women in prostitution and survivors of gender based violence and trauma , survivors of institutional abuse, young women and older women, rural women, women in prisons, undocumented women and women living in Direct Provision. Although all may share the experience of gender inequality, women may also experience others forms of inequality and discrimination depending on other aspects of their lives and identities.

The European Institute for Gender Equality (EIGE) describes intersectionality as

‘acknowledging that experiences and positions in society are influenced by gender as well other social categories.’¹²

Ireland already has obligations to recognise the reality of intersectional discriminations and equalities including Article 2 of the Convention on the Elimination of Discrimination Against Women (CEDAW) which requires State parties to

‘legally recognise intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them’.¹³

The NWC Disabled Women's Group work has been highlighting the lack of attention that has been paid to the specific experiences and needs of disabled women in Ireland. Gender inequalities in the structures of our society combine with disadvantages experienced by disabled people to create particular forms of exclusion and discrimination for disabled women. The discourse on disabled women has also often been limited to discussion of health needs, reflecting a medical model approach, rather than the right to participate in the civil, political, economic, social and cultural life of our communities and corresponding barriers to this. The UN Convention on the Rights of Persons with Disabilities recognises that women

¹² EIGE, *Intersecting inequalities Gender Equality Index*, Luxembourg, 2019

¹³ CEDAW (2010) General Recommendation No. 28 on the core obligations of States parties under article 2, para. 18.

with disabilities are subject to “multiple discrimination” and Article 6 imposes an obligation on State Parties to take measures to ensure the full and equal enjoyment by women with disabilities of all human rights and fundamental freedoms. The UN Committee on the Rights of Persons with Disabilities defined intersectional discrimination as ‘a situation where several grounds of discrimination operate and interact with each other simultaneously in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage’¹⁴.

The ongoing and persistent marginalisation, exclusion and racism experienced by Travellers and Roma people has also been highlighted as a particular concern for NWC members. The shocking health inequalities, high levels of unemployment and appalling accommodation conditions these communities experience highlight the terrible injustices faced by minority ethnic groups in Ireland. Traveller women are one of the most marginalised groups in Irish society and Traveller women’s experience of inequality and discrimination differs to that of the majority population or other minority groups, as is their experience of racism and discrimination is different to Traveller men. The needs of Traveller women may not be met by responses and strategies designed to confront and tackle gender inequality or ethnic discrimination alone, i.e. without an examination of the interaction of ethnic disadvantage/discrimination. Acknowledging and addressing this experience is central to outcomes for Traveller women, as the experience of a Traveller woman will sometimes be distinctive because she is a woman, sometimes because she is a Traveller, and sometimes because she is both.

Similarly, members have highlighted how institutional practices such as Direct Provision and systemic injustices in our immigration system point to deep and problematic cultural and social dynamics that left unchallenged allow racism and discrimination to flourish in Ireland. Gender inequality is significantly compounded by racial and ethnic inequalities leading to ‘cumulative disadvantage’ as recognised by the European Network of legal experts in gender equality and non- discrimination.¹⁵ Migrant, Roma, undocumented, refugees, women with irregular migration status and women who live in Direct Provision (DP) face particular structural, language and cultural challenges and barriers in accessing supports and justice when they have been subjected to violence.

NWC is only highlighting these intersections as exemplars of intersectionality, it is a core reality of many marginalised and excluded women and girls across multiple domains and identities and has been well documented by FLAC¹⁶ and others.

Under current equality legislation an individual may bring proceedings on only one of the nine grounds of discrimination, the Labour Court in *Freeman V Superquinn*¹⁷ and the then Equality

¹⁴ General comment on Article 5: Equality and Non-Discrimination, adopted 9 March 2018

¹⁵ European Network of legal experts in gender equality and non- discrimination, “Intersectional discrimination in EU gender equality and non-discrimination law” May 2016

¹⁶ FLAC’s 2019 Annual Report, FLAC highlighted the intersectional and gendered nature of the discrimination frequently faced by Roma women

¹⁷ DEC-E 2002/13

Tribunal in *Lawless V Eurozone Investment Options Ltd*¹⁸ have held that each and every ground of discrimination must be pleaded and defended separately. There is no provision for intersectional discrimination, discrimination on a combination of grounds and recognition of the cumulative impact of multiple discriminations and inequalities. The Equality Acts do not provide for such situations and, as a result, is out of step with many people's lived experiences of discrimination, which often occurs as a response to their identity as a whole and cannot be distinctly and artificially categorised into separate grounds.¹⁹

NWC RECOMMENDS

Amending the equality legislation to provide for the recognition intersectional discrimination, discrimination on a combination of grounds²⁰ and recognition of the cumulative impact of multiple discriminations and inequalities.

Incorporation of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW requires States to 'embody the principle of the equality of men and women in their national constitutions or other appropriate legislation' and to take all appropriate measures to eliminate 'prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women' (Article 5)

Ireland signed and ratified CEDAW in 1985. However, it has not yet been incorporated into domestic law. This is consistent with what has been the State's general approach to domestic incorporation of international treaties, rooted in its dualist legal system. However, as a result of this system, rights holders are unable to rely directly on the provisions of the CEDAW Convention before the Irish courts.²¹ It is noted that the State Report asserts that 'provisions of the Convention are incorporated in Irish law' through equality legislation.²² The purpose of Irish equality law is to transpose EU anti-discrimination directives on employment and access to goods and services. Given the particular purpose intended when these pieces of legislation were enacted, it is not the case that the equality and human rights legislation has expressly incorporated the Convention into domestic equality law.

¹⁸ E/2007/101 Equality Tribunal

¹⁹ Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) at page 142. Judy Walsh has noted that "a legislative amendment could explicitly allow for a flexible approach by specifying that dual or even multiple grounds could be applied with reference to a single hypothetical comparator

²⁰ Recognising that differing discriminations must be proven but may be part of the same incident/process/structural phenomena

²¹ For example, in *Olaniran & Others v Minister for Justice, Equality and Law Reform* [2010] IEHC 83, Clarke J clearly stated that ratification of international human rights treaties, such as the UN Committee on the Rights of the Child, is of no effect in Irish courts.

²² Combined sixth and seventh periodic reports of State parties due in 2016: Ireland, CEDAW/C/IRL/6-7, 16 September 2016, at para. 25.

In its 2005 Concluding Observations, the UN Committee on the Elimination of Discrimination against Women ('the Committee') recommended that Ireland incorporate the UN Convention on the Elimination of All forms of Discrimination against Women into domestic law. IHREC has also recommended that the State take steps to incorporate the Convention into Irish law to ensure that policymakers and public bodies comply with the Convention in the carrying out of their functions.²³

NWC RECOMMENDS

Incorporating CEDAW into Irish law to ensure policy makers, public bodies and legislators comply with the Convention and international norms on gender equality

Referencing CEDAW in the long title to the Employment Equality Acts and the Equal Status Acts and confirming explicitly that the equality legislation incorporates relevant aspects of CEDAW

4. Access to Justice

Awareness & Accessibility of Legislation

The EU Equality Directives envisage a very significant role for civil society organisations, unions and employer bodies in relation to the promotion of equal treatment. Civil society organisations and unions are well placed to provide information and advocacy services to their members in respect of the Equality legislation but the capacity to do so is dependent on available resources. As of Budget 2022, community & voluntary sector investment is still at lower rates than 2008 with a continuing significant impact on their capacity to engage in ongoing complex awareness raising, information or action-oriented supports for the most impacted communities and individuals²⁴.

NWC believes that a very significant problem is that many women may not be aware of the extent of their rights under the Equality Acts and the protections afforded them should they be discriminated against or sexually harassed at work, in schools and colleges and when they are using services such as taxis or in pubs etc. They also may not be aware of what to do or where or how to make a claim if they have been discriminated against or sexually harassed. Women who are low-income workers, migrant women and marginalised women, especially women working in non-unionised employment are unlikely to be fully aware of the panoply of protections that are in place.

²³<https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>

²⁴ Budget 2022: What It Means for the funding voluntary & community organisations: Brian Harvey, The Wheel
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Particularities of the mechanisms of the legislation are also relatively unknown to members of the general public. The Equality Tribunal was the specialised equality body established to hear claims of discrimination. Its disestablishment and amalgamation into the Workplace Relations Commission (WRC) may have led to a lower level of awareness of the equality legislation. Its name does not suggest that it is a forum for hearing discrimination claims under the Equal Status Acts. There is a lack of awareness that the WRC is the relevant body for hearing gender discrimination claims under the ESA, that a gender discrimination claim against pubs, hotels and restaurants must be brought to the District Court, or that gender discrimination claims under both the EEA and the ESA have the option of bringing proceedings before the Circuit Court where there is no limit on the compensation that may be paid.

In addition, complex legal language, multiple exemptions and incomplete transposed EU Directives has made it unlikely that a person who has suffered more than 'simple' discrimination can access justice without legal representation, particularly if they are not in a unionised workplace. This runs contrary to the purpose of the WRC to avoid undue legalisation.

The Acts are difficult and unnecessarily complex. The definitions of discrimination, as well as several other key concepts, are defined in multiple ways across the Acts. The EEAs are particularly inaccessible with the divisions between gender and non-gender grounds, and the consequent disparate provisions including the different definitions of indirect discrimination and different provisions concerning equal pay. The language used, particularly the use of the letters A and B, C and D and the different locations for the exemptions, make it particularly inaccessible.

Whilst there are several statutory bodies that have roles in relation to the provision of information, advocacy and legal advice and representation, including the Irish Human Rights and Equality Commission (IHREC), the Legal Aid Board, The Citizens Information Board and the National Advocacy Services for People with Disabilities, NWC members and women who have contacted the organisation for advice frequently comment on a lack of knowledge as to where to go for support and advice on equality related issues.

Victimisation

The prohibition on victimisation is often said to be the cornerstone of the legislation,

"[T]he victimisation of a person for having on good faith taken a claim under the Equality legislation is very serious as it could have the impact of undermining the effectiveness of the legislation and is completely unacceptable"²⁵

Both Acts contain "victimisation" provisions – which provide protection for people who have made discrimination claims from retaliation from the respondent to their claim (e.g. the employer or provider of goods and services). However, the ESA and EEA contain completely different definitions of "victimisation". In the ESA, victimisation is defined as a "ground". This

²⁵ Dublin City Council V McCarthy [2001] ELR 255

is confusing (and potentially contrary to EU law). The definition of victimisation in the EEA Acts is hard to find and is contained in a subsection of a section that deals with other matters

NWC RECOMMENDS

Reviewing the structure of the Acts, simplifying, clarifying and rationalising equality legislation so that it is more coherent and accessible with single clear definitions of key concepts which apply across all grounds and both Acts.

Empowering and resourcing IHREC, the Legal Aid Board, the Citizens Information Board and the National Advocacy Service for disabled people to provide comprehensive, largescale broad-based, targeted and outreach education information and public awareness campaigns, including on the role of the WRC

Empowering and resourcing civil society organisations to enable them to have the necessary capacity and expertise to provide information and advocacy in relation to anti-discrimination rights legislation

Defining victimisation clearly and consistently in both Acts and in a way that complies with the requirements of the EU Anti- Discrimination provisions

Access to Justice and Legal Aid

Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments. Access to justice is a gateway to the exercise other rights such as those contained in the equality legislation. While it has no single precise definition, access to justice includes knowledge of and access to the legal system as well as whatever legal services are necessary to achieve a just outcome. It is reflected in the constitutional right of access to the Courts, which can be considered to include an entitlement that the right be effective, not just as a matter of law and form but also in practice.²⁶ The right to equality before courts and tribunals, including both equal access and equality of arms and to a fair trial are essential elements of the proper administration of justice. Access to justice includes access to legal aid. The Legal Aid Board is precluded from providing legal aid in any discrimination claim under the Equality legislation before the Workplace Relations Commission, irrespective of the complexity of the issue, the lack of financial resources of the claimant, or the lack of capacity of the claimant to represent herself effectively.

The absence of civil legal aid in discrimination claims has been brought into sharp focus by the Supreme Court judgement in *Zalewski*²⁷ which found that the standard of justice

²⁶ *Persona Digital Telephony Limited & Sigma Wireless Networks Limited and The Minister for Public Enterprise, Ireland and the Attorney General*, [2017] IESC 27, judgment of Justice Clarke, para 2.9.

²⁷ [2021] IESC 24

administered in bodies such as the WRC cannot be lower or less demanding than the justice administered by the Courts and must comply with fundamental human rights principles such as fairness. Parties now before WRC hearing have to swear an oath and be subject to cross examination.

However, there is a concern that the provision of legal aid in discrimination claims may lead to a more adversarial and complex process before the WRC and this must be balanced against the increasing complexity of provisions and concepts in equality legislation.

Civil society organisations and trade unions are in a unique position to provide information advocacy and support services to their member wishing to bring discrimination claims. They are well placed to raise awareness about the meaning of discrimination and remedies, to build capacity for advocacy, provide assistance in reporting discrimination, initiating proceedings and accessing appropriate legal support.²⁸

Dedicated Legal Services

The European Commission has stated that “real change often requires a critical mass of cases”.²⁹ The Commission’s guidelines for Equality Bodies suggest that promoting the achievement of a critical mass of casework under each protected ground should be amongst such body’s aims. It is noted that FLAC has called for the introduction of dedicated legal services for those who are protected by the Equality Acts. While these services cannot be viewed as an alternative to a comprehensive system of civil legal aid, they seek to address unmet legal need to the greatest extent as their resources allow, as well as bringing strategic litigation which has the potential to benefit communities as a whole.

NWC RECOMMENDS

Promoting & resourcing the capacity of civil society and trade unions to provide independent advocacy, legal assistance and support services to people experiencing discrimination, including the provision of targeted legal services.

Undertaking a separate review on how to best balance the provision of legal resources & supports in discrimination & equality claims without adding cost barriers for individuals or unduly increasing adversarial and complex process before the WRC

28 European Union Agency for Fundamental Rights, Access to justice in cases of discrimination in the EU: Steps to further equality (2012), p. 49; Committee on the Rights of Persons with Disabilities, General comment No. 6 on equality and non-discrimination (2018) UN Doc. CRPD/C/GC/6, para 31; and United Nations Special Procedures, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), p. 21.

29 European Commission DG-JUST (2015) Know Your Rights: Protection from Discrimination. Available at: <https://op.europa.eu/en/publication-detail/-/publication/5a511c88-b218-47b5-9f3e-4709d650e28b>

Other Barriers to Access to Justice

Burden of Proof-Equal Pay

Section 29 of the Employment Equality Acts creates an entitlement to Equal Pay, however Ireland has a gender pay gap of 14%.³⁰ The issues around access to information and satisfying the Burden of Proof make claims for equal pay very difficult. The Employment Equality Acts do not allow a person making an Equal Pay claim to use a “hypothetical comparator”, instead they must identify another specific person doing like work for greater pay. This is extremely difficult in many cases and impossible in some.

NWC RECOMMENDS

Amending the Equal Pay provisions of the Employment Equality Acts to allow for a “hypothetical comparator” in Equal Pay cases and strengthening rights to pay information from employers (across all grounds).

Amending the EEA to include a clear definition of work of “equal value”

Approving IHREC’s code of practice on equal pay

Representative and class actions

Only individual persons can act as claimants under the equality legislation so bodies such as NWC or unions cannot bring claims on behalf of their members.³¹

Representative actions would have a particular importance where the issue would be too large for one individual claimants to have to deal with or where the remedy for an individual complaint would not constitute a sufficient remedy for example in case of systemic discrimination.

The EU’s Fundamental Rights Agency (FRA) has stated that one of the ways by which the existing frameworks to combat discrimination on the grounds of race and ethnic origin could be strengthened is to widen access to complaints mechanisms” by allowing NGOs to take discrimination cases on behalf of those they represent.³²

NWC RECOMMENDS

Amending Equality legislation to allow for class actions and representative actions

³⁰ European Parliament, Gender Pay Gap in Europe: Facts and Figures 3 March 2020

³¹ In *Gloria (Ireland’s Lesbian and Gay Choir) v Cork International Choral festival Ltd*, DEC-S2008-078, the Equality Tribunal found that Gloria as an unincorporated association of persons, did not have locus standi.

³² European Union Fundamental Rights Agency (2012). *The Racial Equality Directive: Application and Challenges*. Available at: <https://fra.europa.eu/en/publication/2012/racial-equality-directive-application-and-challenges>

Interim orders/Injunctions

There is no mechanism for interim orders to be made pending the hearing of the claim. The WRC is not empowered to make preventative orders and a claimant has to wait until the claims has been heard and a decision made before getting any orders. Such interim/interlocutory orders may be particularly helpful in cases where there is a risk of ongoing harassment or discrimination, or in some cases where compensation may not be an effective remedy; for example, if a Traveller child was refused admission to a secondary school, or a disabled child was refused access to the July provision additional schooling and where compensation alone will not suffice as a remedy, but the damage may be irreparable after the case is heard and decided.

NWC RECOMMENDS

Allowing claimants to seek interim/interlocutory orders pending the hearing of their claims in appropriate circumstances

Two month written notification

The Equal Status Acts require potential claimants, within two months of the most recent occurrence of the act of discrimination, to send a written notification to the potential respondent, setting out the nature of their complaint and their intention to bring a complaint to the WRC if not satisfied with the Respondent's response.³³ The notification requirement is unique to complaints under the Equal Status Acts. There is no equivalent in the Employment Equality legislation or other employment legislation. Further there is no equivalent in discrimination complaint mechanisms across Europe.

An analysis undertaken by FLAC of all published WRC decisions on Equal Status complaints between 2015 and 2019, shows that the number of complaints which were unsuccessful on the basis of a failure to comply with the notification requirement is increasing year on year. It creates in effect a two-month time limit for bring an Equal Status Claim and constitutes a significant unnecessary barrier for bring a complaint of discrimination under the ESA. It is likely to be in breach of EU requirements for effective and equivalent remedies.

NWC RECOMMENDS

Removing or making optional the written notification requirement in the Equal Status Act

Time limits for bringing claims

The Equality Acts set a six-month time limit for making discrimination complaints. This time limit is restrictive and may present particular problems when an employee is pregnant or on

³³ Section 21(2) of the Equal Status Acts 2000-2015

maternity leave. The six-month time limit makes no allowances for attempts to resolve issues through internal procedures or invoking grievance procedures. It is not of benefit to either the employer or employee for a complaint to be initiated whilst a grievance/internal procedure is ongoing, but a claimant may have no choice due to the time limits.

The Labour Court has decided that the same strict time limit applies even where an employee is delayed in making their complaint because they are using an internal grievance procedure.³⁴ The time limits may be extended up to 12 months where there is reasonable cause.

NWC RECOMMENDS

Removing time limits for discrimination complaints where an employee is pregnant or on maternity leave or where a grievance/internal procedure in relation to the discrimination is ongoing.

Jurisdiction issues

-Discrimination claims against Licensed Premises + District court

-Gender Discrimination + Circuit Court

A person who considers that they have been discriminated against on or at the point of entry to a licensed premise for example if they have been refused service in a pub because they are breastfeeding, or refused entry because they are in a wheelchair, must bring proceedings to the District Court (rather than the WRC).

It has been repeatedly highlighted that the transfer of jurisdiction from the then Equality Tribunal to the District Court in 2003 imposed a fundamentally more onerous process for claimants. The District Court is a more formal setting than the WRC, and it is a wholly adversarial setting. It applies strict and technical rules of evidence. There is a significant risk that the losing party will be ordered to pay costs, even for claims that only fail on the basis of a technicality. The WRC, by comparison, has an investigative function and is a less formal setting and there is no risk of a costs order. Walsh has noted that the consequence of this change has been a significant drop in complaints in that area.³⁵

For some groups that come within the discriminatory grounds under the Equality Acts, the District Court may have negative connotations as the Court also deals with matters such as evictions and criminal proceedings. IHREC have noted that, for Roma and Travellers, the transfer of jurisdiction for some discrimination complaints to the District Court has acted as “a barrier to justice”. In 2019, the UN Committee on the Elimination of Racial Discrimination

³⁴ Dr Judy Walsh (2020), *Country Report: Non-Discrimination, Ireland 2020*. European Commission Directorate-General for Justice and Consumers. Available at: <https://www.equalitylaw.eu/country/ireland>

³⁵ Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) at page 11.

expressed its concern at the disproportionate impact of the transfer of jurisdiction to the District Court for certain discrimination complaints on Travellers and Roma. In 2019, UNCERD recommended that complaints in relation to discrimination that occurs on or at the point of entry to licensed premises should be heard by the WRC.

Circuit Court

Gender discrimination claims under the Equality legislation, have the option of being initiated in the WRC or can be initiated in the Circuit Court where there is no level on the extent of compensation that can be ordered by the Circuit Court. There are other barriers in that a claimant in the circuit court will face the risk of costs and it is a more formal adversarial setting with formal rules of evidence etc.³⁶ However, it is not clear why the WRC cannot be given an unlimited jurisdiction in relation to compensation for discrimination claims. The WRC currently has jurisdiction under Whistle-blower legislation to order compensation of up to 5 years pay.³⁷

Ceilings on compensation

There is a strong requirement derived from the EU Equality Directives that remedies for breaches of anti-discrimination law must be effective proportionate and dissuasive. There are a number of ceilings on compensation in the Equality legislation which may breach this requirement

If you are discriminated against at interview for example because you are pregnant or have small children, the maximum compensation that can be paid is €13,000 in an access to employment case, even though egregious discrimination may occur at the point of hiring someone. The maximum compensation that can be paid in a claim under the Equal Status Claim is €15,000, no matter how serious the breach of the ESA. Adjudication officers have complained that they are constrained by the maximum that can be ordered³⁸ and that it does not reflect the seriousness of the discrimination. If you bring a complaint under the EEA to the WRC, the maximum compensation that you can obtain is two years' salary or €40,000³⁹. However, if you bring a gender discrimination claims to the Circuit court there is no maximum ceiling on the level of compensation that can be paid.

There is an obvious deterrent effect if there is no limit to the compensation that may be awarded. There is no reason why the WRC cannot be given jurisdiction to award compensation without limits. Under the Protected Disclosures Act 2014 the WRC can already award compensation of up to 5 years.

NWC RECOMMENDS

Repealing section 19 of the Intoxicating Liquor Act 2003 and that all discrimination claims be heard in the WRC

Removing all of the compensation limits on the EEA and ESA

³⁶ Section 82(3) of the Employment Equality Acts 1998-2015

³⁷ The Protected Disclosures Act 2014

³⁸ Tenant C V A landlord ADJ-00004705

³⁹ Section 82(4) and (5) EEA

5. Sexual Harassment

ICTU has reported that 81% of employees who experience sexual harassment in the workplace do not inform their employer.⁴⁰ This broadens when harassment is covered including “in employer provided accommodation”. Ireland has yet to ratify the International Labour Organisation Violence and Harassment Convention 2019 (C190). C190 and the accompanying recommendation 206 set out clear steps that governments, employers and social partners can take to protect workers and mitigate the impacts of violence, domestic violence and harassment, including when home is the place of work and the incidence of online harassment is increasing. Article 11 of C190 provides that Member States shall implement guidance, training and awareness raising in relation to harassment at work.

Non-disclosure agreements

NWC is particularly concerned the use of confidentiality clauses in agreements to settle discrimination claims under the equality legislation. There is a growing awareness that NDAs have been used as a tool to suppress knowledge of sexual harassment in the work place. The use of such agreements does not constitute an effective deterrent remedy and leaves the respondent free to engage in the alleged discriminatory behaviour again with a different employee or service user.

Some non- disclosure agreements require the claimant to keep confidential not just the terms of the agreement but also the fact of the agreement. There is usually a significant power imbalance between the parties and the issue at stake may be of great importance to the applicant and a concern that such are agreements are imposed on claimants rather than having entered into them freely. Strict confidentiality clauses prevent legitimate discussion of action or inaction by Respondents and also make it more difficult for other victims to obtain supporting evidence for similar complaints and inhibit access to an effective deterrent remedy

NWC RECOMMENDS

Ratifying ILO Convention 190 and implementing its recommendations urgently

Implementing the provisions of the Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 extending to claims under the ESA

Amending the Safety Health and Welfare at Work Act and the Protected Disclosures Act to insert provisions concerning harassment and sexual harassment

Obligating the WRC to publish the number of complaints of sexual harassment and the outcomes in its annual report

IHREC conducting an inquiry into the scale and size of sexual harassment in workplaces

⁴⁰ ICTU Sexual Harassment in the Workplace, 17th February 2020

6. Reasonable Accommodation

The Equal Status Acts impose a very minimal obligation on service providers, schools and education establishments and provider of accommodation to provide reasonable accommodation for people with disabilities. The obligation to provide Reasonable Accommodation is only imposed on those providing goods or services where, without the accommodation, it would be impossible or unduly difficult for a person with disabilities to avail of the goods and services. The minimal obligation is removed when the provision of the accommodation would cost more than a nominal cost.

The Reasonable Accommodation provisions of the Equal Status Acts must be amended in line with the UN Convention on the Rights of Persons with Disabilities. The UNCRPD contains much more robust provisions than are currently provided for in Irish law and it does not allow for a lesser obligation on providers of goods and services.

IHREC have drafted a Code of Practice in relation to Reasonable Accommodation, but it has not been approved by the Minister yet.

NWC RECOMMENDS

Incorporating an obligation to provide reasonable accommodation into the Equal Status Acts

- **The Equal Status Acts and the Employment Equality Acts should both contain clear, "free-standing" Reasonable Accommodation provisions – which provide that a failure to provide Reasonable Accommodation is unlawful discrimination.**
- **IHREC's code of practice on reasonable accommodation should be approved**

Removing the "nominal cost" exemption

7. Positive Actions

The positive action provisions are a key element of the Equality Acts. The Acts allow for positive action to promote equality or to cater for the special needs of persons. Positive Action is “a crucial element of the legislative framework, which should operate to safeguard measures that treat people differently in order to advance equality of opportunity”.⁴¹

Again, there are several positive action provisions in both Acts, with different definitions. The Equal Status Acts contain numerous provisions which have the potential to be positive action measures but which are not clearly defined. The provisions on positive action in relation to employment are ambiguous and do not clearly and explicitly allow positive action in recruitment on all grounds. In some instances, it is not clear who the measures are aimed at, or what they aim to achieve.

NWC RECOMMENDS

Allowing Positive Action as a general exception with a single definition for all grounds and all sectors and one coherent aim, namely the achievement of full equality in practice. The provisions need to be clear as to their scope and the various activities that they cover

8. Scope of the legislation

Current grounds

Section 2 of the Equal Status Acts and Section 2 of the Employment Equality Acts set out definitions of six of the nine grounds. There has been some criticism of the grounds, on the basis that they do include certain groups, or that certain groups are not clearly provided for.

The Family Status Ground

The introduction of the family status ground was intended to play a central role in making the workplace and the provision of services more family friendly ensure that services and employment are family friendly. It has not achieved that aim.

The definition of “family status” is defined so as to include some “primary resident” carers. The definition of a carer of a disabled person is restricted. Only a carer who is the primary carer resident with the person with the disability can claim protection under the act and that individual must reside with the person requiring care. This may raise problems for people living in institutional care especially that provided on a part-time basis. There is a need to expand the definition of ‘carer’ under the family status ground to encompass the full diversity of carers, resident and non-resident carers, and carers providing continuing or intermittent care.

⁴¹ Judy Walsh (2019) *Primacy of National Law over EU Law? The Application of the Irish Equal Status Act*. European Equality Law Review (Issue 2, 2019) at p.44.

Age

There is a significant exemption to the age ground under section 3(3)(a) of the Equal Status Acts, which means that people under 18 cannot take a claim of discrimination on the basis of their age. This exemption is “unduly broad in that it also exempts discrimination *as between* children of different ages. For instance, a health authority could decide that speech therapy will only be afforded to children under 6, introducing an arbitrary cut-off point for access to a vital service. Such a decision cannot be challenged using the ESA because of section 3(3)(a)”.⁴²

Members of NWC have also noted that young people under 18 experience high levels of stereotyping and associated discrimination. This is evident particularly when seeking to access services, employment and in their experience of policing.

NWC RECOMMENDS

Expanding the definition of ‘carer’ under the family status ground to encompass the full diversity of carers, including resident and non-resident carers, and carers providing continuing or intermittent care

Redefining the age ground without age limits, to include people under eighteen

The Gender Ground

As highlighted above, NWC believes that gender inequality is so fundamentally structural to Irish society that ending it should be a core, horizontal principle and aspiration of equality legislation, rather than one ground amongst nine or more. Nonetheless, this submission has set out a number of ways in which overall, the gender ground and related implications can be strengthened to ensure women and girls equality is more fully vindicated and protected through equality legislation and its associated processes and structures.

In addition, NWC recognises that the Programme for Government included a commitment to “amend the gender ground in equality legislation to ensure that someone discriminated against on the basis of their gender identity is able to avail of this legislation”. NWC welcomes the opportunity to ensure equality legislation can adequately protect and vindicate the rights of women, girls, trans women, intersex and non-binary people.

Current equality legislation prohibiting discrimination on the basis of gender is defined in a binary way in the equality legislation. Article 3 of the Recast Directive (2006/54/EC) on equal opportunities and equal treatment of women and men in employment and occupation, explicitly names that it also applies to discrimination arising from the gender reassignment of

⁴² Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) page 59.

a person.⁴³ Therefore, the prohibition on gender discrimination in the Irish equality acts includes discrimination against transgender people who intend to undertake, are undertaking, or have undertaken a gender confirmation process. However, the legislation does not expressly prohibit discrimination on the basis of gender identity, gender expression, or sex characteristics. As a result, some trans people, as well as those with non-binary and intersex and gender identities, do not come within the scope of the protection afforded by the prohibition of gender discrimination. As such the rights and protections afforded under current equality legislation are fundamentally inadequate. The lack of protection in the legislation for non-binary and intersex people, raises serious concerns. Further, not all trans people wish to, or are in a position to, undergo gender confirmation processes. In this regard, it should be noted that the Irish public healthcare system does not provide several significant gender confirmation procedures.

Notwithstanding our earlier comments on gender equality, the protections and rights afforded to women, girls, intersex, non-binary people and trans women, on ‘the gender ground’ under equality legislation must be clarified and strengthened. There are differing opinions within the National Women’s Council as to how this could be best achieved; the addition of a separate gender identity ground; by expanding the current definition of the gender ground to include gender identity; or some alternative as yet to be determined way. There are differences of approach in EU states and globally that make comparison difficult to achieve. In addition, we must ensure there are no unintended consequences as a result of any reforms to the current ground.

NWC agrees with IHREC that further analysis should be undertaken before any amendments to the ground are made. NWC recommends a detailed and comprehensive stakeholder consultation, led by an expert group is developed by the Dept.

NWC RECOMMENDS

Undertaking further analysis before any amendments to the ground are made

Establishing a detailed and comprehensive stakeholder consultation, led by an expert group with focused research and analysis of the effectiveness of different approaches in collaboration with those communities most impacted

New grounds

The Equality Acts prohibit discrimination on the nine grounds of gender, marital status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community. The Equal Status Acts were amended in 2016 to prohibit discrimination against people who are in receipt of certain housing assistance payments in the provision of

⁴³ Article 3 of the preamble to DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

accommodation services (“the HAP ground”). No “full” new ground (or “protected characteristic”) has been added to either piece of legislation since they were introduced.

Socio-economic disadvantaged status

NWC supports the addition of a “socio-economic” status ground. The urgent need for the introduction of the ground was made clear in a 2019 Report by ATD Ireland which “powerfully chronicles the damaging experience of daily lives persistently crashing up against stigma and stereotyping of socio-economic status”.⁴⁴ Recent research by Tamas Kádár also clearly sets out how and why discrimination on the basis of socio-economic status should be prohibited in Irish law.⁴⁵

Jurisprudence and case law in countries where a socio-economic status ground already exists clearly demonstrates the practical use of this ground. The number of cases on this ground is significant, particularly in certain fields such as housing and employment, where they feature among the grounds most often raised in claims. The research into the perception of discrimination incidents conducted in Hungary shows that socio-economic status features among the most often reported grounds of discrimination. This underlines that there are situations where people in a disadvantaged socio-economic status face clear discrimination and where the ‘traditional’ discrimination grounds do not provide adequate protection to them.

Discrimination on any ground represents a violation of rights, impeding full and effective participation in society. In particular, this ground limits chances to secure quality education and healthcare, employment matching one’s skills, or adequate housing and it often results in a disadvantaged social and economic situation and status. On the other hand, disadvantaged socio-economic status dramatically increases the chances of being discriminated against in all fields of life. Persons living in poverty, or in ‘poor neighbourhoods’, in rural communities, unemployed, or persons relying on social protection experience discrimination based on their socio-economic status, creating a vicious circle that is difficult to escape and perpetuating their disadvantaged status. Some of these instances of discrimination can only be tackled effectively using a socio-economic status ground.

NWC RECOMMENDS

Introducing socio – economic status as a ground, that includes all of the elements contained in the Equality (Miscellaneous Provisions) Bill 2021 Bill.

⁴⁴ ATD Ireland (2019), *Does It Only Happen to Me? Living in the shadows of Socio-Economic Discrimination*, available at: <http://17october.ie/wp-content/uploads/2019/09/SES-Discrimination-Report-ATD-Ireland-Sept-19.pdf>

⁴⁵ Tamas Kádár Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground*, available at: <https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf> at 10.

9. Exemptions

There are a large number of exceptions to the Equality Acts. Some exemptions apply to all discriminatory grounds and areas covered, some apply to individual grounds, and others apply to specific areas covered in the legislation. The Review presents an opportunity for a full re-evaluation of the exemptions to both Acts, and to examine whether they are rational, necessary and proportionate, and comply with EU legislation.

Employment Equality Acts

Exclusion of domestic workers from the definition of employee

The Definition of Employee (section 2 of the Employment Equality Acts) contains an exemption to who is considered an “employee”. As a result, so far as regards access to employment, the Acts do not apply 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”. The result is that people who engage in domestic, adult social care or childcare work may not be fully protected against discrimination. It is likely that this exemption does not comply with the EU Gender, Race and Framework Employment Directives. As domestic workers and personal and social care workers are predominantly women and women of colour and/or migrant status, this is an issue of significant concern for NWC with intersecting vulnerabilities and potential inequalities and exploitations in action. The reservation of the private or domestic realm from public concern is of course familiar to women, and NWC recommends that extend the equality legislation to these workers to ensure they are fully protected.

Equal Pay for People with Disabilities

The Employment Equality Acts contain important “Equal Pay” provisions. However, section 35(1) of the Employment Equality Acts states that it not discriminatory to pay a person with a disability a lesser rate of pay if their output is less than that of a person without a disability. This exemption must be removed. It is a major limitation on the principle of equal pay and is likely to be in breach of the Framework Employment Directive.

Section 37 religious ethos exemptions

NWC notes that this provision has been amended by the Equality (Miscellaneous Provisions) Act 2016. However, it may not be sufficiently narrow to ensure it does not permit unlawful discrimination and the exclusion of religious institutions from the application of section 37(1A), (1b) and (1c) may not be in conformity with the Framework Employment Directive.

NWC RECOMMENDS

Amending Section 37 to ensure compliance with the Framework Employment Directive

Amending Section 37 (1) b to require that an employer must establish that the employee has engaged in active and significant undermining of the ethos or belief of the institution.

Defining the phrase “religious ethos” and establishing a precise list of relevant institutions that may rely on this section, should be provided.

Amending the Acts to include domestic workers in the definition of employee.

Removing section 35(1) from the EEA.

Equal Status Acts

The definition of service in the ESA and the exemptions in section 14 of the ESA, as interpreted by the Courts and WRC, has excluded considerable State activity from the prohibition on discrimination. These provisions and exemptions to the scope of the Equal Status Act leave even those who are a member of a “protected group” under the Equality Acts, unable to challenge discrimination by public bodies, and discrimination in key areas of State activity such as housing, healthcare and social welfare even though those areas should be well within the scope of the ESA, Combatting discrimination in these areas is vital to tackling socio-economic disadvantage and to upholding socio-economic rights.

Public Bodies

The definition of “services” in section 2 of the Equal Status Acts is broad enough to include services provided by public bodies. However, the definition does not extend to the performance of the general functions of public bodies, which cannot be described as services.

As a result, it is unclear to what extent the Equal Status Acts apply to public authorities performing public functions which may not come within the definition of “services” but which may nonetheless have a great impact on lives. For example, areas like immigration, taxation, registration of marriage, and the prison service.

It has been established that the “controlling functions” of An Garda Síochána, including the investigation and prosecution of crimes, do not come within the scope of the Equal Status Acts.

Legislation and Policy

Section 14 of the Equal Status Acts excludes from challenge any action that is required by legislation. In practical terms, this means that any legislation, or the provisions of any legislation, which discriminates on one of the nine grounds or which has a disproportionately negative impact on certain groups falls outside the scope of the Equal Status Acts and cannot be challenged under the equality legislation. A recent High Court judgment appears to exempt any policy that is derived from legislation as well, which makes this an extraordinarily wide exemption.

In *AB v Road Safety Authority*, the High Court adopted a broad interpretation of the section 14 exceptions to the Equal Status Act, and decided that the Road Safety Authority had not discriminated against a woman living in Direct Provision by refusing her application for a driver’s licence, on the basis that a piece of secondary legislation, a Statutory Instrument),

required her to provide evidence of “normal residence” in the State. This interpretation of the exemptions in section 14 enlarges the exemption extensively.

Direct Provision and Immigration and Asylum Applications Exemption

Section 14(1) of the Equal Status Acts contains another broad exemption to the Equal Status Acts, which means it does not apply to certain actions by public authorities “in relation to a non-national”

This exemption means asylum and immigration applications, and the non-statutory direct provision system for international protection applicants, are not open to challenge under the Equal Status Act.

In 2019, the UN Committee on the Elimination of Racial Discrimination (UNCERD) highlighted a range of deficiencies in the “legislative framework for the elimination of racial discrimination”, including:

- “The unclear definition of “services” in section 5 of the Equal Status Acts, which may exclude the provision of services provided by public authorities such as the police, the prison service and the immigration service”
- “Preclusion of complaints against legislative provisions in Section 14 of the Equal Status Acts”⁴⁶

UN CEDAW has also called on Ireland to “ensure that an effective remedy is available for discrimination that has a legislative basis”.⁴⁷

NWC RECOMMENDS

Amending the Equal Status Acts so that the definition of “services” includes the functions of public bodies, and the blanket exemptions for the State under section 14 should be removed

Educational establishments and religious ethos

Section 11 of the Education (Admission to Schools) Act 2018 amended the ESA to the extent that primary schools that are ‘recognised’ (publicly funded schools) cannot discriminate on the basis of religion by affording preferential treatment to students of a particular religion. However, this does not apply to privately funded primary schools and secondary schools.

Section 7(3) allows that a school does not discriminate where the objective of the school is to provide education in an environment which promotes certain religious values. This includes

⁴⁶ UN Committee on the Elimination of Racism (2019), *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR. Available at:

https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COE_IRL_40806_E.pdf

⁴⁷ UN on the Committee on the Elimination of Discrimination against Women (2017), *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, Geneva: OHCHR. Available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2fCO%2f6-7&Lang=en

the right to refuse to admit a student in the basis of religion where it is proved that the refusal is essential to maintain the ethos of the school. In addition, it has significant impacts on the rights of young people to inclusive, gender equality and equality focussed education.

In June 2021 the European Parliament voted to accept the landmark Matic report on “the situation of sexual and reproductive health and rights in the EU”⁴⁸. The report recognises that,

“Sexual and reproductive health and rights (SRHR) are one of the key issues in the discussion on human rights and they are inseparable from the realisation of the fundamental right to health, as well as the achievement of gender equality and the elimination of gender-based violence”⁴⁹

NWC supports the Education (Health, Relationships and Sex Education) Bill 2021 which seeks to amend the Education Act 1998 and guarantee that young people and children can access relationship and sexual education that is unbiased, fact-based and scientifically accurate in all schools. NWC believes such legislation is crucial to ensuring long term gender equality and equality outcomes as they relate to reproductive & sexual health & wellbeing rights, sexual orientation, and gender expression.

Equality legislation which would undermine the intention of such a bill, such as through exemptions at Section 7, must be reviewed and amended.

NWC RECOMMENDS

Reviewing all exemptions in the ESA to ensure that they are clear, necessary and proportionate and comply with EU law. They should be subject to their own equality audit.

Reviewing Section 7 of the ESA to ensure the right to equal treatment and the achievement of broad gender equality & equality outcomes in relevant legislation and national policy.

10. Powers and Functions of IHREC

The Irish Human Rights and Equality Commission (IHREC) has significant powers to tackle systemic and structural forms of discrimination, through conducting equality reviews and inquiries, taking proceedings in their own name. To IHREC has not used their significant inquiry or “own name proceedings” powers.

Public Sector Equality and Human Rights Duty (PSD)

⁴⁸ https://www.europarl.europa.eu/doceo/document/A-9-2021-0169_EN.html

⁴⁹ <https://www.epfweb.org/node/838>

IHREC also has powers to monitor the implementation of the Public Sector Equality and Human Rights Duty (PSD). The PSD imposes a positive obligation on a broad range of statutory and public bodies to have regard, in the performance of their functions, to the need to eliminate discrimination, promote equality of opportunity and protect the human rights of its members, staff and persons to whom it provides services. This includes Government Departments and local authorities. In fulfilling their duties public bodies must consider the human rights and equality impact of their policies, delivery of services, budgets, procedures and practices. By doing so, there is a potential to transform the culture of public bodies by mainstreaming gender equality, equality and human rights in all aspects of their work.

Despite the Public Sector Duty being in effect for over five years, there is limited evidence to date of the duty having delivered on its potential to create this shift in culture within public bodies and the delivery of public services. For many public bodies, the process of implementation and engagement with the public sector duty remains at the very early stages and the implications of the duty for the work of those bodies are largely unexplored. While public bodies are afforded flexibility in how they implement the duty, every public body has a statutory obligation under section 42(2) of the 2014 Act to first assess and address the human rights and equality issues relevant to its work in its strategic plan and, secondly, to report on developments and achievements in its annual report.

Codes of Practice

Codes of Practice are a vital tool for giving effect to the principles contained in the equality legislation. IHREC have a significant power under section 31 of the Irish Human Rights and Equality Commission Act 2014 to produce “Codes of Practice” in relation to the promotion of equality and the elimination of discrimination, and in relation to matters arising from the Equality legislation. These Codes provide guidance on the application of the core concepts of the Equality legislation, and they can be used as evidence in discrimination cases. These Codes of Practice require the approval of the Minister for Children, Equality, Disability, Integration and Youth before they take effect.

Codes of Practice awaiting the approval of the Minister, include Harassment and Sexual Harassment in Employment and Equal Pay. The ongoing delays in approving new Codes of Practice have not been explained.

NWC RECOMMENDS

Strengthening the enforcement provisions in relation to the public sector equality and human rights

Ensuring voluntary organisation + private entities contracted by public bodies to deliver services and goods are obliged to meet the standards and outcomes of the PSD

Considering the introduction of a private sector duty.

IHREC

- Mechanisms for the approval of Codes of Practice which would avoid delays in their coming into effect must be introduced**
- Code of Practice in relation to Harassment and Sexual Harassment in Goods and Services should be introduced**
- Code of Practice in relation to Equal Pay should be introduced**
- Code of Practice on Reasonable Accommodation should be introduced**

Equality Data

There is a recognised lack of gender disaggregated data to inform national policy and decision making. For example, despite several data gathering points (crime statistics compiled by the CSO; DPP; Courts Services; Tusla; HEA Surveys, NGO's such as Rape Crisis Network Ireland, DRCC, Safe Ireland and Women's Aid) there is no national administrative database that captures the magnitude and character of violence against women. Where data is gathered it is not full disaggregated by age, gender, disability, ethnicity, and relationship status thus not allowing for full trend analysis across all date sets. Additionally, specific cases/experiences cannot be tracked through the various systems/institutions as there are no personal identifiers that will allow for tracking.

In addition, the State does not collect sufficient disaggregated data⁵⁰ to allow timely and regular assessment of the efficacy and impact of the legislation or the extent to which the State is meeting its international obligations.⁵¹ Data disaggregated across all equality grounds would give more visibility to diversity and intersectional issues.

IHREC has highlighted the considerable shortfalls in equality data in Ireland, and has repeatedly called for the collection of equality data as standard by public bodies, including "ethnic identifiers". Collection of such data would, in part, assist in the implementation of the Public Sector Equality and Human Rights Duty.

⁵⁰ The gaps and shortcomings in equality data in Ireland are outlined in CSO's 2020 *Equality Data Audit*. See <https://www.cso.ie/en/methods/methodologicalresearch/rp-eda/equalitydataaudit2020/dataissuesandrecommendations/>. The audit found particular gaps or weakness in ethnicity, disability, sex and gender identity, and sexual orientation data. It also found that much of the data that is already available is only high level information and does not always allow for analysis of minority groups. There was also a reported lack of intersectional data.

⁵¹ While the CSO conducted a survey into Equality and Discrimination in 2019, this is not a regularly conducted exercise. The next most recent similar exercise was in 2014, conducted via data from the Quarterly National Household Survey, and used too small a sample size to be meaningful with regard to minority groups. Similarly, the Survey of Income and Living Conditions (SILC) does not provide data disaggregated across equality grounds, and information on the impact of COVID-19 case numbers and deaths among ethnic minorities is poor.

NWC RECOMMENDS

Introducing measures which put a duty on public bodies, particularly those managing complaints mechanisms, to collect equality data, and giving IHREC specific enforcement powers in this regard

The urgent establishment of a coordinated, disaggregated data collection system that is publicly accessible

For any queries and further information please contact:

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