



A submission by Community Law & Mediation to the Department of Children, Equality, Disability, Integration and Youth on the Review of the Equality Acts

This submission has been endorsed by Ballymun Community Law Centre

Executive Summary

Community Law & Mediation (CLM) is an independent community law centre and charity which provides free legal advice, advocacy, mediation and education services in communities experiencing disadvantage. CLM was established in Coolock in 1975 (previously known as Coolock Community Law Centre) and opened a second law centre in Limerick in 2012. Today, it assists more than 4,000 people annually.

Community Law & Mediation recognises the urgent need for amendment of the Equality Acts (“the Acts”) to improve their effectiveness in combatting discrimination and promoting equality, to increase awareness of the legislation, to reduce obstacles to taking a claim, and to expand the grounds upon which a claim can be brought. CLM is grateful for the opportunity to make this submission and is available to engage further with the Department on the issues raised herein. Our submission has been supported and endorsed by Ballymun Community Law Centre.

This review states that it will examine the Acts from the perspective of the person taking a claim under the redress mechanism. Given CLM’s casework experience in representing clients in employment equality and equal status claims, we are deeply aware of the barriers faced by those who take claims under these Acts and the shortcomings of the Equality Acts in providing for vulnerable groups who have been discriminated against. Our submission focuses on the broad themes outlined in the Consultation briefing, with specific recommendations provided for each point highlighted. It is structured around the specific questions raised by the Review and we have limited our comments to our particular expertise as a community law centre providing legal advice, information and representation in the areas of employment equality and equal status. We hope that our practical experience of using the Acts will provide a useful perspective. Our recommendations are as follows:

Recommendation 1: Periodic reviews of the ESA and EEA

Recommendation 2: More accessible and effective mechanisms of enforcement

Recommendation 3: Inquisitorial rather than adversarial process for discrimination claims in the WRC

Recommendation 4: Legislative or procedural guidance for providing additional supports during the adjudication process and at complaint stage

Recommendation 5: The effective exemption from the ESA for public bodies administering legislation in key areas such as housing, healthcare, social welfare etc. requires urgent reform

Recommendation 6: Full re-evaluation of the exemptions in both EEA and ESA, and a thorough examination of whether they are rational, necessary and proportionate

Recommendation 7: Any amendments to the definition of Disability should ensure that the current protection provided is not reduced.

Recommendation 8: A comprehensive Code of Practice on Reasonable Accommodation should be urgently drafted and adopted.

Recommendation 9: Jurisdiction of the WRC should be increased to provide for meaningful compensation for discrimination and to act as an effective deterrent

Recommendation 10: Strengthen the ability to require Respondents to provide relevant information under the EEA

Recommendation 11: The Acts should provide for interlocutory relief in cases of discrimination

Recommendation 12: We recommend that the Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 be implemented in full and extended to cases taken under the ESA

Recommendation 13: The Acts should allow for representative actions to be taken by representative bodies/NGOs on behalf of claimants

Recommendation 14: The Civil Legal Aid Scheme should be expanded to cover discrimination cases taken to the WRC under the ESA and the EEA

Recommendation 15: A review of WRC procedures and resources, with a view to improving the services provided by the body

Recommendation 16: Removal of the notification requirement under the ESA

Recommendation 17: Review of restrictive time limits for lodging discrimination claims

Recommendation 18: Prominence of equality protections increased and suitability of the process for discrimination claims, in particular under the ESA, reviewed and improved

Recommendation 19: Detailed guidance and assistance for legal professionals and WRC Adjudication Officers to make the court process more accessible for people with intellectual disabilities

Recommendation 20: Consultation with people with intellectual disabilities in relation to their needs and appointment of disability liaison officer where support is required

Recommendation 21: Review of jurisdiction under section 19 of the Intoxicating Liquor Act

Recommendation 22: Return section 19 to the remit of the WRC to increase accessibility in making a complaint of discrimination

Recommendation 23: Introduction of a socio-economic ground in the ESA and EEA to provide for prohibiting discrimination on the basis of a person's social and economic disadvantaged background

Recommendation 24: Definition of discrimination widened to expressly include intersectional discrimination in addition to the existing grounds

Recommendation 25: Outreach work and community education and training in relation to intersectional discrimination

Contents

Introduction	5
Recommendation 1: Periodic reviews of the Equal Status Acts and Employment Equality Acts)	5
Practical experience of the Employment Equality Acts (EEA) and the Equal Status Acts (ESA)	5
Case study on the practical difficulties faced in cases challenging discrimination	6
Recommendation 2: More accessible and effective mechanisms of enforcement	7
Recommendation 3: Inquisitorial rather than adversarial process for discrimination claims in the WRC	7
Recommendation 4: Legislative or procedural guidance for providing additional supports during the adjudication process and at complaint stage	7
Clarifying Scope of s.14 of Equal Status Act, 2000	7
Recommendation 5: The effective exemption from the ESA for public bodies administering legislation in key areas such as housing, healthcare, social welfare etc. requires urgent reform	8
Numerous and complex exemptions in the EEA and ESA	8
Recommendation 6: Full re-evaluation of the exemptions in both EEA and ESA, and a thorough examination of whether they are rational, necessary and proportionate.....	9
Disability.....	9
Recommendation 7: Any amendments to the definition of Disability should ensure that the current protection provided is not reduced.	9
Recommendation 8: A comprehensive Code of Practice on Reasonable Accommodation should be urgently drafted and adopted.	9
Jurisdiction	9
Recommendation 9: Jurisdiction of the WRC should be increased to provide for meaningful compensation for discrimination and to act as an effective deterrent	10
Strengthening the ability to require Respondents to provide relevant information	10
Recommendation 10: Strengthen obligation on Respondents to provide relevant information under the EEA	10
Orders and interlocutory relief	10
Recommendation 11: The Acts should provide for interlocutory relief in cases of discrimination	11
Non-disclosure Agreements	11
Recommendation 12: We recommend that the Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 be implemented in full and extended to cases taken under the ESA	11
Representative actions	11

Recommendation 13: The Acts should allow for representative actions to be taken by representative bodies/NGOs on behalf of claimants	11
Lack of Access to Civil Legal Aid in WRC cases.....	12
Recommendation 14: The Civil Legal Aid Scheme should be expanded to cover discrimination cases taken to the WRC under the ESA and the EEA.....	13
Resources in the WRC.....	13
Recommendation 15: A review of WRC procedures and resources, with a view to improving the services provided by the body	14
Other Procedural and Accessibility Issues under ESA and EEA	14
Notification requirement and time limits.....	14
Recommendation 16: Removal of the notification requirement under the ESA	15
Recommendation 17: Review of restrictive time limits for lodging discrimination claims	15
Recommendation 18: Prominence of equality protections increased and suitability of the process for discrimination claims, in particular under the ESA, reviewed and improved.....	15
Barriers to justice for people with intellectual disabilities	15
Recommendation 19: Detailed guidance and assistance for legal professionals and WRC Adjudication Officers to make the court process more accessible for people with intellectual disabilities	16
Recommendation 20: Consultation with people with intellectual disabilities in relation to their needs and appointment of disability liaison officer where support is required	16
Jurisdiction under s. 19 of Intoxicating Liquor Act	16
Recommendation 21: Review of jurisdiction under section 19 of the Intoxicating Liquor Act	16
Recommendation 22: Return section 19 to the remit of the WRC to increase accessibility in making a complaint of discrimination	16
Introduction of disadvantaged socio-economic status as a discrimination ground	16
Recommendation 23: Introduction of a socio-economic ground in the ESA and EEA to provide for prohibiting discrimination on the basis of a person’s social and economic disadvantaged background.....	18
Recognising Intersectionality in Discrimination	18
Recommendation 24: Definition of discrimination widened to expressly include intersectional discrimination in addition to the existing grounds.....	19
Recommendation 25: Outreach work and community education and training in relation to intersectional discrimination	19

About Community Law & Mediation

CLM's mission is to provide people in our communities with expert legal, mediation, and education services they would not otherwise have access to and in doing so, to address underlying issues of injustice and exclusion while working for real change.

For **more information**, contact us at:

Community Law & Mediation
Northside Civic Centre, Bunratty Road, Coolock, Dublin 17
T: 01 847 7804 | E: info@communitylawandmediation.ie
W: www.communitylawandmediation.com.

1) The functioning of the Acts and their effectiveness in combatting discrimination and promoting equality

What measures could be adopted to improve functioning of Acts and their effectiveness in combatting discrimination and promoting equality?

Introduction

This review of our equality legislation is very welcome. This legislation is so fundamental to people's experience of living in a society and working with dignity. We submit that a robust and accessible system of equality law requires built-in periodic review, to incorporate ever-evolving societal changes and an increasingly diverse population in terms of ethnicity, class, gender etc. In a general sense there is a need for provisions to be clearer and more robust (e.g. indirect discrimination and equal pay provisions), exemptions should be limited and narrowly defined to curb the scope for public and private bodies to avoid their obligations under the Acts, and the mechanisms of enforcement should be more accessible and effective.

Recommendation 1: Periodic reviews of the Equal Status Acts and Employment Equality Acts)

Practical experience of the Employment Equality Acts (EEA) and the Equal Status Acts (ESA)

As practitioners regularly providing legal representation to clients before the Workplace Relations Commission (WRC) under the EEA and ESA, we hope our particular experience will provide some helpful insight into the functioning of the Acts. The WRC process itself can be inaccessible and the conduct of hearings can often pose challenges for people who have been discriminated against at work or when accessing goods and services. We submit that in a forum such as the WRC, an inquisitorial rather than an adversarial process would be more appropriate, given the current situation in which the procedural burden lies very heavily with the claimant. The Acts themselves create procedural difficulties, such as the

tight deadlines of usually six months to make a claim (more below), as well as the requirement for written submissions in advance of equality cases. In an employment equality case, for example, the Claimant will need to set out causal links and legal points in their statement of complaint. The complaint can be struck out if the statement is not furnished. This is a significant requirement for a complainant without the assistance of a lawyer or an advocate.

While efforts have been made to make the process more user-friendly and accessible, issues still remain, particularly for those who have experienced discrimination. The process is increasingly online, creating issues for people who don't have internet access or experience. Many of our clients have told us that they would have felt overwhelmed and intimidated having to do this on their own. It is particularly difficult for those with literacy problems, those who have intellectual disabilities or those whose first language isn't English. There is no legislative or procedural guidance for providing additional supports during the adjudication process or complaint stage.

Case study on the practical difficulties faced in cases challenging discrimination

Lisa (not her real name) came to CLM after her case against her employer, alleging racial discrimination and harassment, had failed before the WRC. She was racially harassed by her manager and called names in front of staff and customers in the fast food shop she worked in. She made a complaint to senior management and was promptly sacked the following day. However, the Adjudication Officer at the WRC found against Lisa. We reviewed the Adjudication Officer's decision and we advised Lisa to appeal it. The decision made assumptions about Lisa and without any evidence, found that the comments weren't racially motivated. Her claim for victimisation wasn't examined at all.

Lisa told us about her experience and said that she found the case intimidating and demoralising. Her first language is not English and she did not have an interpreter in the WRC. We appealed the decision to the Labour Court on Lisa's behalf and requested an interpreter for Lisa. The Labour Court part-heard her appeal and the employer conceded at that hearing that the racially abusive language had indeed been used. Ultimately, her employer engaged with us and agreed to pay her compensation for discrimination.

Lisa was very clear that she would have found the whole process impossible to navigate alone.

In practical terms, individuals face an uphill battle in enforcing their rights under the EEA and the ESA. Complex legal concepts including reaching the standard of a *prima facie* case

and establishing a comparator, as well as the operation and application of various EU Directives, for example the Race Directive, pose challenges to practitioners in the area, never mind people without that particular expertise.

Recommendation 2: More accessible and effective mechanisms of enforcement

Recommendation 3: Inquisitorial rather than adversarial process for discrimination claims in the WRC

Recommendation 4: Legislative or procedural guidance for providing additional supports during the adjudication process and at complaint stage

Clarifying Scope of s.14 of Equal Status Act, 2000

Section 14 of the Equal Status Act allows for discrimination in cases where taking an action is required under an enactment or an order of a court. The word ‘enactment’ is not defined by the ESA but case law has shown that it covers Acts of the Oireachtas and statutory instruments. It does not cover any decision where there is some element of discretion as it only relates to discriminatory treatment that is required by law.¹ Effectively, this renders the Equal Status Act a second-tier piece of legislation, which can be superseded by enactments or orders of a court. In real terms, the State is, by and large, exempt from anti-discrimination provisions in the ESA. This particular provision is highly problematic as it heavily limits the application of the ESA in cases involving public bodies, therefore limiting the recourse of claimants who have been discriminated against in accessing accommodation from local authorities, healthcare and social welfare. Several discrimination challenges to social protection provisions have failed because the WRC held it did not have jurisdiction over the claim.²

There is also doubt as to whether this provision is compatible with EU law. The EU Race Equality Directive, to which Ireland is a party, does not envisage any blanket exemptions for discriminatory measures required by law. It is uncertain whether s.14 would be considered compliant with the Directive. As a result of the problems and uncertainty surrounding this provision, further guidance is necessary to determine the exact scope of this provision and whether it is compliant with EU Law. This is crucial to ensure rights are not being unfairly breached under the ESA.

In addition, the recent High Court decision in *AB v Road Safety Authority* appears to exempt any *policy* that is derived from legislation, dramatically increasing the breadth of the exemption. In that case, the High Court interpreted the section 14 exceptions to the Equal Status Act broadly, holding that the Road Safety Authority had not discriminated against a woman living in Direct Provision by refusing her application for a driver’s licence, on the basis that a piece of secondary legislation (a statutory instrument) required her to provide evidence of “normal residence” in the State.

¹ Judy Walsh, EC Country report on Non-Discrimination, 2019, pg.44

² Ibid.

The current position is that any legislation that has a disproportionate effect on groups protected under the ESA cannot be challenged using the ESA's anti-discrimination provisions. This effective exemption for public bodies administering legislation in key areas such as housing, healthcare, social welfare etc. is, we submit, against the spirit of the legislation and requires urgent reform.

Recommendation 5: The effective exemption from the ESA for public bodies administering legislation in key areas such as housing, healthcare, social welfare etc. requires urgent reform

Numerous and complex exemptions in the EEA and ESA

The numerous and complex exemptions contained in the Acts are in need of reform. The EEA, for example, contain exemptions to the principle of non-discrimination in employment. By way of example, the EEA provide an exemption to certain religious, educational or medical institutions to take limited measures in order to maintain the ethos of the institution. While the Equality (Miscellaneous Provisions) Act 2015 introduced reforms, an educational institution funded by the State can still discriminate to prevent the undermining of its religious ethos if it can be objectively justified by the institution's aim and if the action is appropriate, necessary and proportionate.

The INTO has identified significant concerns among teachers whose personal life may not be fully congruent with the religious practice, doctrine or ethos of their employer. Those concerns centre on the potential to make the case that a teacher's personal life or professional practice is undermining or causing damage to the school ethos.

Further exemptions in the EEA applying to the age ground, the gender ground, the disability ground etc allow too broad a scope for the avoidance of obligations under the Acts. There is certainly a need here for review of the broad exemptions that can be relied on by discriminating employers. For example, section 35(1) of the EEA states that it not discriminatory to pay a person with a disability a lesser rate of pay if their output is less than that of a person without a disability. IHREC has previously called for this exemption to be removed and we recommend its immediate removal.

The ESA contain an exemption for the functions of public bodies. The definition of "services" in section 2 of the ESA is broad enough to include services provided by public bodies. However, the definition does not cover the performance of those general functions of public bodies, which cannot be described as services. As a result, there is a lack of clarity around the application of the ESA to public authorities who are performing public functions which may not come within the definition of "services" but which have an enormous impact on people (areas like immigration, taxation, and the prison service). For example, the "controlling functions" of An Garda Síochána, including the investigation and prosecution of crimes, do not come within the scope of the ESA.

The Review presents an opportunity for a full re-evaluation of the exemptions in both the EEA and ESA, and to examine whether they are rational, necessary and proportionate.

Recommendation 6: Full re-evaluation of the exemptions in both EEA and ESA, and a thorough examination of whether they are rational, necessary and proportionate.

Disability

The definition of disability contained in the ESA and the EEA is not in keeping with the Convention on the Rights of Persons with Disabilities (CRPD). In effect, the ESA and EEA define disability as something intrinsic to the person rather than in terms of societal barriers to the person's participation in life. The definition in the ESA and EEA has the advantage of being inclusive – the vast majority of disabilities are included and claimants generally do not have difficulty in proving that they come within the definition. The definition of disability in the CRPD, however, is limited to those with 'long-term' disabilities. This should be broadened to include reference to 'temporary disabilities' also. While the definition requires review, any amendments to the language used in defining Disability should ensure that the current protection provided is not reduced.

We have concerns about the lack of clarity around the concept of 'reasonable accommodation' which is so central to the protection against discrimination on the ground of disability. There are two differing definitions contained in the ESA and the EEA. Consideration should be given to adopting the definition of 'reasonable accommodation' as defined in the CRPD, and ratified by the State, which provides for 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden'. The ESA provides for quite a minimal obligation to provide reasonable accommodation. The obligation is only imposed on those providing goods or services where, without the accommodation, it would be impossible or unduly difficult for a person with disabilities to avail of the goods and services. An obligation to provide reasonable accommodation, except where it would impose a disproportionate burden (as provided for in the CRPD), should be incorporated into the ESA and the nominal cost exemption should be removed entirely. A comprehensive Code of Practice on Reasonable Accommodation covering both Acts should be urgently drafted and adopted.

Recommendation 7: Any amendments to the definition of Disability should ensure that the current protection provided is not reduced.

Recommendation 8: A comprehensive Code of Practice on Reasonable Accommodation should be urgently drafted and adopted.

Jurisdiction

Under the EEA the WRC can make an order for compensation of up to 2 years pay or up to €40,000 for the effects of discrimination or victimisation. The WRC is only entitled to award up to €13,000 for someone who is not an employee of the respondent. This is an inadequate award for someone who has been discriminated against by a prospective employer in the recruitment process, which is often the point at which discrimination occurs. Neither does it constitute a deterrent to the employer. Similarly, the maximum jurisdiction under the ESA is €15,000. In the Circuit Court, by contrast, which can deal with gender claims, there is no limit to the amount of compensation that can be awarded by the Court. If the issue at the

centre of the gender claim is to do with equal pay, the Circuit Court can order pay arrears of up to six years' pay. It should be noted that there is no requirement in EU law that caps be imposed. We recommend that the jurisdiction of the WRC be increased to provide for meaningful compensation for discrimination and to act as an effective deterrent.

Recommendation 9: Jurisdiction of the WRC should be increased to provide for meaningful compensation for discrimination and to act as an effective deterrent

Strengthening the ability to require Respondents to provide relevant information

The EEA provide a right to information to a potential claimant. This provision should be far more robust. The right to information is aimed at assisting people in deciding whether or not to bring a claim. Information can be sought from employers in relation to:

1. Their reasons for any relevant act and any practices or procedures around the act
2. Pay or treatment of other people in the same or a similar position etc

This provision is under-used by claimants and there are minimal consequences for an employer who chooses not to respond, aside from the refusal being considered by the Adjudication Officer in making their decision – but only at their own discretion. As the Claimant bears the onus of proving a *prima facie* case, the information obtained is often vital in discharging this burden. The difference between this essentially toothless provision and the discovery process in the Courts is stark.

Recommendation 10: Strengthen obligation on Respondents to provide relevant information under the EEA

Orders and interlocutory relief

This review is an opportunity for clarification of the type of orders that can be made by a decision-maker, whether Adjudication Officer or Judge, in a discrimination claim. In addition to awarding compensation, the ESA allow the decision-maker to specify a course of action to be taken by a party. For example, if a person is successful in a claim for discrimination against a shop, the Adjudication Officer might order the shop manager to provide discrimination training to staff. The scope of this provision requires clarification and the provision of examples of orders would provide decision-makers with some guidance in this regard.

The Acts should provide for interlocutory relief in cases of discrimination, that is the ability to prevent a discriminatory action and maintain the status quo until the matter is fully heard. The need for such relief is best-illustrated by way of examples:

- Mary approaches her landlady to request that she fill out the relevant forms so that Mary can access the Housing Assistance Payment (HAP). Her landlady refuses to assist and Mary goes into arrears in her rent, resulting in an eviction notice being served. Mary can take a case under the ESA for discrimination under the housing assistance ground but currently, the WRC has no powers to make an interlocutory

order preventing her eviction until after the case has been decided. Mary has no choice but to find alternative accommodation or present as homeless.

- One year ago, Mike was subjected to ongoing racial harassment in the workplace and when he made a complaint, his employment was terminated. Mike made a complaint to the WRC for discriminatory dismissal but the WRC had no powers to make an interlocutory order preventing his dismissal until after the case was decided. Mike lost his job and his income and is still waiting for a hearing date.

Recommendation 11: The Acts should provide for interlocutory relief in cases of discrimination

Non-disclosure Agreements

The Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 proposed to prohibit the use of “non-disclosure agreements” in settlement agreements reached on foot of certain complaints under the EEA, with an exception for those that are requested by an employee. We recommend that this Bill be implemented in full and extended to cases taken under the ESA. The use of strict confidentiality clauses in settling ESA cases against the State is a matter of concern in terms of impactful strategic litigation. The fact of settlement as well as its terms are frequently completely confidential, meaning that while the settlement may benefit the individual claimant, there is no impact on the wider group that may be affected, and there may be no opportunity to share important information with the wider public. Strict confidentiality clauses impede necessary public analysis of action or inaction by the State and also create no precedent for subsequent claimants who are experiencing the same discriminatory actions.

Recommendation 12: We recommend that the Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 be implemented in full and extended to cases taken under the ESA

Representative actions

The Acts should be reformed to allow for representative actions to be taken by representative bodies/NGOs on behalf of claimants who are members of groups protected under the EEA and ESA. The cost and other barriers to justice outlined in this submission maintain a chilling effect on discrimination claims, particularly against State bodies and large employers.

Recommendation 13: The Acts should allow for representative actions to be taken by representative bodies/NGOs on behalf of claimants

2) The degree to which those experiencing discrimination are aware of the legislation and whether there are obstacles which deter them from taking an action

What barriers exist to taking an action under these Acts and what can be done to improve access to justice?

Lack of Access to Civil Legal Aid in WRC cases

The right of access to justice is accepted as a constitutional principle and a right under the European Convention on Human Rights. Without it, people are unable to have their voice heard, exercise their rights, challenge discrimination, or hold decision-makers accountable. It is a basic tenet of a functioning, democratic society. The WRC plays a key role in ensuring that justice is done in the employment equality and equal status context.³

Unfortunately, there are many procedural barriers at present for those trying to bring a claim under the ESA or EEA. Foremost among these is the lack of civil legal aid available in cases before the WRC. Under the Civil Aid Act 1995, the remit of the Legal Aid Board does not extend to providing people with legal representation before quasi-judicial tribunals and bodies, including the WRC.⁴ This is particularly concerning as many employers, service-providers, or public bodies will have legal representation during these cases,⁵ with those challenging discrimination in the workplace or in accessing services often having to navigate complex employment and equality laws without legal assistance.⁶ This creates a serious unmet legal need in such cases, raising concerns around the inequality of arms.

The laws are complex and technical and in practical terms, wholly inaccessible to people who do not have an advocate, Union representation or cannot afford to pay for a private solicitor. Currently, there is no legal aid available to a person experiencing discrimination in the workplace or in accessing goods and services if they wish to take a case to the Workplace Relations Commission. Many workers and particularly those working in low paid, precarious jobs, simply can't afford the services of a lawyer. Most are either forced to represent themselves, often across the table from the employer's or service-provider's legal team, or they do not pursue a case at all. It is simply too much to expect people in cases involving sexual harassment, pregnancy discrimination or complex equal pay cases to have the resources or capacity to represent themselves. This raises serious concerns about access to an effective remedy. If a person has a moderate or low salary, it will be difficult to get a solicitor to act for them, in circumstances where a successful complainant will not be awarded costs. The records of the WRC show that very few equal pay claims are being brought despite the fact we still have a 14 per cent gender pay gap. Similarly, there are very few Employment Equality and Equal Status cases taken under the Traveller Community ground, despite the disproportionate discrimination experienced by Travellers. These cases

³ CLM Submission to the WRC on Remote Hearings during the COVID-19 restrictions 2020, pg. 4.

⁴ Developing a National Action Plan Against Racism – IHREC Submission to the Anti-Racism Committee, 2021, pg. 62.

⁵ CLM Submission on a new National Action Plan against Racism for Ireland, 2021, pg.4.

⁶ Ibid, pg.12.

are complex and the absence of legal aid creates a huge barrier to achieving equality in the area.

The intention in creating the WRC was to remove the need for lawyers but, in practice, employers, service-providers and public bodies are very often legally represented, which is concerning from the point of view of the balance of power and natural justice. There is no logical reason why the availability of legal aid should be determined by area of law rather than need or why tribunals, such as the WRC, should be excluded from legal aid, particularly in view of the Supreme Court's finding in the *Zalewski* case that the WRC is indeed engaged in the administration of justice. In this regard, the following quote by Justice McMenamin in that case is interesting - he said, referring to the employee: "*Throughout the process he has been ably represented by his lawyers. The events in this case prompt a question as to how the appellant could have vindicated his rights if he had not been legally represented?*". A person's job and their ability to access accommodation and other goods and services are critical to social inclusion and when threatened, there are significant adverse consequences not just for the individual themselves but also for their family.

Recommendation 14: The Civil Legal Aid Scheme should be expanded to cover discrimination cases taken to the WRC under the ESA and the EEA

Resources in the WRC

Due to COVID-19, the WRC is experiencing a huge backlog, meaning that many will be without recourse from their claims for a significant period of time. Even before the pandemic, the WRC had a very large body of case law to deal with on a regular basis. This in turn affects the amount of time spent on consideration and enhancement of the relevant provisions, as well as the quality of the case law.

Providing the WRC with more resources and increasing the number of WRC adjudication officers is key. This would allow more time to examine ESA and EEA claims which would enhance the quality of decisions as well as ensuring more efficient wait times for those looking to make claim. Training for Adjudication Officers in equality law is essential to making the equality legislation an effective means of enforcing rights. The Equality Tribunal had dedicated Equality Officers with training in equality law which is of its nature technical and nuanced. We submit that an inquisitorial rather than an adversarial approach is more appropriate to claims of discrimination. Currently, the burden of information gathering and legal argument lies with the claimant, which as discussed below, creates a serious barrier to claimants in the absence of civil legal aid.

In addition, CLM notes through its casework in the WRC that mediation services are often not provided at the early stages of WRC proceedings, even where both parties consent to mediation. Given that mediation procedures are less adversarial than a full WRC hearing, it is recommended that more resources are allocated to these services. This would mean a reduction in cases going to a full hearing as well as improving access to justice for many who struggle with a courtroom-like setting. The WRC has a key role in providing information and support to claimants, as well as engaging in community education and outreach work

around equality legislation, specifically targeting vulnerable groups that are most likely to experience discrimination.

We propose a review of the WRC procedure and resources, with a view to improving the services provided by the body. This should include a function to engage with stakeholders to assess their needs and provide a feedback mechanism in terms of what clarifications are required.

Recommendation 15: A review of WRC procedures and resources, with a view to improving the services provided by the body

Other Procedural and Accessibility Issues under ESA and EEA

Notification requirement and time limits

In addition to the lack of civil aid, there are other procedural complexities which may prevent a successful claim from being taken. For example, under the Equal Status Acts 2000-2015, a complainant is required to notify the person/organisation they are making the complaint against within 2 months of the last act of discrimination.

The requirement for the submission of an ES1 form within 2 months of the discriminatory act is overly restrictive, particularly for those who may require additional assistance in the areas of literacy, translation, understanding of the legal arguments etc. A substantial number of cases are dismissed annually as a result of the failure to comply with this requirement.⁷ This figure does not take into account cases not initiated at the outset because the notification requirement has not been fulfilled. We recommend that this notification requirement be removed or be made optional.

The 6 month time limit which exists for lodging a claim is similarly restrictive for many of the same reasons as above and should be lengthened.⁸ This time limit is an outlier compared with the statute of limitations periods applicable in other areas of law.

This is compounded by the lack of civil legal aid for those who need assistance, as well as the confusion caused by the very name of the Workplace Relations Commission, with many thinking it is solely for employment matters. Clients often question why they should be taking a claim to the WRC when their claim relates to the ESA and has no connection with a workplace setting, e.g. accommodation services, access to healthcare, discrimination when accessing public transport etc.

Those struggling to bring a claim may also be hampered by the limited availability of interpreting services and lack of regulation of these services.⁹ The prominence of equality protections should be increased and the suitability of the process for discrimination claims

⁷ Judy Walsh, EC Country Report, 2020, pg. 105.

⁸ CLM Remote Hearing Submission, pg. 5.

⁹ IHREC Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report, 2019, pg. 142.

(including the lack of a dedicated online complaint form for equal status cases, leading to confusion) should be reviewed and improved.

Recommendation 16: Removal of the notification requirement under the ESA

Recommendation 17: Review of restrictive time limits for lodging discrimination claims

Recommendation 18: Prominence of equality protections increased and suitability of the process for discrimination claims, in particular under the ESA, reviewed and improved

Barriers to justice for people with intellectual disabilities

Previous submissions by CLM have highlighted that accessing legal services remains very difficult for many, particularly those with intellectual disabilities. This is relevant for cases taken under both the ESA and the EEA, where the complaints and adjudication process are complex and often unsuitable for those who have difficulties with adversarial forms of communication.

While accommodations have been made in the WRC adjudication procedure for those with disabilities such as the availability of remote hearings,¹⁰ there is no legislative or procedural guidance for providing additional supports during the complaint stage.

This is also true of cases taken to the District Court under these legislative acts. Some of the barriers that CLM has encountered in its casework include:

- A lack of guidance provided to legal professionals when dealing with cases taken by or on behalf of people with intellectual disabilities
- Information being provided in an unsuitable format to be understood by people with intellectual disabilities
- Failure to provide appropriate non-adversarial arrangements in cases taken by or on behalf of people with intellectual disabilities

Through our casework, we have identified an unmet need for guidance or assistance on how to make any part of the process more accessible and manageable for people with intellectual disabilities.

Given that disability is one of the grounds for discrimination under both the ESA and EEA, it is very important that proper measures and clear guidance are introduced to ensure people with physical and intellectual disabilities can make a claim to the WRC/ District Court without undue difficulty. As a service-provider itself, it can be argued that the WRC has an obligation to provide reasonable accommodation to claimants with intellectual disabilities, parallel to the public sector duty it is obligated to fulfil.

¹⁰ <https://www.workplacerelements.ie/en/news-media/workplace-relations-notice/guidance-note-for-a-wrc-adjudication-hearing.html>

Recommendation 19: Detailed guidance and assistance for legal professionals and WRC Adjudication Officers to make the court process more accessible for people with intellectual disabilities

Recommendation 20: Consultation with people with intellectual disabilities in relation to their needs and appointment of disability liaison officer where support is required

Jurisdiction under s. 19 of Intoxicating Liquor Act

Under section 19 of the Intoxicating Liquor Act, any person who believes that they have been discriminated against at or on the point of entry to a licensed premises on the basis of one of the nine grounds included in the Equal Status Acts 2000-2018 must bring their case to the District Court rather than the Workplace Relations Commission. This requirement places a disproportionate burden on members of the Traveller community who are 38 times more likely than other white-Irish to experience discrimination in accessing goods and services.

There are greater costs associated with lodging a case before the District Court, as well as the risk of a costs award made against the unsuccessful application, meaning they might be ordered to pay the legal costs of the other side as well as their own. Members of the Traveller community who wish to raise a claim of discrimination against a licenced premises therefore face additional barriers in relation to costs, time limits and the onus of proving evidence. These additional barriers are unnecessary deterrents in bringing such a discrimination case.¹¹ It should be noted that legal aid is available, we understand, for applications under section 19 of the Intoxicating Liquor Act. We recommend below the establishment of a new socioeconomic ground for discrimination. It is likely that there will be significant interaction between this new ground and section 19 of the Intoxicating Liquor Act, meaning that these cases will also be excluded from the remit of the WRC, creating a barrier to accessing justice for those experiencing discrimination.

In addition, civil legal aid should be readily available for this type of case given the complexities of court proceedings of this nature as well as the consequences for the plaintiff if their claim is unsuccessful.

Recommendation 21: Review of jurisdiction under section 19 of the Intoxicating Liquor Act

Recommendation 22: Return section 19 to the remit of the WRC to increase accessibility in making a complaint of discrimination

3) The scope of the current definitions of the nine equality grounds. This will include consideration of the gender ground, the disability ground and whether new grounds should be added, such as the ground of socio-economic discrimination

Introduction of disadvantaged socio-economic status as a discrimination ground

¹¹ CLM Anti-Racism Submission, pg. 5.

The inclusion of socio-economic status as a discriminatory ground under Irish equality legislation is something which had been advocated for by numerous rights bodies, review recommendations of the current law, and by various political parties. This anti-discrimination ground is already recognised in international human rights instruments and a number of European countries have recently adopted measures seeking to address discrimination based on economic and social grounds.¹² It is our position that Irish equality law should be amended to prohibit discrimination based on socio-economic status.

The introduction of this discriminatory ground was previously proposed in the Equality (Miscellaneous Provisions) Bill 2017 which came before the Dáil but, due to the perceived definitional imprecision, was deemed to require further research to ensure clarity.¹³ This is despite IHREC's observations that definitional ambiguities can be addressed through interpretation by the WRC and the courts.¹⁴ Other grounds, such as race and disability, also have objective and subjective elements which have not precluded their advancement in equality law. IHREC has also highlighted the fact that any challenges in implementing this legislation are counterbalanced by the potential benefits to be gained in increasing the effectiveness of Irish equality law. The 2020 Programme for Government also committed to examining the introduction of this new ground for the Equality Acts. A further Bill was proposed in 2021 (Equality (Miscellaneous Provisions) Bill 2021), to provide for prohibiting discrimination on the basis of a person's social and economic disadvantaged background. We recommend that the wording in this 2021 Bill be adopted in full.

The effects of socio-economic discrimination are well-documented in reports investigating those who have been affected, who are often without recourse due to the lack of legislative provision. The 2019 ATD report into the matter describes the experiences of those who have been unfairly treated in accessing goods, public services, and education due to their socio-economic background.¹⁵ At our legal advice clinics, we often meet people who suspect they have been excluded from employment or access to a service because of their socio-economic status.

CLM is strongly in favour of the addition of a new ground in both legislative acts to address this form of discrimination. Doing so would have numerous positive impacts on the lives of those currently affected including providing equal opportunities for accessing services and employment. It would also have a knock on effect in terms of combatting the stigma and stereotypes that exist in society toward certain groups of people. It is evident from CLM's work that socio-economic discrimination is often one of the grounds upon which intersectional discrimination occurs. If it were to be recognised as a discriminatory ground under the Equality Acts, intersectional discrimination claims could be brought before the relevant adjudicator and remedies could be sought for the injured party. In order to ensure

¹² Tamas Kadar, An analysis of the introduction of socio-economic status as a discrimination ground, <https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf>

¹³ ATD Ireland: Does it only happen to me?, 2019, <http://17october.ie/wp-content/uploads/2019/09/SES-Discrimination-Report-ATD-Ireland-Sept-19.pdf>

¹⁴ IHREC: Observations on the Equality (Miscellaneous Provisions) Bill 2017 <https://www.ihrec.ie/app/uploads/2018/01/Observations-on-Equality-Miscellaneous-Provisions-Bill-2017.pdf> pg. 10.

¹⁵ ATD Ireland Report 2019, pg. 10.

effectiveness, the purpose of the discriminatory ground should be clearly set out in the preamble to the relevant legislation, to provide clear guidance for the WRC and the judiciary in deciding these cases.

Recommendation 23: Introduction of a socio-economic ground in the ESA and EEA to provide for prohibiting discrimination on the basis of a person's social and economic disadvantaged background

4) Whether the legislation adequately addresses intersectionality or the intersection of discrimination across a number of grounds

Recognising Intersectionality in Discrimination

Intersectional discrimination is when an individual or a group of individuals are discriminated against based on grounds that are intertwined in such a way that they produce a unique and new type of discrimination. In such cases, one would not make several claims of separate cases of discrimination, but rather one case of intersectional discrimination.¹⁶ It is commonly mistaken with multiple discrimination which, while related, is not an identical term. This refers to separate but simultaneous identity based cases of discrimination targeted at an individual. The concept of multiple identity is also relevant and emphasises the existence of intersectional groups of people and the importance of responding to their particular needs.¹⁷

Under the EEA and ESA, neither intersectional nor multiple discrimination are explicitly prohibited. This is despite the issue being flagged by the UN Committee on the Elimination of Racial Discrimination which recommended the laws be reviewed to provide for the explicit prohibition of multiple discrimination. Research by IHREC research also provides many examples of harmful effects of intersectional discrimination. One such example is the finding that discrimination on the housing assistance ground is often combined with discrimination on the grounds of ethnicity, resulting in an intersectional impact in additional harm and social exclusion, as evidenced in respect of groups such as Travellers.¹⁸

Under Section 79(1)(A) EEA and Section 25(1)(A) ESA, complaints of discrimination may be referred on more than one ground and a complaint lodged on several grounds is investigated as one case. However, decisions are made on each of the claims and adjudicators deal with each claim separately. This procedure fails to recognise the combined effect of multiple discrimination and the intrinsic links between different type of discrimination.

While there has been Irish case law which recognised multiple discrimination and has dealt with discriminatory grounds together, these decisions are exceptional and it is highly

¹⁶ <https://www.enar-eu.org/IMG/pdf/intersectionality-report-final-3.pdf> pg. 20.

¹⁷ https://equineteurope.org/wp-content/uploads/2018/01/equinet_perspective_2016_-_intersectionality_final_web.pdf pg. 11.

¹⁸ IHREC Submission to the Anti-Racism Committee, 2021, pg.50.

unlikely that further developments will be made without explicit changes to the EEA and ESA.

We recommend that the definition of discrimination be widened to include intersectional discrimination, a concept that should be clearly set out within the relevant Act. A more robust recognition of intersectionality in discrimination is key. It is evident from our work that socio-economic discrimination is often one of the grounds upon which intersectional discrimination occurs and is indeed cross-cutting across the people who access our services.

Recommendation 24: Definition of discrimination widened to expressly include intersectional discrimination in addition to the existing grounds

Recommendation 25: Outreach work and community education and training in relation to intersectional discrimination