

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

10 Ireland

by Mark Bell²

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² Dr. M.S. Bell (mb110@le.ac.uk) is a Senior Lecturer in law at the University of Leicester, United Kingdom.

Addendum

On 18 July 2004, the Equality Act 2004 came into force.³ This Act amended the Employment Equality Act 1998 and the Equal Status Act 2000 with a view to implementing several EU equality Directives, including the Framework Directive.

There are various legislative changes relevant to sexual orientation discrimination; these are set out below. In addition, the Equality Tribunal decided the first successful complaint of sexual orientation discrimination in employment on 11 June 2004. A waiter who experienced verbal harassment from his co-workers, as well as discriminatory remarks made by his manager in an email to another manager, was awarded Euro 10,000 in compensation. The firm was further required to introduce new staff training in equality and to revise their employee information documents.⁴

A *Ground of discrimination*

Section 4 introduces a new definition of direct discrimination modelled on the definition found in the Directive. However, it clarifies that reference to the ground of discrimination includes situations where that ground: '(i) exists, (ii) existed but no longer exists, (iii) may exist in the future, or (iv) is imputed to the person concerned'.⁵ Moreover, the prohibition of discrimination is extended to cover situations where: 'a person who is associated with another person (i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation'.⁶ These amendments have the combined effect of protecting individuals from discrimination because of an assumption relating to their sexual orientation or because of an association with a person of a particular sexual orientation.

B *Definition of discrimination*

The definition of discrimination has been revised and consolidated so that a single definition of direct discrimination, indirect discrimination and harassment applies to all grounds covered by the Act. The new definition of indirect discrimination introduces a test that reflects more closely the terms of the Directive:

'(a) Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (being As and Bs) at a particular disadvantage in respect of any matter other than remuneration compared with other employees.

(b) Where paragraph (a) applies, the employer shall be treated for the purposes of this Act as discriminating against each of the persons referred to (including A or B), unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'⁷

³ The full text of the Act is available at: www.oireachtas.ie/documents/bills28/acts/2004/A2404.pdf

⁴ Equality Tribunal, *Piazza v The Clarion Hotel*, 11 June 2004, DEC-E2004-033.

⁵ Section 4(a), Equality Act 2004.

⁶ Section 4(b), Equality Act 2004.

⁷ Section 13(a), Equality Act 2004.

Although this definition is framed by reference to gender, it is applied by analogy to all grounds covered by the Act, including sexual orientation.⁸ There is a similar definition of indirect discrimination in the area of equal remuneration.⁹

The definition of harassment is amended to reflect more closely the terms of the Directive. Harassment is defined as:

‘any form of unwanted conduct related to any of the discriminatory grounds, and

(ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,

being conduct which in either case has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.’¹⁰

The main substantive difference that this introduces is the prohibition of sexual harassment between persons of the same-sex.

In addition, it is clarified that the concept of discrimination in the Act includes ‘an instruction to discriminate’.¹¹

C *The material scope*

The material scope of the Act is extended to include business partnerships (section 7) and there is a broader definition of the concept of ‘employee’, in order to capture the self-employed. ‘Contract of employment’ is extended to include ‘any other contract whereby (i) an individual agrees with another person personally to execute any work or service for that person’.¹² The main exception to the broad definition of employment relates to privacy. The exception for all employment in private households has been deleted, but this is replaced with an amendment to the definition of ‘employee’:

‘so far as regards access to employment, [employee] does not include a person employed in another person’s home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons’.¹³

Although there is no specific exception in these terms found within the Framework Directive, the fundamental right to privacy could be invoked under Article 2(5) of the Directive as a potential support for this provision.

D *Exceptions to the prohibition of discrimination*

The genuine occupational requirement exception that applies to all grounds has been amended to reflect the wording of Article 4(1) of the Framework

⁸ Section 20(a), Equality Act 2004.

⁹ Sections 12(b) and 19, Equality Act 2004.

¹⁰ Section 8(a), Equality Act 2004.

¹¹ Section 3(a), Equality Act 2004.

¹² Section 3(a), Equality Act 2004.

¹³ Section 3(a), Equality Act 2004.

Directive.¹⁴ Section 37(1), which provides an exception for employment based on religious ethos, has not been amended. A new provision expressly permits positive action to be taken on a range of grounds, including sexual orientation:

‘Nothing in this Part or Part II shall render unlawful measures maintained or adopted with a view to ensuring full equality in practice between employees, being measures –

(a) to prevent or compensate for disadvantages linked to any of the discrimination grounds ...’¹⁵

E Procedures for enforcement of legislation

Although in its practice the Equality Tribunal had already applied the shift in the burden of proof, it is now explicitly provided for in the legislation.¹⁶ Similarly, the Equality Tribunal had permitted organisations, such as trade unions, to bring complaints on behalf of individuals, but this is now inserted in the legislation:

‘any party to any proceedings under this Act before the Director or the Labour Court may be represented by any individual or body authorised by the party in that behalf.’¹⁷

It should be noted, however, that this provision does not affect legal standing rules before the higher courts. The definition of victimisation is adjusted to include protection for any person who acts as a comparator in legal proceedings.¹⁸

The most significant procedural change relates to the jurisdiction of the Equality Tribunal. Previously, complaints of discriminatory dismissal were dealt with by the Labour Court, which had the specific power to make a reinstatement order. The jurisdiction for dismissal cases has been transferred with immediate effect to the Equality Tribunal. It may award any remedies that were previously within the powers of the Labour Court.

10.1 General legal situation

Protection against discrimination in Ireland is primarily based on statutory law; specifically, the Employment Equality Act 1998 and the Equal Status Act 2000. This is underpinned by a constitutional equality guarantee.

Although these Acts already meet many of the requirements of the Race and Framework Directives, there are significant differences in their detailed content. The Equality Bill 2004 amends both of the above Acts in order to complete implementation of the Directives. It addresses a range of issues, such as the definition of discrimination, and these are examined further in this report. It was approved by the upper house of the Irish Parliament on 24 February and it is now being considered by the lower house. On 20 May 2004 it was referred to the Select Committee on Justice, Equality, Defence and Women’s Rights, which

¹⁴ Section 25, Equality Act 2004.

¹⁵ Section 22, Equality Act 2004.

¹⁶ Section 38, Equality Act 2004.

¹⁷ Section 32(d), Equality Act 2004.

¹⁸ Section 29(b), Equality Act 2004.

will consider the bill further. It should be adopted within several months. A separate piece of legislation, the Social Welfare Act 2004,¹⁹ was enacted on 25 March 2004 and this deals with issues relating to pensions. Sections 22 and 23 of this Act amend the Pensions Act 1990, which is hereafter referred to as the Pensions Acts 1990 and 2004.

10.1.1 Constitutional protection against discrimination

Article 40.1 of the Constitution states: ‘all citizens shall, as human persons, be held equal before the law. This shall not be held to mean that this State shall not in its enactments have due regard to differences of capacity, physical or moral, and of social function.’

So far, the Supreme Court has not enforced this provision very rigorously.²⁰ The Court starts from the view that: ‘Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids arbitrary discrimination.’²¹ The difficulty lies in the wide discretion accorded by the Supreme Court in respect of justifying differences of treatment. In *Norris v Attorney General*, the plaintiff challenged the constitutionality of criminal legislation that rendered private and consensual sexual activity between adult men unlawful, whereas similar behaviour between women was not penalised. This was not held to violate the constitutional equality guarantee on the basis that ‘the legislature would be perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as requiring prohibition because of the social problem it creates’.²²

It is not entirely clear if distinctions based on sexual orientation would be now presumed contrary to Article 40.1. In 1997, the Supreme Court declared ‘the forms of discrimination which are, presumptively at least, prescribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions’.²³ The 1996 Constitutional Review Group recommended the addition of specific reference to sexual orientation in a revised Article 40.1.²⁴ Finally, it should be noted that the case-law has not yet resolved whether the equality guarantee may be enforced in actions between private parties.²⁵

With regard to international instruments, Ireland is a party to the European Convention on Human Rights.

The European Convention on Human Rights Act 2003 allows claimants to rely directly on Convention rights in domestic legal proceedings and courts may issue a ‘declaration of incompatibility’ where national legislation does not conform to the requirements of the Convention.

¹⁹ No. 9 of 2004.

²⁰ Casey, 2000, 451.

²¹ Walsh J., *de Búrca and Anderson v Attorney General* [1976] Irish Reports 38 at 68.

²² O’Higgins C.J., *Norris v Attorney General* [1984] Irish Reports 36 at 59.

²³ Article 26 and the Employment Equality Bill 1996 [1997] 2 Irish Reports 321 at 347.

²⁴ Constitutional Review Group, 1996, 230. The Parliamentary All Party Committee on the Constitution is reviewing aspects of the Constitution following the 1996 report.

²⁵ Casey, 2000, 474.

10.1.2 *General principles and concepts of equality*

Given the treatment of Article 40.1, it is unsurprising that the concept of equality underlying the statutory protection is based on a notion of formal equal treatment,²⁶ with an emphasis on equivalent treatment for persons in a comparable situation. Legal protection for some forms of positive action has been provided (see 10.4.7), yet this remains essentially an option rather than an obligation for the State, employers or service-providers.

10.1.3 *Division of legislative powers relating to discrimination in employment*

The Irish Parliament, the Oireachtas, enjoys the legislative competence for regulating discrimination in employment. Pursuant to the Acts of the Oireachtas, in some instances the power to issue more detailed regulations is conferred on the relevant Minister.

10.1.4 *Basic structure of employment law*

Employment law is based on a combination of common law principles and statute. The rights and obligations of employees can be derived from a range of sources. In particular, these can be established from the individual contract of employment, through its express and implied terms. The terms of collective agreements are not automatically binding on all employees, although in some circumstances these may become incorporated into individual employment contracts.²⁷ Statute has become an increasingly important restraint on the content of contracts of employment. For example, anti-discrimination legislation restricts the possibility for discriminatory terms of contract, or invalidates their effects.

Employment law in Ireland does not distinguish fundamentally between employment in the public and private sectors. Statutes specify the range of employees to which they apply. Some statutes exclude state employees in general, whereas others only exclude or treat differently certain public sector employees (e.g. the Defence Forces).²⁸

The anti-discrimination legislation applies to all employed persons, although there are some specific rules and procedures in respect of the *Garda Síochána* (police), Defence Forces and the prison service.

10.1.5 *Provisions on sexual orientation discrimination in employment or occupation*

The main source of legal protection is found in the Employment Equality Act 1998, which forbids discrimination on the grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community.²⁹ This covers all aspects of the employment relationship, subject to detailed exceptions. In addition, protection from discriminatory dismissal can be located in the Unfair Dismissals Acts 1977 and 1993. Section 6(2)(e) was amended in 1993 in order to specify that a dismissal

²⁶ Bolger and Kimber, 2000, 415.

²⁷ Byrne, Kennedy, Ni Longain and Shannon, 2003, 235.

²⁸ See further, Forde, 2001, 35.

²⁹ All the Acts of the Oireachtas (Parliament) are available at: www.statutes.irlii.org.

due to, *inter alia*, 'sexual orientation' was automatically unfair and not open to justification. The Unfair Dismissal Act does not apply to most civil servants and some other public sector employees (e.g. police and the Defence Forces). However, general principles of administrative law provide some protection for such employees against unjustified dismissal.

An employee cannot bring an action under the Employment Equality Act if they have already initiated proceedings under the Unfair Dismissals Acts 1977 and 1993 (and vice versa).³⁰

10.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

There has yet to be any major decision on the sexual orientation ground under the Employment Equality Act or the Unfair Dismissals Act. There has been one significant decision on sexual orientation discrimination pre-dating the introduction of the Employment Equality Act 1998. In *Brookfield Leisure Ltd v. A Worker*³¹ a woman was dismissed following a complaint from a client that the woman was seen kissing another woman during the course of her employment. The Labour Court rejected the argument that this was unlawful discrimination on grounds of sex.

The Office of the Director of Equality Investigations (hereafter the Equality Tribunal) received 1 complaint of sexual orientation discrimination in employment during 2000; 5 complaints in 2001; 5 complaints in 2002; and 4 complaints in 2003.³² From the total number of complaints relating to discrimination in employment, 1-2% are on the sexual orientation ground.

None of these complaints has resulted in a finding in favour of the complainant. In one instance, the complainant withdrew her argument based on the sexual orientation ground³³ and in another the tribunal determined that it lacked jurisdiction because the complainant worked predominantly in Northern Ireland.³⁴ In a further case, the complainant initially entered mediation, but this failed. However, the complainant failed to renew his application to the Equality Tribunal within the necessary time limit.³⁵

The Labour Court has rejected two complaints of dismissal due to alleged sexual orientation discrimination.³⁶ For example, in one case the dismissal occurred following a dispute between two employees working in the same bar, which left them apparently unable to continue working together. In choosing to dismiss the employee more recently appointed, the Labour Court concluded that the dismissed employee may have been treated unfairly, but that there was not sufficient evidence that this selection had been adversely influenced by the employee's sexual orientation.

³⁰ Section 101(4) and 101(5), Employment Equality Act.

³¹ EEO 12/1993.

³² <www.equalitytribunal.ie/htm/about_us/statistics.htm>. The full text of all its decisions is available at: <<http://www.odei.ie>>.

³³ Equality Tribunal, *Martinez v Network Catering*, DEC-E2001-004, 16/1/04.

³⁴ Equality Tribunal, *A Complainant v A Company*, DEC-E2002-036, 19/8/02.

³⁵ Equality Tribunal *A Male Complainant v A Bar and Restaurant*, DEC-E2003-005, 6/2/03. Labour Court, *Spring Grove Laundry v A Worker*, ED/03/34 Determination No. 42.

³⁶ Labour Court *Sashore Ltd trading as Jacksons Restaurant v A Worker*, ED/01/34 Determination No. 27. The full text of all Labour Court determinations is available at: <www.labourcourt.ie>.

The Equality Authority has been working on 8 cases of sexual orientation discrimination in employment in 2001, and 9 cases in 2002. This represents 3-4% of its casework.³⁷

10.1.7 *Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation*

All the main legislative provisions on discrimination in employment or occupation include sexual orientation.

10.1.8 *Provisions on sexual orientation discrimination in other fields than employment and occupation*

The principal source of legal protection from sexual orientation discrimination in areas outside employment is the Equal Status Act 2000. The Act forbids discrimination on various grounds, including sexual orientation, in the provision of goods and services, accommodation and educational establishments. There are also rules providing for sanctions against registered clubs (e.g. registered sports associations) who discriminate on a prohibited ground (including sexual orientation). Further protection will be afforded outside the employment sector by the passing of the Equality Bill 2004.

Sexual orientation is mentioned in various statutes. Incitement to hatred against a group of persons on account of their sexual orientation is a criminal offence³⁸ and a video may be refused a certificate for release by the Official Censor if its viewing 'would be likely to stir up hatred against a group of persons in the State or elsewhere on account of their ... sexual orientation'.³⁹ Persecution linked to sexual orientation is recognised as a possible ground for award of refugee status (under the category of 'membership of a particular social group').⁴⁰

10.2 The prohibition of discrimination required by the Directive

10.2.1 *Instrument(s) used to implement the Directive*

The Employment Equality Act 1998 will be amended in order to implement the Directive. The Pensions Acts 1990 and 2004 implement the principle of equal treatment in the area of occupational pensions. This legislation contains definitions of all the grounds of discrimination (including sexual orientation), as well as direct and indirect discrimination. These are drawn from the existing Employment Equality Act and the Equality Bill 2004, in order to provide consistency between the different pieces of legislation. Therefore, in the sections below, separate reference will not be made to the Pensions Acts 1990 and 2004 unless these contain specific aspects relevant to this report.

³⁷ Equality Authority, 2003, 38: <www.equality.ie>.

³⁸ Prohibition of Incitement to Hatred Act 1989.

³⁹ Section 3(1)(a)(ii), Video Recordings Act 1989.

⁴⁰ Section 1, Refugee Act 1996.

10.2.2 *Concept of sexual orientation (art. 1 Directive)*

Section 2(1) Employment Equality Act states 'sexual orientation' means 'heterosexual, homosexual or bisexual orientation'.

10.2.3 *Direct discrimination (art. 2(2)(a) Directive)*

The definition of direct discrimination in the Employment Equality Act corresponds to that found in the Directive. Section 6 states:

'(1) For the purposes of this Act, discrimination shall be taken to occur where, on any of the grounds in subsection (2) (in this Act referred to as the 'discriminatory grounds'), one person is treated less favourably than another is, has been or would be treated.

(2) As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are - ... (d) that they are of different sexual orientation'.

Subsection 2 will need to be amended in order to comply fully with the Directive. See further par. 10.3.1.

The Equality Bill 2004 reformulates the existing definition of direct discrimination, but retains its core meaning. Section 6(1) of the Employment Equality Act 1998 would be amended to read 'discrimination shall be taken to occur where - (a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2)'.

10.2.4 *Indirect discrimination (art. 2(2)(b) Directive)*

The Employment Equality Act is organised differently between gender discrimination (Part III) and all other grounds (Part IV). In relation to the latter, there are several definitions of indirect discrimination: section 29 (equal pay); section 31(1) (employment); section 31(2) (membership of a regulatory body). Section 31(1) is analysed below, but the problems identified are equally applicable to sections 29 and 31(2). Section 31(1) states:

'Where a provision (whether in the nature of a requirement, practice or otherwise) relating to employment –

(a) applies to all the employees or prospective employees of a particular employer who include C and D or, as the case may be, to a particular class of those employees or prospective employees which includes C and D,

(b) operates to the disadvantage of C, as compared to D, in relation to any of the matters specified in paragraphs (a) to (e) of section 8(1),⁴¹

(c) in practice can be complied with by a substantially smaller proportion of the employees or prospective employees having the same relevant characteristic as C when compared with the employees or prospective employees having the same relevant characteristic as D, and

⁴¹ Section 8 defines the areas where employment discrimination is forbidden.

(d) cannot be justified as being reasonable in all the circumstances of the case,

then subject to subsections (4) and (5), for the purposes of this Act the employer shall be regarded as discriminating against C, contrary to section 8, on whichever of the discriminatory grounds gives rise to the relevant characteristics referred to in paragraph (c).'

This lengthy and cumbersome definition is not entirely consistent with the definition provided in the Framework Directive. First, the Directive does not require the complainant to demonstrate that they have already suffered disadvantage, simply that the practice contains the potential to place persons of a particular sexual orientation at a particular disadvantage. In contrast, Article 31(1)(b) introduces an additional hurdle by requiring the complainant to show that the specific practice being challenged individually disadvantages them.

Second, the Labour Court has indicated that the phrase 'substantially smaller proportion' demands the production of 'reliable statistics', at least in relation to equal pay cases.⁴² This is contrary to the more flexible reference in the Directive to 'particular disadvantage', which was intended to avoid the need for statistical evidence. This is especially problematic in cases on the sexual orientation ground where limited data currently exists and issues of confidentiality and openness present barriers to compiling reliable statistics.

Finally, the justification test of 'reasonable in all the circumstances of the case' is weaker than the requirement in the Directive to demonstrate that the practice is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.⁴³ Importantly, the government has already accepted that the definition of indirect discrimination will have to be amended in order to conform to the Directive.⁴⁴

The Equality Bill 2004 aims to clarify the law by replacing the various definitions of indirect discrimination with a new single definition, common for all grounds. Section 22 (as amended) will state:

'(1)(a) Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (being As or Bs) at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer.

(b) Where paragraph (a) applies, the employer shall be treated for the purposes of this Act as discriminating against each of the persons referred to (including A or B), unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

(1A) In any proceedings statistics are admissible for the purpose of determining whether subsection (1) applies in relation to A or B.'

A similarly phrased clause applies to indirect discrimination in remuneration (section 19(4)). Although expressed in terms of gender discrimination, this test is applied to all the other grounds by virtue of amended section 31(1). The same

⁴² Labour Court, *St James Hospital v Bennett Kim Heng Eng*, ADE/02/4 Determination No. 23.

⁴³ Art 2(2)(b)(i).

⁴⁴ Department of Justice, Equality and Law Reform, 2002, 5.

method is adopted to apply the new definition of indirect discrimination in respect of remuneration to all grounds (amended section 29(4)). The new definition of indirect discrimination appears to meet the requirements of the Framework Directive and resolve the existing problems.

10.2.5 *Prohibition and concept of harassment (art. 2(3) Directive)*

Section 32(5) Employment Equality Act provides that:

‘any act or conduct of E (including, without prejudice to the generality, spoken words, gestures or the production, display or circulation of written words, pictures or other material) constitutes harassment of C by E if the action or other conduct is unwelcome to C and could reasonably be regarded, in relation to the relevant characteristic of C, as offensive, humiliating or intimidating to C’.

This definition of harassment applies to all grounds (including sexual orientation) covered by the Employment Equality Act other than gender, which is regulated elsewhere in the Act. Harassment is forbidden when it takes place ‘where C is employed ... or otherwise in the course of C’s employment’.⁴⁵ The Act states that harassment constitutes discrimination by the employer, regardless of whether it is committed by the employer personally, or a co-worker, customer or client.⁴⁶ In a recent decision, the Labour Court held that a school could be liable for acts of harassment by students against a teacher.⁴⁷ However, it is a defence for an employer to prove that they ‘took such steps as are reasonably practicable’ to prevent the harassment occurring or to reverse its effects’.⁴⁸ Practical guidance for employers on how to fulfil their duties can be found in the 2002 statutory Code of Practice on harassment.⁴⁹ Its contents are admissible in evidence and ‘shall be taken into account’ in relevant legal proceedings.⁵⁰

The definition of harassment includes a combined subjective and objective test. First, it must be shown that the act or conduct was unwelcome to the victim. The Code clarifies that ‘it is up to each employee to decide (a) what behaviour is welcome, irrespective of the attitudes of others to the matter and (b) from whom, if anybody, such behaviour is welcome or unwelcome, irrespective of the attitudes of others to the matter.’⁵¹ It is not clear if some forms of conduct are so unacceptable that they may be presumed to be unwelcome to any individual.

Secondly, the Act imposes an objective standard that the action or conduct ‘could reasonably be regarded, in relation to the relevant characteristic of C, as offensive, humiliating or intimidating to C.’⁵² The objective element of this test has been criticised as a potential weakness, given that the reasonable person standard may be insufficiently sensitive to the viewpoint of victims.⁵³

⁴⁵ Section 32(1), Employment Equality Act.

⁴⁶ Section 32(1), Employment Equality Act.

⁴⁷ Labour Court, *A Boys’ Secondary School v Two Female Teachers*, AEE/01/9 Determination No. 21.

⁴⁸ Section 32(6), Employment Equality Act.

⁴⁹ Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002, Statutory Instrument Number 78 of 2002.

⁵⁰ Section 56(4), Employment Equality Act.

⁵¹ Page 9.

⁵² Section 32(5), Employment Equality Act.

⁵³ Buckley, 2000, 277.

The Equality Bill 2004 would replace the existing definitions of harassment with a new single definition covering all grounds. The proposed definition follows closely the approach in the Directive:

- ‘(a) In this section – (i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds,
and (ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,
being conduct which in either case has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.
(b) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.’ (Amended section 14A(7)).

This new test appears to move away from the existing approach with its emphasis on an objective standard. It also clarifies that harassment constitutes discrimination (amended section 14A(1)). The original definition of the scope of employer liability is retained (see above), but it is additionally specified that the employer can be liable for the actions of ‘any other person with whom the employer might reasonably expect the victim to come into contact in the workplace or otherwise in the course of his or her employment’ (amended section 14A(4)).

10.2.6 *Instruction to discriminate (art. 2(4) Directive)*

Section 14 Employment Equality Act states that ‘a person who procures or attempts to procure another person to do anything which – (a) constitutes discrimination which is unlawful under this Act, or (b) constitutes victimisation for the purposes of Part VII, shall be guilty of an offence.’ The personal scope of this provision is not restricted and covers any person who so acts. In addition, section 8(4) forbids employers from having ‘rules or instructions which would result in discrimination against an employee’. These provisions appear sufficiently broad to comply with the Directive.

The Equality Bill 2004 would clarify the law further by adding a clause to section 2 stating “discrimination” includes the issue of an instruction to discriminate’.

10.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

Art. 3(1) of the Directive lists four parts to its material scope and I shall examine each in relation to the Irish legislation.

(a) *access to employment and promotion*

Section 8 (1), (5) and (8) of the Employment Equality Act forbid discrimination in these areas. However, the Directive also addresses ‘conditions for access to employment, *self-employment or to occupation*’ (emphasis added). In contrast,

the protection of the self-employed under the Employment Equality Act is partial and the government has acknowledged the need for amendment here.⁵⁴

Section 13(c) forbids discrimination (as defined earlier) by 'a body which controls entry to, or the carrying on of, a profession, vocation or occupation'. However, many provisions of the Act refer only to an 'employee'. This is defined in section 2(1) as 'a person who has entered into or works under ... a contract of employment'. This is not sufficiently broad to capture self-employed persons, although it does include persons supplied to perform work or services by an employment agency. The gaps in the existing law were illustrated in *A Named Complainant v A Named Company*.⁵⁵ In this case, a casino worker was suspended and subsequently demoted after kissing another man on the casino floor. However, the Equality Tribunal concluded that the terms of his contract meant that he was self-employed and not covered by the relevant provisions of the Act.

The government agreed to amend its definition of the 'contract of employment' in section 2. However, the final wording of the definition is not yet clear. The government has already agreed to amend its initial text during the parliamentary debates.⁵⁶

(b) vocational training, guidance and work experience

These are all covered by virtue of sections 8(7) and 12 of the Employment Equality Act.

(c) employment and working conditions, including dismissals and pay

The first three categories are fully dealt with by section 8(1) and 8(6) of the Employment Equality Act. Pay discrimination on the sexual orientation ground is forbidden in section 29. Section 2(1) clarifies that 'remuneration' for the purposes of the Act 'does not include pension rights but, subject to that, includes any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment'. Whilst this formulation broadly reflects the case-law of the Court of Justice on the definition of 'pay' under gender equality legislation, the exclusion of pension rights was manifestly contrary to the Court's approach. The Pensions Acts 1990 and 2004 today forbid discrimination in relation to occupational pension schemes and other occupational benefits delivered in the form of a pension, but related to a variety of circumstances, such as sickness, accidents, death or unemployment. This includes discrimination on the ground of sexual orientation (section 66(2)(d)).

(d) organisations of workers, employers and professional associations

Section 13 Employment Equality Act forbids discrimination by 'an organisation of workers or employers' and 'a professional or trade organisation', including both in relation to membership of the body as well as the benefits that it provides.

New section 13A proposed by the Equality Bill 2004 would apply the prohibition of discrimination to relations within business partnerships.

⁵⁴ Department of Justice, Equality and Law Reform, 2003.

⁵⁵ DEC-E-2003/015, 2 April 2003.

⁵⁶ Mr. O'Dea, *Parliamentary Debates – Seanad Éireann*, No. 11, Vol. 175, Column 792, 18 February 2004.

10.2.8 *Personal scope of applicability: natural and legal persons to whose actions are the object of the prohibition*

The main prohibition of discrimination in employment applies only to employers and providers of agency work.⁵⁷ The ban on harassment is targeted at employers and no clear provision is made to allow an action against the individual(s) committing the acts of harassment.

In some instances, the Employment Equality Act imposes liability on the 'person' responsible for the action. For example, this is applied to the offence of procuring discrimination⁵⁸ or displaying a discriminatory advertisement.⁵⁹ The term 'person' is not defined in the Act, but it may encompass both legal and natural persons. In order to ensure full compliance with the Framework Directive, it would be preferable if the Act clarified its application to natural persons committing discriminatory acts.

In practice, cases are normally brought against the employer. This is because section 15(1) renders the employer liable for 'anything done by a person in the course of his or her employment ... whether or not it was done with the employer's knowledge or approval'. It is a defence, however, for the employer to prove that they 'took such steps as were reasonably practicable to prevent the employee (a) from doing that act, or (b) from doing in the course of his or her employment acts of that description'.⁶⁰

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

10.3.1 *Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour*

The Employment Equality Act forbids discrimination on the ground of 'sexual orientation'. The concept of 'orientation' is not defined, but the initial case-law has raised examples of difference in treatment due to having a same-sex partner,⁶¹ or being seen kissing a person of the same-sex.⁶² In none of these cases did either party suggest that difference of treatment due to homosexual behaviour (i.e. having a partner) was not covered by the concept of sexual orientation discrimination.

There is no case-law yet concerning discrimination based on a (mistaken) assumption of sexual orientation. The prohibition of harassment in section 32(4) clarifies that the Employment Equality Act specifically covers harassment based on perceived characteristics. The legal position is less clear in relation to other forms of discrimination. Section 6(1) speaks broadly of persons being treated less favourably on 'discriminatory grounds', but section 6(2) refers to discrimination between two persons where 'they are of different sexual orientation' (emphasis added). In contrast, the Equal Status Act states without equivocation that discrimination occurs where a person is less favourably

⁵⁷ Section 8(1), Employment Equality Act.

⁵⁸ Section 14, Employment Equality Act.

⁵⁹ Section 10, Employment Equality Act.

⁶⁰ Section 15(3), Employment Equality Act.

⁶¹ Equality Tribunal, *A Male Complainant v A Bar and Restaurant*, DEC-E2003-005, 6/2/03.

⁶² Equality Tribunal, *A Named Complainant v A Named Company*, DEC-E-2003/015, 2 April 2003.

treated on a ground 'which is imputed to the person'.⁶³ In order to comply fully with the Framework Directive, it should be clarified that the Employment Equality Act prohibits discrimination based on assumed characteristics.

The Equality Bill 2004 amends the definition of discrimination to clarify that it applies to a ground which '(i) exists, (ii) existed but no longer exists, (iii) may exist in the future, or (iv) is imputed to the person concerned' (amended section 6(1)(b)). This will ensure that discrimination based on an assumption relating to sexual orientation is within the scope of the Act.

10.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

Existing case-law implicitly confirms that discrimination due to a person being open about their sexual orientation would be unlawful discrimination (see 10.3.1).

10.3.3 *Discrimination between same-sex partners and different-sex partners*

There has been no case-law yet concerning benefits for same-sex partners under the Employment Equality Act 1998. The National Economic and Social Forum recently identified the non-recognition of same-sex partners as one of the most significant barriers to equality for lesbians, gays and bisexuals in Ireland.⁶⁴ However, there is no indication that the government has any plans to introduce partnership legislation in the near future.⁶⁵

- *Discrimination between unmarried same-sex and unmarried opposite-sex partners*

In principle, this would be direct discrimination on grounds of sexual orientation contrary to the Employment Equality Act. Problems may arise in relation to entitlement to *force majeure* leave under the Parental Leave Act 1998. This is paid leave granted where for 'urgent family reasons, owing to an injury to or the illness of a person specified in subsection (2), the immediate presence of the employee at the place where the person is, whether at his home or elsewhere, is indispensable'.⁶⁶ The persons listed in subsection (2) include '(b) the spouse of the employee or a person with whom the employee is living as husband or wife'. It cannot be certain that the tribunals and courts would interpret this phrase as including same-sex partners.⁶⁷

- *Discrimination between unmarried same-sex partners and married opposite-sex partners*

The Employment Equality Act specifically provides protection for benefits limited to married partners. Section 34(1) provides an exception from the ban on discrimination where an employer provides:

'(a) a benefit to an employee in respect of events related to members of the employee's family or any description of those members;

⁶³ Section 3(1)(a), Equal Status Act.

⁶⁴ National Economic and Social Forum, 2003, 60.

⁶⁵ *Ibid*, 41.

⁶⁶ Art. 13(1) Parental Leave Act 1998.

⁶⁷ Mee and Ronayne, 2000, 17.

- (b) a benefit to or in respect of a person as a member of an employee's family;
- (c) a benefit to an employee on or by reference to an event occasioning a change in the marital status of the employee'.

Two issues arise in respect of this provision. First, it should be noted that the definition of 'member of the family' in section 2(1) of the Act excludes families based on same-sex partnerships. This refers to 'that person's spouse, or a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant of that person or that person's spouse.' Therefore, paragraphs (a) and (b) of section 34(1) permit employers to limit workplace benefits to married partners. Second, paragraph (c) provides protection for workplace benefits that are only available where an individual changes their marital status. Typically, this would protect 'one-off' benefits where a person marries or where a spouse dies. As same-sex partners cannot marry in Ireland, gays and lesbians are excluded from all such benefits.

In relation to occupational pensions, the Pensions Acts 1990 and 2004 contain an exception to the prohibition on sexual orientation discrimination. This states:

'It shall not constitute a breach of the principle of equal pension treatment on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member's widow or widower provided that it does not result in a breach of the said principle on the gender ground.' (section 72(3)).

This protects pension schemes that only provide a survivor's pension in respect of married partners.

- *Benefits in respect of other family members and parental leave*

The definition of the family in the Employment Equality Act refers only to a 'lineal descendant',⁶⁸ therefore, an employer is free to limit benefits provided in respect of an employee's children to those children with whom the employee shares a legal or biological link.⁶⁹ In addition, section 6(1) of the Parental Leave Act 1998 limits the entitlement to 14 weeks unpaid leave to 'an employee who is the natural or adoptive parent of a child'.

10.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations*

There is no express provision in the Employment Equality Act to deal with this form of discrimination, nor is there any existing case-law. This is striking when compared to the Equal Status Act, which covers situations where 'a person who is associated with another person is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated'.⁷⁰

The Equality Bill 2004 would clarify that discrimination occurs where:

'a person who is associated with another person –

⁶⁸ Section 2(1) Employment Equality Act.

⁶⁹ See 10.3.5.

⁷⁰ Section 3(1)(b)(i), Equal Status Act.

- (i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
- (ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination.’ (amended section 6(1)(b)).

10.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays and/or bisexuals*

The Employment Equality Act is framed in terms of discrimination against individual employees. However, the Equality Authority enjoys legal standing to bring a complaint to the Equality Tribunal where ‘discrimination or victimisation is being generally practised against persons or that a practice referred to in section 8(4) is being applied or operated’.⁷¹ Section 8(4) forbids employers from having ‘rules or instructions which would result in discrimination against an employee or class of employees’. This could be used in situations where, for example, an employer discriminated against a workplace meeting of lesbian, gay and bisexual employees.

10.3.6 *Discrimination on grounds of a person’s refusal to answer, or answering incorrectly, a question about sexual orientation*

It is well-established within Irish gender equality law that questions or comments relating to a discrimination ground in the recruitment process are unlawful discrimination *per se*, regardless of whether this affects the complainant’s chance of being appointed.⁷² This approach continues to be followed by the Equality Tribunal in its decisions under the Employment Equality Act.⁷³ Therefore, any question relating to sexual orientation will normally be unlawful discrimination.

10.3.7 *Discrimination on grounds of a person’s previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*

Although the principal areas of discrimination in the criminal law against homosexual men were only removed in 1993, these had been very rarely applied since the mid-1970s.⁷⁴ See also 10.4.7.

10.3.8 *Harassment*

Where unwelcome conduct occurs due to the victim’s sexual orientation, this would be unlawful harassment contrary to the Employment Equality Act.⁷⁵ For example, this would occur where a male employee sends a homophobic email to another employee, who he perceives to be a gay man. Making unwelcome

⁷¹ Section 85(1)(a), Employment Equality Act.

⁷² Bolger and Kimber, 2000, 401.

⁷³ For example, Equality Tribunal (both cases) *Byrne v FÁS*, DEC-E2002-45, 18/9/02; *Hughes v Aer Lingus*, DEC-E2002-49, 26/11/02, (discriminatory comments and questions during interview related to age).

⁷⁴ Rose, 1998, 60.

⁷⁵ Section 32(1), Employment Equality Act.

sexual advances to a person of the opposite-sex is sexual harassment contrary to section 23 Employment Equality Act. However, the Act does not cover sexual harassment between persons of the same-sex.⁷⁶ This omission has been widely criticised.⁷⁷

The new definition of harassment and sexual harassment provided in the Equality Bill 2004 would extend to sexual harassment between persons of the same-sex (see paragraph 10.2.5).

10.4 Exceptions to the prohibition of discrimination

10.4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

See 10.2.4.

10.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

See 10.4.7.

10.4.3 Social security and similar payments (art. 3(3) Directive)

Discrimination in this area on the sexual orientation ground is not expressly prohibited in Ireland.

10.4.4 Occupational requirements (art. 4(1) Directive)

Section 37(2) states 'nothing in this Part or Part II applies to discrimination against C in respect of employment in a particular post if the discrimination results from preferring D on the ground that the relevant characteristic of D is or amounts to an occupational qualification for the post in question'. This is similar to Article 4(1) of the Directive, but it fails to specify that an occupational qualification must be 'genuine and determining', as well as pursuing a legitimate objective that is proportionate in nature.

The Equality Bill 2004 proposes to replace section 37(2) with a text based on Article 4(1) of the Directive:

'For the purposes of this Part a difference of treatment which is based on a characteristic related to any of the discriminatory grounds (except the gender ground) shall not constitute discrimination where, by reason of the particular occupational activities concerned or of the context in which they are carried out –

- (a) the characteristic constitutes a genuine and determining occupational requirement, and
- (b) the objective is legitimate and the requirement proportionate.'

⁷⁶ Section 18(1) and section 23, Employment Equality Act.

⁷⁷ Bolger and Kimber, 2000, 269.

10.4.5 *Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)*

One of the most controversial aspects of the Employment Equality Act was its application to employers with a religious ethos.⁷⁸ Although discrimination in this context is ostensibly based on religious belief, in many cases, difficulties arise for lesbian, gay and bisexual workers where the employer's religious beliefs include disapproval of homosexuality. After lengthy debate, section 37(1) states:

'A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person ... if –

(a) it gives more favourable treatment, on the religious ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or

(b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.'

Ensuring that the Framework Directive did not impinge on this carefully crafted provision of the Employment Equality Act was a key issue for the Irish government.⁷⁹ Nevertheless, at least two differences remain between the texts. First, Article 4(2) of the Directive applies in a more limited set of circumstances than section 37(1). Specifically, it does not cover all forms of employment in a religious organisation, but only 'where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement'. Therefore, employers will need to show that a person's religion or belief are relevant to the individual post in question. Whilst the need to assess each post individually may be already implied by paragraph (a) of section 37(1), the Directive states this much more precisely.

The second paragraph of Article 4(2) flanks section 37(1)(b) of the Act. However, an important difference between the two can be identified. The second paragraph of Article 4(2) begins 'provided its [the Directive's] provisions are otherwise complied with'. Therefore, any measures under this provision may not be discriminatory on other grounds, including sexual orientation. In contrast, section 37(1)(b) does not appear to exclude the possibility that measures to prevent an employee undermining the religious ethos of the organisation could be discriminatory on grounds other than religion.

In its analysis of section 37(1), the Supreme Court held that a derogation from the principle of non-discrimination can be justified 'to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution'.⁸⁰ Nonetheless, it stressed that the 'final decision on what is

⁷⁸ Mullally, 2001, 103.

⁷⁹ Irish Times (19 October 2000) 'Churches lobbied on EU Directive'.

⁸⁰ Supreme Court, *Article 26 and the Employment Equality Bill 1996*, 15 May 1997, [1997] 2 Irish Reports 321 at 358.

reasonable or reasonably necessary to protect the ethos will rest with the Court and the Court in making its overall decision will be conscious of the need to reconcile the various constitutional rights involved'.⁸¹

The report of the Equality Authority's Advisory Committee on Lesbians, Gays and Bisexuals expressed concern that section 37(1) reinforced fears of discrimination for lesbians, gays and bisexuals working in institutions managed by religious orders.⁸² Moreover, the Committee concluded that it increased the need for such employees to hide their sexual orientation at work. Ideally, section 37(1) should be amended to reflect more precisely the language of the Directive. However, the Supreme Court's position leaves considerable discretion for courts to achieve the objective of the Directive through a purposive interpretation. The government has not indicated that it intends to amend this provision when implementing the Directive.

The Equality Bill 2004 does not propose any amendment to section 37(1).

10.4.6 Positive action (art. 7(1) Directive)

Positive action on the sexual orientation ground is not expressly permitted in the Employment Equality Act. The government has indicated that it intends to extend the exceptions related to positive action to all grounds covered by the Act.⁸³

The Equality Bill 2004 introduces a broader legal protection for positive action:

'Nothing ... shall render unlawful measures maintained or adopted with a view to ensuring full equality in practice between employees, being measures –

(a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than the gender ground)' (amended section 33).

10.4.7 Exceptions beyond the Directive

Section 37(5) Employment Equality Act provides that the ban on, *inter alia*, sexual orientation discrimination does not apply to 'the employment of any person for the purposes of a private household'. The government has accepted the need to amend this exclusion.⁸⁴

The Equality Bill 2004 would delete section 37(5), but replace this with a modification to the definition of 'employee'. 'Employee' would not include 'a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons' (amended section 2(1)). However, the final wording is not yet clear as the Minister agreed in Parliament to revise this clause with a view to restricting it to decisions on access to employment.⁸⁵ Section 16(5) Employment Equality Act states 'nothing in this Act shall be construed as requiring an employer to recruit, retain in employment or promote

⁸¹ Ibid, 359.

⁸² Equality Authority, 2002b, 60.

⁸³ Department of Equality, Justice and Law Reform, 2003.

⁸⁴ Department of Equality, Justice and Law Reform, 2003.

⁸⁵ Mr. O'Dea, *Parliamentary Debates – Seanad Éireann*, No. 11, Vol. 175, Column 794, 18 February 2004.

an individual if the employer is aware, on the basis of a criminal conviction of the individual or other reliable information, that the individual engages, or has a propensity to engage, in any form of sexual behaviour which is unlawful.’ Some commentators have expressed concerns that section 16(5) would permit an employer to discriminate on the basis of rumours about a person’s sexual inclinations as it refers to employers acting upon ‘other reliable information’.⁸⁶ There is no case-law yet on section 16(5), however, the Supreme Court had an opportunity to consider this provision in its opinion on the Employment Equality Bill 1996. The Court decided that it reflected a concern on the part of Parliament relating to ‘the addictive character of certain sexual offences involving minors’.⁸⁷ Given that the courts would have to apply this provision in the light of ‘constitutional justice and fair procedures’, it was a legitimate response. Employers could not act on ‘every idle word’, but where they make a ‘proper value judgement having regard to all the circumstances’, this will not be invalidated merely because it turns out to be wrong on the facts.

10.5 Remedies and enforcement

10.5.1 Basic structure of enforcement of employment law

With the exception of certain public sector employees (for example, the defence forces⁸⁸), the enforcement mechanisms apply equally to public and private employees. There are a variety of specialised tribunals in different areas of employment law.

10.5.2 Specific and/or general enforcement bodies

The Employment Equality Act creates two institutions with functions related to the enforcement of the legislation. The *Equality Authority* is charged with working towards the elimination of discrimination, promoting equality of opportunity and providing information to the public on the legislation.⁸⁹ This encompasses a wide range of activities, including research and awareness-raising,⁹⁰ review of the legislation⁹¹ and the drafting of statutory Codes of Practice.⁹² Significantly, the Authority also enjoys powers as regards the enforcement of the Act.

First, it is authorised to conduct inquiries. Where, following an inquiry, the Authority is satisfied that a person (including an employer) is responsible for unlawful discrimination it can issue a ‘non-discrimination notice’.⁹³ The notice specifies the conduct and what steps must be taken in order to prevent further discrimination. It is a criminal offence not to comply with a notice for a period of 5 years following its issue, carrying a maximum penalty of two years of

⁸⁶ Byrne et al, 2003, 219.

⁸⁷ Article 26 and the Employment Equality Bill 1996 [1997] 2 Irish Reports 321 at 376.

⁸⁸ Section 77(7) and 104, Employment Equality Act.

⁸⁹ Section 39, Employment Equality Act.

⁹⁰ Section 57, Employment Equality Act.

⁹¹ Section 39, and section 73 Employment Equality Act.

⁹² Section 56, Employment Equality Act.

⁹³ Section 62, Employment Equality Act.

imprisonment and/or a maximum fine of EUR €31,743.⁹⁴ Moreover, the Authority can seek an injunction from the High Court or Circuit Court during this 5 year period to restrain the actions of an employer where there is a likelihood of further discrimination.⁹⁵

Secondly, the Authority can invite a business, group of businesses or a sector of industry to conduct an equality review and/or to prepare an equality action plan.⁹⁶ The review is an audit of all existing practices, whereas an action plan is a programme for the promotion of equality of opportunity. Where there are more than 50 employees concerned, the Authority may carry out the review itself and prepare an action plan. If there is a failure subsequently to implement the action plan, then the Authority can issue a notice specifying what steps are reasonably required for its implementation.⁹⁷ If this notice is not respected, then an order can be issued by either the High Court or Circuit Court requiring compliance.⁹⁸

The Act also created the *Office of the Director of Equality Investigations – the Equality Tribunal*. This is a quasi-judicial forum for the investigation of complaints. It is relatively informal and there is no requirement for parties to be legally represented.⁹⁹ The Director normally allocates complaints to an equality officer who, following investigation, issues a legally reasoned and publicly available decision. The equality officer's decision is legally binding. All complaints of sexual orientation discrimination in employment must be first brought to the Equality Tribunal, with the exception of complaints relating to dismissal. Similarly, complaints relating to discrimination in the provision of occupational pension benefits may be brought to the Equality Tribunal, unless they are connected with a dismissal, in which case they will fall within the jurisdiction of the Labour Court.

The *Labour Court* receives appeals from the Equality Tribunal.¹⁰⁰ It is also the first instance forum for complaints relating to dismissal brought under the Employment Equality Act. The Labour Court is an industrial relations tribunal, operating on a tripartite basis. The panel will consist of a full-time chair and one representative each of employers and workers. Its determinations are binding on the parties. Determinations on dismissal complaints can be appealed to the Circuit Court.¹⁰¹ Where it is acting as an appellate body in cases from the Equality Tribunal, its determinations can be appealed on a point of law to the High Court.¹⁰²

The *Circuit Court* is a court of law with jurisdiction over a range of criminal and civil litigation.¹⁰³ Unlike other grounds of discrimination, gender discrimination cases falling under the Employment Equality Act may be brought directly to the Circuit Court and this forum offers enhanced remedies for victims (see 10.5.4).

⁹⁴ Section 66, Employment Equality Act.

⁹⁵ Section 65, Employment Equality Act.

⁹⁶ Section 69, Employment Equality Act.

⁹⁷ Section 70, Employment Equality Act.

⁹⁸ Section 72, Employment Equality Act.

⁹⁹ Office of the Director of Equality Investigations – the Equality Tribunal, 2002b, 4.

¹⁰⁰ Section 83(1), Employment Equality Act.

¹⁰¹ Section 90(1), Employment Equality Act.

¹⁰² Section 90(3), Employment Equality Act.

¹⁰³ Doolan, 1996, 43.

Appeals on a point of law lie to the High Court.¹⁰⁴ Final decisions of the Equality Tribunal and the Labour Court can be enforced through the Circuit Court.¹⁰⁵

It should be also noted that complaints of dismissal due to sexual orientation can be brought under the Unfair Dismissals Acts 1977 and 1993 (see 10.1.5). These complaints can be considered first by a *Rights Commissioner*, whose recommendations are not legally binding.¹⁰⁶ Legally-binding determinations are made by the *Employment Appeals Tribunal*, with the possibility of appeal to the Circuit Court, and subsequently the High Court.¹⁰⁷

Finally, the Employment Equality Act currently provides a different redress process for members of the Defence Forces, which excludes direct access to the Equality Tribunal or Labour Court.¹⁰⁸ The government has indicated that it intends to amend the Act in order to allow access for the Defence Forces to the general redress procedures on all grounds (except age and disability).¹⁰⁹

10.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*

The option of mediation is provided for in section 78 of the Act, both in proceedings before the Equality Tribunal and the Labour Court. The Equality Tribunal established its mediation service in December 2000. In its first two years of operation, it dealt with 47 cases relating to employment equality, of which 50% resulted in an agreement.¹¹⁰ However, only two cases were on the sexual orientation ground and these were not resolved. A mediated settlement agreed by the parties becomes legally binding and its terms can be enforced at the Circuit Court.¹¹¹

10.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*

The Employment Equality Act provides for a range of remedies, combining compensation awards with orders for employers to take specific actions. All contracts of employment shall be taken to include a 'non-discriminatory equality clause' that modifies any provisions of the contract that would otherwise give rise to unlawful discrimination.¹¹² Discriminatory provisions in collective agreements are null and void.¹¹³

In terms of compensation, section 82(4) places a maximum limit on financial awards by the Equality Tribunal or the Labour Court of two years pay. This is calculated on the basis of the complainant's weekly pay at the time the case was referred. However, where the complainant was not in receipt of remuneration at the date the case was referred (for example, in a case concerning failure to appoint a job candidate), then the maximum award is

¹⁰⁴ Section 90(2), Employment Equality Act.

¹⁰⁵ Section 91, Employment Equality Act.

¹⁰⁶ Byrne et al, 2003, 267.

¹⁰⁷ Forde, 2001, 209.

¹⁰⁸ Section 104, Employment Equality Act.

¹⁰⁹ Department of Justice, Equality and Law Reform, 2003.

¹¹⁰ Office of the Director of Equality Investigations – the Equality Tribunal, 2002c, 11.

¹¹¹ Section 91(2), Employment Equality Act.

¹¹² Section 30, Employment Equality Act.

¹¹³ Section 9, Employment Equality Act.

€12,697.¹¹⁴ This does not seem to comply with the requirement in the Directive for sanctions to be proportionate and dissuasive. For example, the maximum compensation available would be quite inadequate if someone was refused a permanent job for a discriminatory reason and that post attracted a salary of €100,000.

In cases of unequal pay, the Equality Tribunal can award compensation in the form of arrears of pay, where this is attributable to discrimination. This can cover a maximum period of three years prior to the referral of the case.¹¹⁵ Given the remit of the Labour Court for dismissal cases, it can make an order for reinstatement or re-engagement of the employee and/or compensation.¹¹⁶

The compensation awards available from the Equality Tribunal and the Labour Court compare unfavourably with the sanctions at the discretion of the Circuit Court (where gender discrimination cases may be heard). Here, compensation for unequal pay can cover a maximum period of six years¹¹⁷ and there is no monetary limit on the amount of compensation for other types of employment discrimination.¹¹⁸ Moreover, section 82(5) allows the Equality Tribunal or the Labour Court to order the payment of interest on compensation awards only in gender discrimination cases. The stronger remedies available for cases on the gender ground reflect the need for the law to comply with the effective remedies case-law of the Court of Justice pursuant to EU gender equality legislation.¹¹⁹ Given that the Framework Directive echoes the Court's language in its reference to 'effective, proportionate and dissuasive' sanctions,¹²⁰ it is clear that the remedies in the Employment Equality Act for non-gender cases will need, as a minimum, to be equalised with those already available in gender cases.

The Act also foresees non-financial sanctions and these have been used proactively by the Equality Tribunal. In particular, the Tribunal or Labour Court may make 'an order that a person or persons specified in the order take a course of action which is so specified'.¹²¹ This contains a wide potential and the Tribunal has made orders requiring employers to take steps such as creating an equal opportunities policy,¹²² re-training staff¹²³ and reviewing from an equality perspective recruitment procedures.¹²⁴ Final decisions of the Equality Tribunal or the Labour Court can be enforced by the Circuit Court.¹²⁵

In general, the Act does not provide penal sanctions for unlawful discrimination, however, there are a number of instances where it creates specific criminal offences: e. g. making false statements in response to an Equality Authority inquiry (s. 60(3)) or dismissal as a form of victimisation (see 10.5.10).

¹¹⁴ Section 82(4), Employment Equality Act.

¹¹⁵ Section 82(1)(a), Employment Equality Act.

¹¹⁶ Section 82(2)(b), Employment Equality Act.

¹¹⁷ Section 82(3)(a), Employment Equality Act.

¹¹⁸ Section 82(3), Employment Equality Act.

¹¹⁹ For example, Case 152/84 *Marshall* [1986] European Court Reports 723.

¹²⁰ Article 17 Framework Directive.

¹²¹ Section 82(1)(e), Employment Equality Act.

¹²² Equality Tribunal, *Nevin v Plaza Hotel*, DEC-E2001-33, 7/11/01

¹²³ *Ibid.*

¹²⁴ Equality Tribunal, *Equality Authority v Ryanair*, DEC-E/2000/14, 29/12/00.

¹²⁵ Section 91, Employment Equality Act.

10.5.5 *Natural and legal persons to whom sanctions may be applied*

The Employment Equality Act provides protection against discrimination for natural persons who are employees, including agency workers. It is not clear whether this is sufficient to comply with all aspects of the Directive. For example, the obligation to forbid discrimination by organisations of employers (Art 3(1)(d)) may require legal protection from discrimination against lesbian and gay businesses. The relevant provision of the Act forbids discrimination by organisations of employers 'against a person in relation to membership of that body...'. It is not clear whether 'person' encompasses legal persons (see 10.2.8).

10.5.6 *Awareness among law enforcers of sexual orientation issues*

The Equality Authority and the Equality Tribunal are specialised bodies created for the purpose of dealing with discrimination cases, including on the sexual orientation ground. Both institutions are organised by function, not by reference to specific grounds of discrimination. For example, the Equality Authority has five departments: administration, development, legal, communications and research.¹²⁶ The Equality Authority has undertaken a number of actions targeted at sexual orientation discrimination issues. In particular, in 1999 it created an Advisory Committee on Lesbian, Gay and Bisexual Issues. This produced a substantial report examining issues of sexual orientation discrimination in many different areas of life.¹²⁷ This was referred to the National Economic and Social Forum, which is pursuing the implementation of the Advisory Committee's recommendations.¹²⁸

10.5.7 *Standing for interest groups (art. 9(2) Directive)*

The Employment Equality Act does not expressly provide for interest group legal standing, however, the informal nature of proceedings before the Equality Tribunal and the Labour Court means that in practice individuals are often represented by trade unions or non-governmental organisations.¹²⁹ Such representation does not appear possible where a case reaches the courts of law (that is, the Circuit Court or High Court).¹³⁰ This is an omission that will need to be corrected in the transposition of the Directive.

It should also be noted that the Equality Authority (unlike other organisations) enjoys autonomous legal standing to bring complaints to the Equality Tribunal relating to patterns of discrimination, discriminatory advertising or the contents of a collective agreement.¹³¹ The Authority can also provide legal assistance and representation to an individual complainant.¹³²

The Equality Bill 2004 amends the standing provisions of the Employment Equality Act:

¹²⁶ Equality Authority, 2003, 75.

¹²⁷ Equality Authority, 2002b.

¹²⁸ National Economic and Social Forum, 2003.

¹²⁹ Bolger and Kimber, 2000, 426.

¹³⁰ Ibid.

¹³¹ Sections 85 and 86, Employment Equality Act.

¹³² Section 67, Employment Equality Act.

‘A party to any proceedings under this Act before the Director or the Labour Court may be represented by any individual or body authorised by the party in that behalf’ (amended section 77(11)).

This amendment does not, however, clarify whether such legal standing could be enjoyed before the courts if appeal proceedings ensued.

10.5.8 *Burden of proof of discrimination (art. 10 Directive)*

A shift in the burden of proof is currently only provided for in respect of cases on the gender ground¹³³ and this will have to change in order to comply with the Directive. In practice, the Equality Tribunals frequently invoke this principle when dealing with non-gender cases.¹³⁴

In a recent decision, the Labour Court held that as the deadline for the implementation of the Race Directive has now passed, the principle of indirect effect found in the case-law of the Court of Justice requires the Labour Court to interpret the Employment Equality Act in the light of the wording and the purpose of the Directive. Consequently, the provisions on the shift in the burden of proof have to be applied in respect of race discrimination cases.¹³⁵ Presumably, the same approach would apply in respect of all the grounds of discrimination covered by the Framework Directive.

This area of ambiguity will be removed by the Equality Bill 2004. This will insert a specific provision on the burden of proof.

‘Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary’ (amended section 85A(1)).

This also applies in cases brought by the Equality Authority (section 85A(3)) and expressly includes proceedings relating to indirect discrimination, victimisation and harassment (section 85A(4)). The definition of the burden of proof already adopted in the Pensions Acts 1990 and 2004 is slightly different from that originally proposed in the Equality Bill 2004:

‘Where in any proceedings facts are established by or on behalf of a complainant from which it may be reasonably inferred that there has been a breach of the principle of equal pension treatment in relation to him, it is for the respondent to prove the contrary’ (amended section 76(1)).’

10.5.9 *Burden of proof of sexual orientation*

The name of the applicant can remain confidential in proceedings before the Equality Tribunal or the Labour Court and this option is commonly used. However, there is no specific provision in the Employment Equality Act for applicants to retain anonymity if cases reach the Circuit Court.¹³⁶ The Equality

¹³³ European Communities (Burden of Proof in Gender Discrimination Cases) Regulations, 2001, Statutory Instrument Number 337 of 2001.

¹³⁴ For example, par. 4.16, Equality Tribunal, *Nevin v Plaza Hotel*, DEC-E2001-33, 7/11/01 (concerning discrimination on the Traveller community ground).

¹³⁵ Labour Court, *Citibank v Massinde Ntoko*, ED/01/13 Determination No. 45.

¹³⁶ Bolger and Kimber, 2000, 425.

Authority has noted that concern about anonymity is a significant barrier that deters lesbians, gays and bisexuals from pursuing complaints through to litigation.¹³⁷

10.5.10 *Victimisation (art. 11 Directive)*

Victimisation is forbidden in the Employment Equality Act –

‘where the dismissal or other penalisation of the complainant was solely or mainly occasioned by the complainant having, in good faith

- (a) sought redress under this Act ...
- (b) opposed by lawful means an act which is unlawful under this Act ...
- (c) given evidence in any criminal or other proceedings under this Act ...
- (d) given notice of an intention to do anything within paragraphs (a) to (c).¹³⁸

The normal sanctions for any other act of discrimination are also applicable to acts of victimisation, unless the victimisation takes the form of dismissal. In this case, a criminal offence has been committed.¹³⁹

The Equality Act 2004 would replace the definition of victimisation with a broader text:

‘For the purposes of this Part victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to –

- (a) a complaint of discrimination made by the employee to the employer,
- (b) any proceedings by a complainant,
- (c) an employee having represented or otherwise supported a complainant,
- (d) the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act,
- (e) an employee having been a witness in any proceedings under this Act or the Equal Status Act 2000 or any such repealed enactment,
- (f) an employee having opposed by lawful means an act which is unlawful under this Act or the said Act of 2000 or which was unlawful under any such repealed enactment, or
- (g) an employee having given notice of an intention to take any of the actions mentioned in the preceding paragraphs.’ (amended section 74(2)).

¹³⁷ Equality Authority, 2003, 18.

¹³⁸ Section 74(2), Employment Equality Act.

¹³⁹ Section 98, Employment Equality Act.

10.5.11 *Other aspects of remedies or enforcement*

Complaints of discrimination or victimisation must be brought within six months of the most recent occurrence of the act.¹⁴⁰ This may be exceptionally extended to a maximum of twelve months.¹⁴¹

10.6 Reform of existing discriminatory laws and provisions

10.6.1 *Abolition of discriminatory laws (art. 16(a) Directive)*

Discriminatory legislation could, in principle, be challenged under the constitutional equality clause, or as contrary to the European Convention on Human Rights. See further paragraph 10.1.1.

10.6.2 *Abolition of discriminatory administrative provisions (art. 16(a) Directive)*

The situation for administrative provisions is similar to that for legislation (see 10.6.1 and 10.1.1). Insofar as these provisions related to employment matters, they could be challenged under the Employment Equality Act 1998.

10.6.3 *Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)*

There is no mechanism for a systematic review of collective agreements, etc, however, the powers of the Equality Authority to conduct investigations should be noted (see paragraph 10.5.2). Section 9 of the Employment Equality Act 1998 provides that any elements of such agreements that give rise to discrimination are null and void. Although discriminatory agreements are 'null and void' according to the legislation, in practice, this can only be established in the course of litigation. An individual who believes a collective agreement applicable to them to include discriminatory elements will have to make a complaint to the Equality Tribunal, which will make a determination on whether the relevant provision of the agreement is contrary to the legislation. If it is in breach of the legislation, then that part of the agreement cannot be enforced and will need to be modified.

In addition, sections 29 and 30 insert equality clauses into all contracts of employment. This ensures that if any other term of the contract of employment gives rise to less favourable treatment (either in remuneration or in other respects), then the equality clause shall modify that term to prevent it having that effect.

The Equality Authority or a person affected by the provisions of a collective agreement, etc. may refer the agreement in question to the Director of the Equality Tribunal for a decision (section 86). If the Equality Tribunal finds that

¹⁴⁰ Section 77(5), Employment Equality Act.

¹⁴¹ Section 77(6)(a), Employment Equality Act.

provisions of the agreement breach the Act, then these shall be rendered null and void. The Tribunal may indicate to the parties how alternative provisions in compliance with the Act could be devised (section 87).

10.6.4 *Discriminatory laws and provisions still in force*

Although there are potential difficulties regarding the definition of family members in employment legislation (see paragraph 10.3.3), there are no other specific examples of discriminatory legislation within the scope of the Framework Directive.

10.7 **Concluding remarks**

It is clear that Ireland already possesses a sophisticated and relatively comprehensive anti-discrimination law. The concept of discrimination is thoroughly defined and there is an elaborate institutional framework for the enforcement of the legislation. In many respects, this goes beyond the minimum standards required by the Framework Directive. Nonetheless, there are a number of areas where the legislation demands amendment in order to comply fully with the Directive's requirements.

Most of the key issues are addressed in the Equality Bill currently before Parliament. This includes:

- amending the definition of indirect discrimination;
- extending protection against discrimination to include the self-employed;
- ensuring protection against discrimination based on a person's assumed sexual orientation;
- amending the exception covering employment in a private household;
- extending the rules on the shift in the burden of proof to include the sexual orientation ground.

Given that the legislation is not yet finalised and that the text has already changed from the original draft of the Bill, it is too early to reach a firm conclusion on whether the final legislation will fully comply with the Directive. However, there are a number of areas where the draft Bill may be considered lacking:

- ensuring that the exception relating to employment in an organisation with a religious ethos is sufficiently narrow;
- extending the remedies already available for discrimination cases on the gender ground to cases on the sexual orientation ground;
- permitting actions against the natural person committing discrimination;
- providing legal standing for organisations with a legitimate interest in enforcing the equal treatment principle to act on behalf of complainants at all levels in the judicial process.

The principal challenge in Ireland is not formal compliance with the provisions of Framework Directive. Rather, it is ensuring that individuals vulnerable to sexual

orientation discrimination feel sufficiently confident to make use of the legislation. Despite the strong legal framework on discrimination, very few complaints of sexual orientation discrimination have been brought to the Equality Tribunal.

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