



## **Executive Summary**

### **Ireland Country report on measures to combat discrimination by Shivaun Quinlivan**

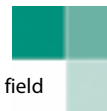
#### **1. Introduction**

The make up of Irish society is quite homogeneous. The official census in 2006 showed that 4,172,013 people were present in Ireland on census night; this reflects a population growth of 8.2% from 2002. 3,644,965 of those present on census night described themselves as Roman Catholic, which is about 87% of the population. Those describing themselves as having no religion made up 175,252 about 4% of the population; with Church of Ireland accounting for 118,948, or 2.85% of the population; and Muslims with 31,779 accounting for slightly less than 1% of the population; the remaining population described themselves as belonging to a variety of religions, or not stating their religion.

A new question was placed on the 2006 census relating to ethnic or cultural background. The results show that 94.8% of the population described themselves as white Irish, Irish Traveller or any other white background. 1.1% of the population described themselves as Black, or Black Irish, 1.3% of the population described themselves as Asian or Asian Irish, 1.1% described themselves as other including mixed background, and 1.7% did not state their ethnic or cultural identity. The census of population also revealed that some 22,435 (0.53% of the population) people considered they belonged to the Irish Traveller Community this reflected a decline in population from the census in 2002.

The census of population also revealed that the Irish population had aged by half a year since 2002 and the average age is now 35.6 years of age. The figures for those describing themselves as disabled are not yet available, but in 2002 people with disabilities made up 8.3% of the population. No census figures are available on the issue of sexual orientation. Questions were asked as to nationality, with 3,706,683 describing themselves as Irish, with 419,733 of the population being non-nationals (just over 10%), this reflects a significant change in the make up of the population. In 2002, non-nationals made up 5.8% of the population. Of those describing themselves as non-nationals 65% came from another EU Member State, with the United Kingdom accounting for 26.8% of the total number of non-nationals.

The major impetus for the development of the equality regime in Ireland was its accession to the European Union in 1972. The 1990's witnessed all party agreement on the necessity for a significant expansion of Ireland's equality laws, governing more than gender discrimination. This resulted in the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004. These Acts also established the Equality Authority and the Equality Tribunal. At the outset there of this equality regime there was significant support for the bodies and their actions, it would appear that in recent years there has been something of a backlash. This is evidenced most keenly by the introduction of the Intoxicating Liquor Act 2003. This Act governs the enforcement of discrimination in licensed premises, requiring complainants to use the ordinary court system rather than the specialised Equality Tribunal. The introduction of this Act was the direct result of political pressure by the vintners of Ireland. The reason for such pressure would appear to be a direct result of the significant body of case law which established wide spread discrimination by licensed premises against members of the Traveller Community.



## 2. Main legislation

The Constitution of Ireland contains a provision on equality the jurisprudence on the subject has been described as remarkably underdeveloped. In the case of *Norris v. Attorney General*, [1984] IR 36 the plaintiff challenged a nineteenth-century statute that criminalised homosexual conduct between males, but did not criminalise similar conduct between females. The Supreme Court held that this did not amount to constitutional discrimination. The claimant successfully brought this case to the European Court of Human Rights, and homosexual conduct was decriminalised by the Criminal Law (Sexual Offences) Act 1993. The difficulty with the constitutional equality guarantee is reflected in the broad discretion the Irish Supreme Court has in respect of justifying discrimination. In *Draper v. Attorney General*, [1984] IR 277 the Supreme Court held that the failure of the legislature in enabling disabled people to vote in general elections did not infringe Article 40.1. The Irish Constitution is also noted for its religious overtones, and this is perhaps best evidenced by the preamble to the Constitution, which refers to the fact that the people of Ireland acknowledge our 'obligations to our Divine Lord, Jesus Christ.'

The main impetus for change in respect of Irish equality law came about by virtue of Ireland's membership of the European Union. On joining the European Union in 1973 Ireland were obliged to comply with the gender equality requirements, and this instigated the equality debate in Ireland. The early 1990's saw the first pro-active steps by an Irish Government on the issue of equality, this led to the introduction of two enactments the Employment Equality Act 1998, and the Equal Status Act 2000. These enactments expanded the scope of non-discrimination legislation quite considerably on two fronts, firstly, the Equal Status Act dealt with non-discrimination in the context of the provision of goods and services, secondly both Acts prohibited discrimination on nine grounds: gender, race, religion, disability, age, marital status, family status, sexual orientation and membership of the Traveller community. These two enactments, as well as the previous equality legislation, which dealt with gender discrimination, have ensured that Ireland has a considerable body of equality jurisprudence.

The Equality Legislation created two equality bodies, namely, the Equality Authority and the Equality Tribunal. The later body is the enforcement body of the Equality Legislation. The Equality Authority is charged with the duty to inform the public on the equality provisions, and also to engage in dialogue with various stakeholders in Irish society. The Equality Authority have built up various partnerships and are involved in numerous joint ventures, all with a view to promoting equality within Irish society.

The cornerstones of the anti-discrimination system, in Ireland, are the three Equality Acts, the Employment Equality Act 1998, the Equal Status Act 2000 and the Equality Act 2004. The Equality Act of 2004 was introduced to amend the other two Acts to ensure compliance with both the Employment Framework Directive and the Race Directive. The Equality Act of 2004 is significant for the amendments made to the other two Acts, these two Acts do however remain the fundamental law on equality within Ireland. These Acts prohibit discrimination on the grounds of gender, race, religion, age, disability, sexual orientation, marital status, family status, and membership of the Traveller Community. The major distinction between the Employment Equality Act and the Equal Status Act relates to their scope. The Employment Equality Act prohibits discrimination in the sphere of employment and vocational training, whereas the Equal Status Act prohibits discrimination in the provision of goods and services. Section 19 of the Intoxicating Liquor Act 2003 amended the Equal Status Act, to ensure that cases involving discrimination in respect of licensed premises are now governed by the Act of 2003. The major impact of which is to ensure that such cases go before the District Court as opposed to the specialised Equality Tribunal. The other relevant

Act is the Social Welfare (Miscellaneous Provisions) Act 2004; this was enacted to amend the Pensions Act 1990. These Acts give effect to the two Directives as they relate to occupational pensions.

All of these Acts prohibit harassment, victimisation, direct and indirect discrimination, instructions to discriminate, as well as requiring the provision of reasonable accommodation. All of these Acts (bar the Intoxicating Liquor Act, 2003) are promoted and the public informed about their provisions through the work of the Equality Authority. The three Acts are enforced in the specialised Equality Tribunal. Both of these bodies were created under the Employment Equality Act and their main function is to ensure the implementation, and enforcement of the equality legislation. The ban on discrimination contained within the Equality Acts is augmented by various anti-discrimination clauses that exist in several acts regulating different fields of life, such as hate speech, education, unfair dismissals and so on.

There are a number of concerns in respect of Ireland's compliance with the EU directives: there is no provision for associations, organisations or other legal entities, bar the Equality Authority, to take cases to enforce the equality norms; the sanctions available for non-gender discrimination are not effective, proportionate and dissuasive as required by the Directives; there are certain limitations on the scope of the Acts, for example, the provisions of the equality legislation do not apply to persons employed in another person's home. Further, in 2003 the introduction of the Intoxicating Liquor Act now governs the prohibition of discrimination in licensed premises. No body has been charged with disseminating information about the legal protection against discrimination as governed by this Act.

Ireland has ratified all the major international instruments combating discrimination including: Charter of the United Nations; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child; International Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Nationality of Married Women; International Convention on the Elimination of All Forms of Racial Discrimination; Convention relating to the Status of Refugees; European Convention for the Protection of Human Rights and Fundamental Freedoms; European Social Charter; European Social Charter (revised); Framework Convention for the Protection of National Minorities and European Convention on the Exercise of Children's Rights. It should be noted that Ireland is a dualist state this means that for international law to have an impact in the Irish legal system it must be transposed by means of legislation into the national legal order. The only international convention that has been transposed into Irish law is the European Convention on Human Rights that was incorporated by means of the European Convention on Human Rights Act 2003.

### 3. Main principles and definitions

The Equality Acts prohibit discrimination across nine grounds, but govern different aspects of discrimination. The Employment Equality Act 1998-2004 prohibits discrimination in the sphere of employment; the Equal Status Act 1998-2004 prohibits discrimination in the provision of goods and services; the Social Welfare (Miscellaneous Provisions) Act 2004 prohibits discrimination in the provision of occupational pensions. These acts prohibit: direct discrimination, indirect discrimination, victimisation, harassment, instructions to discriminate, the procurement of discrimination on the grounds of race, religion, gender, age, disability, sexual orientation, marital status, family status and membership of the Traveller community. The Equality Acts also require reasonable accommodation. Since the instigation of these Acts the Equality Tribunal has accepted cases of multiple discrimination.

There are no rules that deal with such cases but the figures from the Tribunal suggest that almost one in four cases claim more than one discriminatory ground.

Direct discrimination is defined in the Equality Acts as treating one person less favourably than another person is, treated, has been treated or would be treated on any of the nine discriminatory grounds. This prohibition includes discrimination by association, and discrimination on a discriminatory ground that exists, existed but no longer exists, may exist in the future, or is imputed to the person concerned. Indirect discrimination is defined, within the Equality Acts as occurring where an apparently neutral provision puts a person within one of the protected classes at a particular disadvantage when compared with others not within that protected class. This difference of treatment as a result of the apparently neutral provision may be permitted where it can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. There is some concern that this definition is not fully in compliance with the Directives as no provision is made for the use of hypothetical comparators. There is no necessity for a complainant to show that there was an intention to discriminate, either directly or indirectly, it is sufficient if the actions do in fact discriminate. The Equality Acts define harassment as any unwanted conduct relating to a discriminatory ground, being conduct which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. This conduct can include acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. Victimisation covers any person who claims discrimination, instigates proceedings, supports a complainant, acts as a comparator or a witness to a complaint, opposes discrimination by lawful means, or gives notice of an intention to do any of the above, and as a result they suffer dismissal or adverse treatment.

It is the issue of reasonable accommodation that sees the most divergence between the Equality Acts. The Employment Equality Act 1998-2004 provides that where a person who has a disability can perform the duties of the post with or without the assistance of 'appropriate measures' they will be deemed competent under the Act. The employer has an obligation to take appropriate measures to enable a person with a disability to have access to employment, to participate or advance in employment, to undergo training unless such measures would impose a disproportionate burden on the employer. To determine what amounts to a disproportionate burden account must be taken of the costs of the measure in question, the scale and financial resources of the employer in question, the possibility of obtaining public funding or other assistance. The Equal Status Act 2000-2004 provides that where a provider of goods or services fails to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, without which it would be impossible or unduly difficult for the person to avail of the good or service in question. A failure to provide the requisite special treatment or facility in question will not amount to a failure to provide reasonable accommodation where the provision of the treatment or facility would give rise to more than a nominal cost to the provider of the goods or services in question.

The Equality Acts contain a number of exceptions to the principle of non-discrimination. In the Employment context, the provisions do not apply to persons employed in another person's home for the provision of personal services. There are exceptions to the non-discrimination principle where the characteristic in question is a genuine and determining occupational requirement for the post and the objective is legitimate and the requirement proportionate. There are a number of exceptions relating to the grounds of age, disability, and religion, these relate to occupational pensions, remuneration in respect of someone with a

restricted capacity and working in bodies with a religious ethos. Equally there are exceptions in respect of certain forms of employment such as the Defence Forces, the Garda Síochána and the emergency services. With regard to the Equal Status Act there are a number of exceptions and exemptions to the non-discrimination rule. Differences of treatment are permissible in respect of annuities, pensions and insurance policies where there is actuarial evidence to show that the difference is reasonable. There are exceptions to the non-discrimination norm for the purposes of organizing sporting events, for authenticity purposes for a dramatic performance, or other entertainment, or for the provision of services for religious purposes. The exception that has proved most problematic relates to the provision of goods or services that would lead a reasonable person to believe there is a substantial risk of criminal or disorderly conduct, then, discrimination is not actionable. The Equal Status Act also contains a number of exceptions in respect of education on the grounds of age, gender, religion and disability.

#### 4. Material scope

The Employment Equality Act 1998 – 2004 applies to the field of employment and vocational training; this does not distinguish between public and private sector employees. This relates to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading or classification of posts. This Act also covers vocational training, employment advertisements and agencies and agency workers.

The Equal Status Act 2000-2004 prohibits discrimination in relation to goods and services, including: education, accommodation. State services such are not explicitly mentioned in the Act, in the case of *Donovan v. Donnellan*, DEC-S2001-011 the Equality Officer interpreted the term service and held: “while State services are not specifically mentioned as being covered they are not specifically excluded either and I believe that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services and health services, etc.” There is no express prohibition on discrimination in respect of social protection, therefore compliance with the Race Directive is dependent on future judicial interpretation. This situation is further impacted by section 14 of the Equal Status Act. This provides a statutory exemption to the Equal Status Act, where an act or action is required by virtue of another piece of legislation then the Equal Status Act 2000-2004 does not apply.

#### 5. Enforcing the law

The Employment Equality Act 1998-2004 introduced the enforcement mechanisms for the Equality Acts. The enforcement mechanisms apply equally to public and private employees with the exception of certain public sector employees. Complaints under either the Employment Equality Act 1998-2004 or the Equal Status Act 2000-2004 may be brought before the Equality Tribunal. The Equality Tribunal assumes an investigative role in the hearing of complaints, complainants may represent themselves, costs may not be awarded against either party, and the procedure is informal. The option of mediation is provided for in section 78 of the Employment Equality Act 1998-2004. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court. The decisions of the Tribunal may be appealed; the Labour Court hears the employment appeals, whereas the Circuit Court hears the equal status appeals. Where the Labour court is acting as an appellate body, its determinations can be appealed on a point of law to the High Court. In addition complaints of unfair dismissal may also be brought under the Unfair Dismissals Acts 1977 and 1993. Unfair dismissal cases are considered first by a Rights Commissioner, whose recommendations are not legally binding. The Employment Appeals Tribunal makes



legally binding determinations, with the possibility of appeal to the Circuit Court, and subsequently the High Court.

Claims are brought before the relevant body by way of application using standard forms. Once litigation has been instigated the respondent (alleged discriminator will be notified). Hearings are in private before the Equality Tribunal and Labour Court; before the Employment Appeals Tribunal the hearings are normally in public. The decisions of each of the bodies are available for public inspection, with both the Equality Tribunal and the Labour Court publishing their decisions on their respective websites. A recent amendment to the Equal Status Act 2000-2004 now requires complaints under that Act involving licensed premises (i.e. pubs etc) to be brought to the District Court rather than as previously to the Equality Tribunal. The major impact of this amendment is the cost implications for complainants.

Organisations may represent an individual complainant, at the Equality Tribunal or the Labour Court where they are authorised to do so by the complainant. The legislation does not provide that such organisations may represent the individual before the Circuit Court or the High Court. Organisations are not permitted to instigate a complaint, with the exception of the Equality Authority. The Equality Authority enjoys legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement. The Authority can also provide legal assistance and representation to an individual complainant.

The Equality legislation provides for a shift in the burden of proof in non-discrimination cases. The burden of proof will shift where in equality proceedings the facts established by the complainant suggest there is a prima facie case of discrimination in that case it is for the respondent to prove the contrary. This also applies in cases brought by the Equality Authority, and expressly includes proceedings relating to indirect discrimination, victimisation and harassment. The section is silent as to its applicability in the context of reasonable accommodation.

The use of statistics is permitted, and may assist an applicant, but it is not necessary to raise a prima facie case of discrimination. Situation testing has not been used to any great extent in this jurisdiction. There are no procedural or other rules prohibiting the use of 'situational testing.' Situational testing does not occur with any regularity in the Irish context. Anecdotal evidence suggests that Judges from the Irish superior courts would be hostile to this form of evidence, seeing it as a form of entrapment. That being stated there are some cases where it may be inferred from the facts that a form of situational testing is taking place see *Delaney v. The Harp Bar*, DEC-S2002-53/56.

The Employment Equality Act 1998-2004 provides for a broad range of remedies: compensation, orders for employers to take specific courses of action, re-instatement and re-engagement. All employment contracts are deemed to have an equality clause that transforms any provisions of the contract that would otherwise give rise to unlawful discrimination. All discriminatory provisions in collective agreements are deemed null and void it is not possible to contract out of the terms of the equality legislation. There are maximum limits on financial awards, those limits in the context of employment are a maximum of two years pay, and where the complainant was not in employment then the maximum award is €12,697. The Employment Equality Act 1998-2004 also provides for non-financial sanctions, it is possible for the Equality Tribunal or the Labour Court to make an



order that a person should take a course of action including orders for re-instatement or re-engagement.

The Equal Status Act 2000-2004 also provides for a variety of remedies including: compensation, orders for service providers to take specific course of action. This Act also imposes maximum award limits, the current maximum is €6,348.69. That being the case it is clear that the majority of awards granted do not come anywhere near the maximum. This coupled with an extraordinary delay in cases coming before the Tribunal suggests that the sanctions under this Act are not effective, proportionate or dissuasive.

## 6. Equality bodies

The Employment Equality Act 1998-2004 established two national institutions with enforcement functions under the Equality legislation. These bodies cover all nine of the protected grounds, and all the non-discrimination provisions of the Equality Acts. The first of these two bodies is the Equality Authority: an independent body. This body is required under the legislation to work towards the elimination of discrimination, to promote equality of opportunity, to provide information to the public on a number of matters and to review various legislative enactments. The Equality Authority may fulfil these functions by means of research and awareness raising, review of the legislation and the drafting of statutory Codes of Practice. The Equality Authority also has the power to instigate litigation on its own behalf or to assist a litigant. Additionally the Equality Authority is authorized to conduct inquiries, and to carry out equality reviews. These are in effect an audit of the level of equality that exists in a particular business or industry. The Department of Justice, Equality and Law Reform, under the direction of the Minister fund the Equality Authority. The Equality Authority works closely with the social partners, non-governmental organizations, trade unions and government departments promoting the effectiveness of the equality legislation.

The second body established under the Employment Equality Act 1998-2004 is the Equality Tribunal. The Equality Tribunal is a quasi-judicial body established for the purpose of investigating complaints under the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004. The Equality Officers investigate complaints and issue a legally reasoned and public decision, this decision is binding. Discrimination complaints, including dismissal cases are brought at first instance to the Equality Tribunal. Cases may only be sent to mediation where both parties agree to the process. A mediated settlement agreed by the parties is binding and is enforceable by the Circuit Court. The Equality Tribunal is a statutory body, and an independent and impartial forum to hear or to mediate alleged discrimination. The Department of Justice, Equality and Law Reform, under the direction of the Minister fund the Equality Tribunal. The Equality Tribunal publishes annual reports, annual legal reviews, annual mediation reviews and statistics on their work.

There are two other relevant bodies in the context of equality: the Irish Human Rights Commission and the National Disability Authority. The Irish Human Rights Commission is charged with the protection and promotion of human rights. The Commission work to ensure the protection of civil, political, economic, social and cultural rights in recognition of the universal, indivisible, interdependent and inter-relation of all human rights. The National Disability Authority, on behalf of the State, promotes and helps secure the rights of people with disabilities. Their responsibilities include policy development, research and advice on standards.