LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

SUBMISSION ON THE REVIEW OF THE EQUALITY ACTS

DEPARTMENT OF CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH

DECEMBER 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

1.1 The Law Society of Ireland ('the **Society**') welcomes the opportunity to contribute to the public consultation on the review of the Equality Acts (Equal Status Acts 2000-2018 and the Employment Equality Acts 1998-2015) ("the **equality legislation**") by the Department of Children, Equality, Disability, Integration and Youth ("the **Department**").

1.2 The Society is the educational, representative and co-regulatory body for the solicitors' profession in Ireland. This submission is based on the views of solicitor members of the Society's Human Rights & Equality Committee with extensive experience and expertise in those areas.

1.3 The Society welcomes the opportunity to input to this consultation. A review of the equality legislation is now timely, in light of the experience gained from the operation of the legislation over the last twenty years, the changed institutional architecture to promote equality and deal with complaints of discrimination, and the emergence of various movements (such as Me Too and Black Lives Matter) which have highlighted the deep inequalities that continue to exist in society, despite the existence of formal laws that would purport to ensure equality for all. These movements have shown that while humans understand and appreciate the value of equality, but certain power structures continue to oppress certain groups and privilege others. Recently, the Society conducted a survey to understand the levels of bullying, harassment and sexual harassment within the solicitors' profession in Ireland. The resultant *Dignity Matters Report* revealed worrying levels of these behaviours within the profession, with women faring worst. This suggests that no sector in society can assume itself to be free of discrimination.

1.4 While meaningful social equality cannot be achieved by legislation alone, it is nevertheless an important means by which minimum standards can be set and positive action can be legitimised. In addition, legislation can have a normative effect, establishing a standard for how we can expect to be treated, whether in the workplace, as consumers or as users of public services. In addition to protecting the individual, robust equality legislation also establishes, in a concrete way, the kind of society we want to be. It follows that the equality legislation must be accessible and effective in providing remedies for individuals and, in turn, educating society at large.

1.5 It is noted that the purpose of the consultation is wide ranging and is set out under the following five broad categories:

i. The Programme for Government commitments on the introduction of a socio-economic-economic ground for discrimination and the amendment of the gender ground will be considered as part of the review.

ii. The review will examine the functioning of the Acts and their effectiveness in combatting discrimination and promoting equality. It will also include a review of current definitions, including in relation to disability.

iii. In addition, the review will examine the use of non-disclosure agreements by employers in cases of sexual harassment and discrimination, in line with the issues raised in the Employment Equality (Amendment) (Non-Disclosure Agreement) Bill 2021 Private Member's Bill.

iv. The review will examine the operation of the Acts from the perspective of the person taking a claim under its redress mechanisms. It will examine the degree to which those experiencing discrimination are aware of the legislation and whether there are practical or other obstacles, which preclude or deter them from taking an action.

v. The review also provides an opportunity to review other issues arising, including whether or not further additional equality grounds should be added, whether existing exemptions should be removed or modified and whether or not the existing legislation adequately addresses issues of intersectionality.

1.6 In light of the scope of the consultation, this submission will address the following points:

- The grounds of discrimination – whether there is a need to expand those grounds and to amend existing definitions (including the victimisation ground);
- The Housing Assistance Ground;
- Access to Justice issues;
- The remedies available under the Acts;

- Intersectional discrimination; and
- Exemptions and exclusions.

2. Executive Summary

A number of the below recommendations (i.e. those related to the operation of the Equal Status Acts and the Employment Equality Acts) were made by the Society in a July 2021 submission to the Public Consultation on a New National Action Plan Against Racism. As such, we would ask that both submissions are read together for the purposes of this review.

Recommendations

The Society recommends:

2.1 The Society recommends that the equality legislation should include a provision to allow additional grounds to be added to the legislation by Ministerial Regulation to allow for flexibility into the future and to provide for redress for discrimination in a manner that is responsive to changing societal conditions and in line with European law.

2.2 The introduction of a socio-economic economic ground into the equality legislation along those lines proposed in the Equality (Miscellaneous Provisions) Bill 2021.

2.3 That gender as a protected ground should be clarified and extended to include women and men, sex characteristics, gender identity and gender expression.

2.4 That the protection from victimisation in the equality legislation be made simpler, with no requirement for a comparator and with express provisions as to the procedure for referring a complaint of victimisation for investigation.

2.5 That any amendment of the current definition of disability in the equality legislation should maintain a low threshold for inclusion in the protection of the legislation and does not require the complainant to prove that they have a limitation arising from an impairment before legislative protection is extended to them.

2.6 That a refusal to provide reasonable accommodation as an instance of discrimination is set out clearly in the Employment Equality Acts.

2.7 That section 35 of the Employment Equality Acts be repealed in full.

2.8 That the “not exceeding a disproportionate burden” standard be included in the Equal Status Acts, accompanied by the factors that may be taken into account in determining whether a particular measure contended for would fulfil or exceed this requirement. In addition, the threshold to trigger the obligation to provide reasonable accommodation to

a person with a disability on the part of a service provider should be lowered to any hindrance in accessing services.

2.9 That section 16(2)(b) of the Equal Status Acts be amended to ensure that it is fully compatible with the Assisted Decision-Making (Capacity) Act 2015.

2.10 That, in order to make the protection under the Equal Status Acts for tenants more robust, the existence of a complaint to the WRC under the housing assistance ground or a finding of discrimination against a landlord under the Equal Status Acts would be a relevant consideration to be taken into account by the Residential Tenancies Board in determining the validity of the Notice of Termination related to arrears of rent.

2.11 That consideration be given to a legal mechanism which would require that any landlord advertising a private residential property for rent would be capable of being identified in the event of a subsequent complaint being lodged with the WRC.

2.12 That, in addition to the IHREC, *bona fide* civil society organisations and Trade Unions should be given explicit *locus standi* to bring complaints of discrimination in their own name, and that the remedies available under the equality legislation would be modified accordingly.

2.13 The Society recommends the review of the level of compensation for discrimination that may be awarded by the WRC (and other Courts on appeal) to ensure they are in line with EU law, and that a list of principles to be considered in determining the appropriate level of compensation be included in the equality legislation.

2.14 That the equality legislation should explicitly provide a remedy for intersectional forms of discrimination.

3. Grounds of Discrimination

3.1 The equality legislation interacts with ancillary legislation which deals with matters such as the establishment and operation of the Workplace Relations Act[1], the Irish Human Rights and Equality Commission Act 2014 which conferred various powers to promote compliance with the equality legislation on the Irish Human Rights and Equality Commission ("the **IHREC**") and established the public sector human rights and equality duty ("the **public sector duty**").[2]

3.2 The equality legislation operates by reference to identifying a group's characteristics or circumstances as protected grounds. If a person has one or more of those characteristics or the particular circumstance applies to them, then legislative protections extend to those persons in the context of employment and access to goods and services.

3.3 The number of such grounds is finite and all are defined by reference to a comparator who either has a different characteristic or status or does not share the characteristic or status at all. So, by way of examples, the definition of gender is "*that one is male and the other is female (the "gender ground")*"[3] and the religion ground is "*that one has a different religious belief from the other, or that one has a religious belief and the other has not (the "religion ground")*".

3.4 There are currently nine protected grounds, namely gender; civil status; family status; sexual orientation; religion; age; disability; race and membership of the Traveller community. There is an additional ground under the Equal Status Acts that does not apply in the employment context. That is the housing assistance ground which protects those in receipt of housing assistance from the State[4] but only in the context of the disposal of some form of interest in premises which, in practical terms, relates to the rental of residential property. Many of the grounds are subject to exceptions which carve out from the legislation a range of circumstances in which the guarantee of equal treatment does not apply. The scope of this consultation refers to the commitment in the Programme for Government to introduce a socio-economic economic ground of discrimination; the amendment of the gender ground; consideration of the definition of

[1] Workplace Relations Commission Act 2015
[2] Section 42 of the Irish Human Rights and Equality Commission Act 2014
[3] See section 2(a) of the Equal Status Acts and section 6(2)(a) of the Employment Equality Acts
[4] The housing assistance referred to in the Equal Status Acts is rent supplement (within the meaning of section 6(8)), housing assistance (construed in accordance with Part 4 of the Housing (Miscellaneous Provisions) Act 2014) or any payment under the Social Welfare Acts

disability and the consideration of whether any additional grounds should be included under the legislation.

Other Grounds

3.5 It is evident that, since comprehensive equality legislation was introduced in the State more than twenty years ago, other forms of discrimination have emerged that were either not contemplated or insufficiently understood to warrant inclusion at that time. The Society considers that, in seeking to update the equality legislation, it is necessary to consider first the experience of discrimination when accessing goods and services and/ or employment and seek to create inclusive grounds to confer protection on anyone who experiences such discrimination. It is important, in the context of reviewing the equality legislation, that identifiable groups which experience unjustifiable discrimination will be protected from that experience and have access to remedies wherever it occurs. This does not mean that discrimination can be judged by reference to an individual alone, and the experience of discrimination must be shared across a group, and the group must be capable of being defined on an objective basis, such that the characteristics of the group can be set out in legislation similar to the existing grounds. However, it does require an examination of the results of discriminatory behaviour in the first instance followed by a consideration of whether there is an identifiable group which requires protection.

3.6 Having regard to the State's obligations under European law, it is evident that the existing grounds in the equality legislation may not match with such obligations and there may be gaps in the protection afforded under national legislation. For example, it is noted that the European Convention on Human Rights ('ECHR') under Article 14 (which is the protection from discrimination in the enjoyment of Convention rights), provides the following non-exhaustive list of discriminatory grounds:

> "The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

3.7 This has allowed the European Court of Human Rights ('ECtHR') to approach complaints of discrimination from the perspective of whether or not discrimination can be found to exist by reference to an appropriately defined characteristic or circumstance. In

conducting this exercise, the Court is not bound to exclude a complaint of discrimination because a person does not fit within the enumerated protected grounds. The "other status" ground under Article 14 has been developed to protect persons with disabilities from discrimination which includes a failure to provide reasonable accommodation; to protect against differential treatment of prisoners; treatment based on different immigration status; trade union membership; a person's HIV status; place of residence and employment status.[5]

3.8 In addition to the various equality directives[6] which have been adopted by the EU, the Charter of Fundamental Rights ("the **CFR**") provides specific forms of protection for a number of named groups (gender, age, disability and children) it also includes a general prohibition on discrimination in Article 21 as follows:

> "1. *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
>
> *2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."*

3.9 Under the CFR, the list of protected grounds is extensive but non-exhaustive and refers to discrimination on "any ground". This is significant as Members States are bound by the CFR when implementing EU law and so, Article 21's non-exhaustive list of protected grounds is part of domestic law where the implementation of EU law is concerned.

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[5] See respectively: *GL v Italy*, Judgment of 10 September 2020, at paras 60 to 66; *Clift v The United Kingdom*, Judgment of 13 July 2010, at para 55; *Hode and Abdi v The United Kingdom*, Judgment of 6 November 2012: *Danilenkov and Others v. Russia*, Judgment of 30 July 2009; *Kiyutin v Russia*, Judgment of 10 March 2011; *Carson & Ors v The United Kingdom*, Grand Chamber Judgment, 16 March 2010 and E*ngel & Ors v Netherland*s, Judgment of 8 June 1976.

[6] Directive 2000/43 (the Race Directive) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The Race Directive prohibits discrimination on the grounds of racial or ethnic origin in employment as well as in relation to "social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing". Directive 2006/54 (the Recast Directive) prohibits gender discrimination in employment. Also relevant to the promotion of equal treatment and opportunities between men and women in work are Directives 92/85 (the Pregnancy Directive), 2010/18 (the Parental Leave Directive), and 97/81 (the Part-time Work Directive). Directive 2000/78 (the Framework Directive) prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation in employment. Directive 2004/113 (the Gender Goods and Services Directive) prohibits discrimination based on gender in access to, and supply of, goods and services.

When first introduced, Ireland's equality legislation was progressive in seeking to provide a wide scope of protection to those subject to discrimination. However, it is now evident that there are gaps in the protection afforded under the legislation and this review affords not only an vehicle to address those gaps, but also a welcome opportunity to effectively future proof the legislation by providing scope to add additional grounds to the protection afforded under the legislation as those grounds may emerge in the future and to keep track of emerging case law under the relevant articles of the CFR and the ECHR.

Recommendation:

The Society recommends that the equality legislation should include a provision to allow additional grounds to be added to the legislation by Ministerial Regulation to allow for flexibility into the future and to provide for redress for discrimination in a manner that is responsive to changing societal conditions and in line with European law.

Socio-economic-economic Ground

3.10 As mentioned, introduction of an additional ground of socio-economic economic status is specifically mentioned as an objective of the present review. The introduction of such a ground would provide an additional aspect to the efforts of the State and others to combat social exclusion on economic and other grounds. In addition, such form of discrimination may already be envisaged under the CFR and ECHR which specify "property", "birth" and "social origin" as grounds.

3.11 Socio-economic-economic status is a multi-dimensional concept that cross cuts a range of factors which can lead to exclusion and lack of opportunity, such as economic poverty, family status (e.g. lone parents experiencing high levels of poverty), ethnicity (e.g. the Traveller community experiencing high levels of deprivation across a number of indexes) and so on. While a socio-economic-economic ground in the equality legislation can only be considered as one means by which to combat exclusion, it is certainly a measure which could enhance those efforts and empower those who experience such disadvantage to challenge exclusion and establish, in a concrete way, its unacceptability in our society. The overlap with other grounds referenced above also suggests that the

introduction of a socio-economic economic ground could bring an additional aspect to the protection of certain groups.

3.12 While the grounds which are currently protected by the equality legislation tend to provide protection on a symmetric basis, this would not appear to be necessary in the context of a socio-economic economic ground, where the protection of the privileged is not the underlying objective. The Equality (Miscellaneous Provisions) Bill 2021 which was introduced in January 2021 proposes to amend the equality legislation to introduce a new 'socio-economic-economic disadvantage' ground, which is defined by reference to a list of non-exhaustive characteristics and allows for protection on the basis of differing socio-economic-economic disadvantage. This approach commends itself in the context of the present review.

Recommendation:
The Society recommends the introduction of a socio-economic economic ground into the equality legislation along those lines proposed in the Equality (Miscellaneous Provisions) Bill 2021.

Gender

3.13 Currently the legislative protection afforded to persons on the gender ground is predicated on the person identifying as either a man or a woman. This is, to some extent in line with the case law of the CJEU which has, on a number of occasions, indicated that various EU equal treatment directives apply to transgender persons in their identified gender as they do to persons of that gender so identified at birth.[7] What is less clear is whether the equality legislation or the aforementioned directives extend to protecting the

[7] See for example: *P v S and Cornwall County Council*, Case C-13/94, [1996] ECR 1-2143, where the Court found that the principle of equal treatment on grounds of sex prohibited the less favourable treatment of the applicant as a woman than he had received when considered a man prior to the process of gender reassignment. In *KB v National Health Service Pensions Agency & Anor*, Case C-117/01, [2004] ECR 1-541 the CJEU ruled that the principle of equal pay for men and women applied in a situation in which the then-inability of a person who had undergone gender reassignment surgery to obtain legal recognition, and marry in, their acquired gender (same-sex marriage being unavailable at the time) impacted on an employee's pension entitlement. In *Richards v Secretary of State for Work and Pensions*, Case C-423/04 [2006] ECR 1-3585, the CJEU ruled that the failure to recognise a post-operative transwoman's acquired gender for the purposes of pension entitlement breached Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. In *MB v Secretary of State for Work and Pensions*, Case C-451/16 (2018) 46BHRC 202, the CJEU ruled that the denial of recognition to a post-operative trans woman for the purposes of pensionable age (then lower for women than for men) because she was unable, by reason of remaining married to a woman, to obtain legal recognition in her acquired gender breached Directive 79/7.

individual on the basis of being intersex; having a different gender identity (neither identifying as being a man or a woman); being transgender *per se* and irrespective of whether the person has undergone any medical intervention or on the basis of gender expression. As noted above, the gender ground requires comparison to the opposite gender, but it may not be possible for some people who have mixed sex characteristics, or those who do not identify with the gender binary to point to an opposite gender, but who may experience discrimination because their sex characteristics or gender identity or expression are seen as deviating from gender norms.

3.14 It is also notable that the ECtHR has been developing its case law in relation to the protection of persons who are transgender, and that it has specifically found breaches of the ECHR where States require a person to have undergone gender affirming surgery before extending gender recognition to such persons.[8] In Ireland, the Gender Recognition Act, 2015 confers a right on individuals to have their identified gender recognised for official purposes by reference to self-identification but somewhat strangely, the equality legislation was not amended at the time to unambiguously assert the right of such persons to be protected from discrimination. This absence of an explicit protection in the equality legislation may obscure the scope of the gender ground to protect persons who are transgender and identify as either male or female.

3.15 In the context of combating hate speech and hate crime, the Society has previously recommended that:

> *"……gender should be separately and specifically defined to cover acts targeted at individuals based on actual or perceived sex, having multiple protected characteristics, gender identity and gender expression.*
>
> *The aim of this recommendation is to ensure that explicit protection against incitement to hatred could be made available to intersex persons, persons identifying as gender nonbinary, transgender people and people discriminated against on the basis of how their gender identity is perceived by others."*[9]

3.16 This recommendation is in line with the recommendation of the European Commission against Racism and Intolerance ('ECRI') made in its most recent monitoring report on

[8] In its recent decision, in *X & Y v Romania* [2145/16, 20607/16], the ECtHR declared that requiring trans persons to undergo gender affirming surgery before they could obtain legal gender recognition violated their right to respect for their private lives under Article 8 of the Convention

[9] Submission on the Review of The Prohibition Of Incitement To Hatred Act 1989, Law Society of Ireland, January 2020

Ireland in respect of hate crime.[10] The same report also recommended that the equality legislation is amended to explicitly include the ground of gender identity.[11] IHREC have also previously recommended "*that the equality acts should explicitly prohibit discrimination against transgender, non-binary and intersex people*".

3.17 The Council of Europe's Commissioner on Human Rights has separately considered the situation of persons who are intersex and has made various recommendations in relation to securing their human rights, including in respect of inclusion in anti-discrimination law as follows:

> "*Whatever the approach, however, legal certainty needs to be guaranteed. In this respect, a specific provision for intersex, such as "sex characteristics" or "intersex status", has the advantage of playing an educational role for society at large as well as providing visibility to this marginalised group. In the absence of a specific term, an authoritative legal interpretation of the applicability of the category of sex/gender would appear necessary."*[12]

Recommendation:

The Society recommends that gender as a protected ground should be clarified and extended to include women and men, sex characteristics, gender identity and gender expression.

Victimisation

3.18 Victimisation of a complainant, or someone acting as a witness on behalf of a complainant, by a respondent is prohibited under the equality legislation, as is opposing discrimination. However, under the Equal Status Act victimisation is not just prohibited, it is treated as a further separate ground of discrimination which requires a comparator. It is not clear whether a complainant must refer a separate complaint and notification regarding victimisation or whether such a claim can be integrated into the preceding complaint of discrimination (if same has been referred to the WRC) out of which the victimisation arose, although it would seem a separate claim may be required.

[10] ECRI Report On Ireland (fifth monitoring cycle), CRI(2019) 18, adopted 2 April 2019, at para 35.
[11] *Ibid*., at para 122.
[12] Human rights of intersex people, Issue paper published by the Council of Europe Commissioner for Human Rights, 2015, at p. 46.

3.19 In summary, the victimisation ground should be simplified and effectively decoupled from the concept of discrimination, such that it is not necessary to provide a comparator to establish victimisation. It should only require proof of some form of penalisation to attract the legislative protection. In addition, the procedure for referring a complaint of victimisation should be set out with more clarity in the legislation.

Recommendation:

The Society recommends that the protection from victimisation in the equality legislation should be made simpler, with no requirement for a comparator and with express provisions as to the procedure for referring a complaint of victimisation for investigation.

Defining Disability

3.20 Since the introduction of comprehensive protection from discrimination under the equality legislation, there has been a profound shift in the way that disability is conceptualised from a human rights perspective. This shift is reflected in the adoption of the final text of the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD'), which was opened for signature in 2006. The UNCRPD, which came into effect in 2008 and was ratified by Ireland in 2018, does not create new rights but seeks to secure the protection of existing human rights for persons with disabilities on an equal basis with others. A core principle set out in its pre-amble recognises that:

> *"..disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."*

Therefore, disability is not something that is intrinsic to the person, but rather arises from societal barriers that prevent or hinder that person's full and equal participation in society.

3.21 Article 1 of the UNCRPD refines this further and provides a narrative around who may be considered a person with a disability for the purpose of its protections as follows:

"*Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*"

Article 1 therefore refers to certain impairments, but then goes on to place those impairments in their social context which may give rise to a denial of full and effective participation in society.

3.22 Article 2 of the UNCRPD sets out a series of definitions including what discrimination as applied to disability means as follows:

"any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

The definition of disability in the equality legislation is as follows:

"disability" means—

(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,

(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,

(c) the malfunction, malformation or disfigurement of a part of a person's body,

(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or

(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,

and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person;

The definition of discrimination is also similar across the two Acts and consists of "less favourable treatment" than how another person is, has or would be treated in a

comparable situation on any ground including the disability ground which is defined as follows:

(g) that one is a person with a disability and the other either is not or is a person with a different disability (in this Act referred to as "the disability ground"),

A definition of indirect discrimination is also included in both pieces of legislation.

3.23 The current definition of disability under the equality legislation might be considered not to be in line with the concept of disability as it is recognised in the UNCRPD but, of course, the conceptualisation of disability in the UNCRPD is intended to address the full scope of human rights, not just anti-discrimination law, which has a very distinct function and purpose. The UNCRPD – on the other hand - incorporates issues of distributive justice and the positive obligations of the State across a range of issues which include habilitation and rehabilitation, education, participation in cultural life, recreation and sport.

3.24 Bearing this in mind, it is noted that the definition of disability in the equality legislation requires some form of condition to be identified to bring a person within the personal scope of the legislative protection. The legislation does not require proof of the extent of an impairment or proof of a limitation in participation in employment or society. If such a threshold were to be included in the legislation, it could create an artificially high barrier to protection from discrimination (which, to date, has not been the case). There are additional aspects of the definition that go beyond merely identifying an impairment and make it sufficiently flexible to cover a range of situations that would be encompassed within the concept of disability under the UNCRPD. The definition is framed widely to include almost anyone with some form of impairment, not only long term or enduring impairments but also more short term medical issues or illnesses.[13] In addition, the disability can be one that existed in the past, may exist in the future or may be imputed to the person. In this way, societal perception of a disability comes into play and brings the person within the scope of the legislative protection if, of course, they can demonstrate less favourable treatment as a result.[14]

[13] It is noted that *S.C. v. Brazil* found that people with illnesses are not automatically excluded from the scope of the UNCRPD. In that decision, the CRPD Committee observed that any distinction between illness and disability is '*a difference of degree and not a difference of kind, and that a health impairment which is initially conceived of as illness can develop into an impairment in the context of disability because of its duration or its chronic development*'. Committee on the Rights of Persons with Disabilities, Communication No.10/2013, UN Doc. CRPD/C/12/D/10/2013

[14] The CRPD Committee has further noted that discrimination on the basis of disability can arise with regard to those who '*had a disability in the past or who have a disposition to a disability that lies in the future*'. CRPD (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 20

3.25 It therefore appears that Irish law has avoided the criticism attracted by the approach of the CJEU to discrimination on the disability ground which, it has been suggested, departs from the UNCRPD. In the absence of a definition of disability in the Framework Equality Directive,[15] the CJEU has had to consider what constitutes "disability" for the purpose of the Directive. In the case of Kaltoft, which concerned a man who alleged that he was dismissed from his employment on the basis of his obesity, the Court repeated its established definition of disability as follows:

> "*It entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers*."[16]

3.26 While the Court considered the limitations that might arise from obesity (such as reduced mobility or discomfort), Mr Kaltoft asserted that he did not experience any difficulty undertaking his work as a result of his obesity and did not experience those limitations. Therefore, the approach of the Court appeared to exclude the possibility that a disability can be created by a negative attitude to a person's condition, such as obesity, rather than arising from an actual limitation in the context of the person's work. On this basis, the approach of the Court has been criticised for its failure to properly engage with the model of disability included in the UNCRPD:

> "*By requiring that an individual not only has an impairment but also experiences a limitation directly related to that impairment, the Court's definition seems to exclude from the definition of disability individuals who are disabled simply because of socially created barriers, such as false assumptions and prejudices about an individual's ability, and possibly even barriers in the physical environment. In this sense, the Court's definition arguably fails to embrace in full the human rights model of disability embodied by the CRPD. This seems to recognise as disabled those people with an impairment who are disadvantaged purely by environmental factors ('various barriers')*"[17]

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[15] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), OJ L 303. 2.12.2000, pp. 16-22

[16] Case C-354/13 FOA acting on behalf of Karsten Kaltoft v. Kommunernes Landsforening, ECLI:EU:C:2014:2463

[17] *Combatting disability discrimination and realising equality*, European Commission, Waddington and Broderick, October 2018. See also, Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States, Vlad Perju, 44 Cornell International law Journal 279 (2011)

3.27 It is also of note that, unlike the other grounds under equality legislation, once a person can bring themselves within scope of the legislation on the disability ground, this then links with the obligation to provide reasonable accommodation under both Acts. The limitations on the obligation to provide reasonable accommodation is considered further below but in relation to employment, the Employment Equality Acts assert that a person with a disability shall be considered competent to undertake any duties of a position, if they would be so competent with the provision by the employer of any reasonable accommodation appropriate to the position. In this way, it is for the employer to make the adjustment and remove the barrier to employment, whatever that may be, rather than placing the obligation on the person with a disability to address such barriers. This appears to align with the understanding of disability under the UNCRPD and, in particular, the obligation to provide reasonable accommodation.[18]

3.28 Although the current equality legislation does - in some respects (despite its extensive definition based on a medicalised view of disability) and when considered as a whole, address disability from the perspective of social barriers which operate to bring it closer to the UNCRPD model. In considering WRC case law (and that of the earlier Equality Tribunal) on the disability ground, it does not appear that this problematic approach has been replicated in Irish law, rather the definition has operated as being inclusive rather than exclusive. However, it is an issue which should be borne in mind in the event that the current definition of disability is amended.

Recommendation:

The Society recommends that any amendment of the current definition of disability in the equality legislation should maintain a low threshold for inclusion in the protection of the legislation and should not require the complainant to prove that they have a limitation arising from an impairment before the legislative protection is extended to them.

[18] Article 5.3 of the UNCRPD provides that: "*In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided*."

Reasonable Accommodation

3.29 This section considers the circumstances in which the provision of reasonable accommodation, and the adjustments to be made, differ across the two Acts.

Section 16 of the Employment Equality Acts provides (as relevant):

> *"16.—(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—*
>
> *…….*
>
> *(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.*
>
> *…….*
>
> *(3) (a) For the purposes of this Act a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as 'appropriate measures') being provided by the person's employer.*
>
> *(b) The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability—*
>
> > *(i) to have access to employment,*
> >
> > *(ii) to participate or advance in employment, or*
> >
> > *(iii) to undergo training,*
> >
> > *unless the measures would impose a disproportionate burden on the employer.*
>
> *(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of—*
>
> > *(i) the financial and other costs entailed,*
> >
> > *(ii) the scale and financial resources of the employer's business, and*

(iii) the possibility of obtaining public funding or other assistance.

(4) In subsection (3)—

'appropriate measures', in relation to a person with a disability—

(a) means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,

(b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but

(c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself;"

3.30 Section 4 of the Equal Status Acts provides:

"4.—(1) For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

(2) A refusal or failure to provide the special treatment or facilities to which subsection (1) refers shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the provider of the service in question.

(3) A refusal or failure to provide the special treatment or facilities to which subsection (1) refers does not constitute discrimination if, by virtue of another provision of this Act, a refusal or failure to provide the service in question to that person would not constitute discrimination.

(4) Where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination.

(5) This section is without prejudice to the provisions of sections 7(2)(a), 9(a) and 15(2)(g) of the Education Act, 1998, in so far as they relate to functions of the

Minister for Education and Science, recognised schools and boards of management in regard to students with a disability.

3.31 The Society considers that the provisions around reasonable accommodation could be improved in a number of respects and in light of the UNCRPD requirements. Article 5 of the UNCRPD creates a free standing obligation to provide reasonable accommodation, such that a refusal to do so will be considered discrimination. However, a refusal to provide reasonable accommodation by a provider of goods and services, or an employer, is not set out as a clear instance of discrimination in either Act, and both Acts couch the obligation in a high level of conditionality. For instance, section 16 of the Employment Equality Act does not, of itself, state that a refusal to provide reasonable accommodation may be regarded as an instance of discrimination, although it is in certain circumstances. This reduces the accessibility of the legislation and the clarity of the obligation on the employer.

Recommendation:
The Society recommends that a refusal to provide reasonable accommodation as an instance of discrimination is set out clearly in the Employment Equality Acts.

3.32 Section 35 of the Employment Equality Act provides a broad exemption to the equal pay requirements under the Act in relation to persons with disabilities. This arises where "*by reason of the disability, the amount of that work done by the employee during a particular period is less than the amount of similar work done, or which could reasonably be expected to be done, during that period by an employee without the disability.*"[19] The section is not cross-referenced to the employer's obligation to provide reasonable accommodation, although such failure might address any difficulty the employee with a disability has in reaching whatever targets the employer has set. An obvious tension exists between the obligations set out in section 16 and the effective exemption from equal pay contained in section 35. In addition, the section also means that an employee, who fails to meet certain work targets but does not have a disability, cannot be provided with a lower rate of pay, but a person with a disability, who works to their utmost ability, may nonetheless be paid a lesser amount by reason alone of the fact they have a disability. As regards the very limited exceptions permitted to the overall obligation to provide equal treatment in employment under the Framework Employment Directive

[19] As substituted by s. 24 (a) of the Equality Act 2004

(Council Directive 2000/78/EC), including on the disability ground, it does not appear that section 35 complies with same and accordingly, it should be removed.

Recommendation:
The Society recommends that section 35 of the Employment Equality Acts be repealed in full.

3.33 The Employment Equality Acts align with the UNCRPD in so far as the obligation to provide reasonable accommodation does not go beyond what would impose a "disproportionate burden" on the employer. This contrasts significantly with the Equal Status Acts which arguably impose a high threshold of conditionality before the obligation to provide reasonable accommodation is engaged. It then further sets the obligation below the "unreasonable burden" test as set out in UNCRPD and applies in the employment context, and it will not be reasonable if the cost exceeds a nominal cost to the provider.

3.34 As noted earlier, the obligation to provide reasonable accommodation arises only if it would otherwise be "*impossible or unduly difficult*" for the person to avail themselves of the service. In this regard, the fact that it is awkward or inconvenient for the person with a disability to avail of a service is not sufficient to trigger the obligation to provide reasonable accommodation, it must be much more difficult for a person with a disability to access the service. This puts much of the burden on the person with the disability to access the service without assistance before they can seek an appropriate accommodation. However, this threshold would not appear to be in line with the general requirements of the UNCRPD (in particular, the definition of discrimination and reasonable accommodation under Article 2 and the requirement under Article 5(2) that the protection against discrimination be equal and effective). This means that it should be no more difficult for a person with a disability to rely on anti-discrimination law than would be the case in respect of discrimination on any other ground. Further, even where the requirement to provide reasonable accommodation is triggered, it is subject to the further significant limitation that it does not exceed a nominal cost. While the provision of reasonable accommodation will often not exceed a cost that is nominal in nature, this "nominal cost" threshold is much lower and less flexible than the "disproportionate or undue burden" threshold set out in the UNCRPD.

3.35 The Society notes that Head 82 of the General Scheme and Heads of Bill Assisted Decision- Making (Capacity) (Amendment) Bill 2021, 5 November 2021 contains a proposed amendment to section 4 of the Equal Status Act. The proposed amendment applies a differentiated threshold to a range of public bodies, banks, insurance companies, telecommunications and transport providers, and credit unions, who would be subject to the "disproportionate burden" test, whereas the nominal cost threshold would remain in place as regards other service providers. The proposed amendment also sets out a list of factors to be taken into account when determining whether special treatment or facilities would impose a disproportionate burden.

3.36 The relevant section of the Explanatory Memorandum notes that: "*The Supreme Court decided in the Article 26 referral of the Employment Equality Bill 1996 that it would be unconstitutional to impose such a requirement where the cost exceeds a nominal cost*." On this basis, it is suggested that imposing the "not exceeding a disproportionate burden" standard to other commercial entities would create a constitutional impediment, but this can be considered in light of developments in relation to EU anti-discrimination legislation.

3.37 It is submitted that this explanation of why the "disproportionate burden" standard would not be applied to all service providers misinterprets the Supreme Court decision. It fails to have regard to the significant passage of time since that decision was delivered and the corresponding evolvement of the concept of disability and development of understanding of reasonable accommodation which is now enshrined as a single standard internationally by way of the UNCRPD.[20] It also fails to address the precise

[20] For instance in his judgment in the case of *M.X [APUM] v HSE* [2012] IEHC 491, Mr Justice MacMenamin considered whether the UNCRPD had force of law in the context of EU law. In the circumstances of the particular case, he considered that it did not however, he went on to consider whether the UNCRPD could be regarded as a guiding principle in interpreting the Constitution and stated the following at para. 61: "Should this Court then have reference to the UNCRPD if not as a rule, then at least as a guiding principle? The values in question here are in no sense contrary to any provision of the Constitution. The UN Convention affirms the contemporary existence of fundamental rights for persons with a mental disorder. Although the UN Convention itself is not part of our law, it can form a helpful reference point for the identification of "prevailing ideas and concepts", which are to be assessed in harmony with the constitutional requirements of what is "practicable" in mind. A court will, of course, (subject to the qualification pronounced in McD. v L. [2010] 2 I.R. 199) also "have regard" to the jurisprudence of the European Court of Human Rights to which Ireland also adheres on the basis of an international convention. As well as the UNCRPD itself, are there also relevant principles, ideas and concepts identified in Strasbourg case law? By virtue of ss. 2-5 of the European Convention on Human Rights Act 2003, this court is required to interpret laws of this State in compliance with the State's obligation under the ECHR provisions. Judicial notice is to be taken of decisions of the ECHR and the principles contained therein. This allows a court in an appropriate case to consider whether those principles may inform present day interpretation of "prevailing ideas and concepts" provided such principles accord with the Constitution."

misgivings of the Supreme Court in its 1997 Judgment as regards the burden being placed on employers to provide reasonable accommodation.

3.38 We would further note that the Supreme Court judgment related to the provision of the Employment Equality Bill. Indeed it was on foot of the judgment that the "not exceeding a disproportionate burden" proviso was included in the subsequent Employment Equality Act 1998, which has some twenty odd years later not been the subject of a constitutional challenge or any serious suggestion that it would be. Therefore, the Explanatory Memorandum is flawed and the decision of the Supreme Court is not a clear prohibition on changing the threshold on the provision of reasonable accommodation under the Equal Status Acts to "not exceeding a disproportionate burden" with guidance to be included as to the factors to be considered in coming to that position. In this way the factors enumerated in the legislation could take account of the difference in the employer/ employee relationship on the one hand and the relationship between a service provider and those to whom they provide services on the other hand.

Recommendation:

The Society recommends that the "not exceeding a disproportionate burden" standard be included in the Equal Status Acts, accompanied by the factors that may be taken into account in determining whether a particular measure contended for would fulfil or exceed this requirement. In addition, the threshold to trigger the obligation to provide reasonable accommodation to a person with a disability on the part of a service provider should be lowered to any hindrance in accessing services.

Assisted Decision Making (Capacity) Act 2015

3.39 It is now expected that the Assisted Decision Making (Capacity) Act 2015 ('the **2015 Act'**) will commence in mid-2022. The 2015 Act moves away from assessments of capacity in respect of decision-making and towards assessments of supports needed in decision-making.[21] Section 16 (2)(b) of the Equal Status Acts refers to treating a person differently not constituting discrimination if the person is incapable of entering into an enforceable contract or giving an informed consent. The wording of section 16 is problematic for a number of reasons. The term 'incapable' is not defined and there is no

[21] For more information on decision-making supports see the https://decisionsupportservice.ie/services/decision-supporters

guidance around how a person's capability or incapability may be established. In light of this provision, the commencement of which is imminent, it is evident that capacity to enter into an enforceable contract or give informed consent should only be determined by reference to the Assisted Decision-Making (Capacity) Act 2015. There should be no presumption of incapacity simply because a person has a disability and it should be specifically provided that the support arrangements under the 2015 Act must be given due consideration before any view is taken in respect of legal capacity to enter a contract.

Recommendation:

The Society recommends that section 16(2)(b) of the Equal Status Acts be amended to ensure that it is fully compatible with the Assisted Decision-Making (Capacity) Act 2015.

4. Housing Assistance Ground

4.1 Section 3B of the Equal Status Acts provides:

> "For the purposes of section 6(1)(c), the discriminatory grounds shall (in addition to the grounds specified in subsection (2)) include the ground that as between any two persons, that one is in receipt of rent supplement (within the meaning of section 6(8)), housing assistance (construed in accordance with Part 4 of the Housing (Miscellaneous Provisions) Act 2014) or any payment under the Social Welfare Acts and the other is not (the "housing assistance ground"

As previously noted, this ground only applies in respect of the disposal of an interest in premises as set out in section 6 of the Equal Status Acts. While this ground may be viewed as the first attempt to establish a socio-economic-economic ground in equality legislation, the circumstances in which it applies are so narrow that it is unlikely to have any significant impact on addressing overall socio-economic-economic discrimination. However, the ground itself remains important in protecting tenants in the private rented sector where, for a variety of reasons, landlords may be reluctant to take on a tenant where a State subsidy is involved in supporting rental payments, effectively creating a tripartite relationship between the tenant, the landlord and the State.

4.2 It is clear that many of the cases taken to the WRC have involved discrimination at the point of access to private rented accommodation i.e. where a prospective tenant is not considered for a tenancy because they may be receiving a State subsidy towards their rent[22]. The provision has also been invoked by sitting tenants seeking to avail of the relevant State subsidy where their landlord is refusing to cooperate.[23]

4.3 While a considerable number of complaints have been referred to the WRC on the Housing Assistance Ground, the Society considers that practical difficulties arise in the context of such complaints. The first is that there is no direct link with the refusal of a Landlord to cooperate with the housing assistance payment ('HAP') or the rent supplement payment and the Private Residential tenancies Act 2004. Section 196 of that Act provides that:

[22] See for example A tenant v A Letting Company, ADJ-00023816, Decision of 19 August 2020
[23] See for example Roxanne O'Leary v Margaret O'Leary, ADJ-00024757, Decision of 12 July 2021

"Nothing in this Act—

(a) authorises conduct prohibited by section 6 of the Equal Status Act 2000, or

(b) operates to prejudice the powers under Part III of that Act to award redress in the case of such conduct."

4.4 So, while the operation of the 2004 Act cannot prevent a tenant from enforcing their rights under the Equal Status Acts, it falls short of ensuring that a tenant who has made a complaint under the Equal Status Acts against their landlord cannot, at the same time, have their tenancy terminated under the 2004 Act for failure to pay rent, even though the failure to pay rent may be a direct result of the landlord's failure to facilitate access to HAP or rent supplement. Therefore, a finding of discrimination by the WRC does not protect the tenancy and, as such, it would make more sense (where the objective of the amendment to the Equal Status Acts was to protect tenants from discrimination) to ensure that such tenants do not ultimately lose their tenancy while seeking to vindicate their rights before the WRC.

4.5 The second issue that arises relates to the difficulty that many prospective tenants may experience in seeking to ascertain the identity and address for service of a landlord who refuses to consider their expression of interest in a tenancy. A prospective tenant is unlikely to be given a landlord's correct name and address if they are refused a tenancy, making the protection under the Equal Status Acts somewhat illusory where it is impossible to identify an appropriate respondent to a claim of discrimination.

Recommendation:

The Society recommends that, in order to make the protection under the Equal Status Acts for tenants more robust, the existence of a complaint to the WRC under the housing assistance ground, or a finding of discrimination against a landlord under the Equal Status Acts, would be a relevant consideration to be taken into account by the Residential Tenancies Board in determining the validity of the Notice of Termination related to arrears of rent.

The Society recommends that consideration be given to a legal mechanism which would require that any landlord advertising a private residential property for rent would be capable of being identified in the event of a subsequent complaint being lodged with the WRC.

5. Access to Justice

5.1 While the Society accepts that the forum for the determination of discrimination disputes, the WRC, is intended to be relatively informal and a place where an individual should, at least in theory, be able to represent themselves or be assisted by another party, without the need to be legally represented, it is inevitably the case that legal representation will be merited in some complaints. This is for a number of reasons such as ensuring an equality of arms between the parties; particularly complex legal issues falling to be determined in the context of the complaint; the difficulty for the complainant or respondent to be objective on their own behalf and notably, the increased formality of proceedings that is likely to result from the decision of the Supreme Court in *Zalewski*,[24] will mean that it is not always in a person's best interest to represent themselves.

5.2 In our submission to *t*he Public Consultation on a New National Action Plan Against Racism for Ireland, the Society highlighted the absence of State-funded legal aid to represent complainants before the WRC. This is irrespective of the complexity of the case, the vulnerability of the complainant or whether the respondent is legally represented. In addition, while IHREC may grant legal assistance to individuals to take complaints, the resources of that organisation for that purpose are limited which, in turn, obligates it to take a selective or strategic approach to the provision of such assistance.

5.3 The Society acknowledges that equality law, at least outside the context of employment law, is not a significant area of practice amongst our members, largely because awards from the WRC are very low and there is no provision for legal cost and, as such, it does not present a financially viable area of practice. While it might seem attractive to designate the WRC as a Tribunal in respect of which the Legal Aid Board may grant legal representation,[25] it is evident that, without significant additional resources, this would simply add to an already overburdened system that would not be responsive to the needs of victims of discrimination. In this light, the Society reiterates our previous recommendation that the institutional capacity of IHREC, which is already the expert body in the area, be increased sufficiently to enable it meet the need for expert representation of complainants[26]:

[24] *Zalewski v The Workplace Relations Commission & Ors*, Judgment of the Supreme Court, 6th April 2021
[25] While legal aid is not generally available for parties before a tribunal, exceptions can be made by Ministerial regulation under section 27 (2) (b) of the Civil Legal Aid Act 1995
[26] It is noted that while the Equality and Human Rights Commission for England Wales, does not provide direct legal representation, it has a funding scheme to cover the legal costs associated with taking a case.

Recommendation:

The Society recommends that effective legal aid be made available to victims of discrimination and, in particular, that the institutional capacity of IHREC be increased to allow that organisation to significantly increase the legal assistance it provides to victims of discrimination.

5.4 The Society is also conscious of the reduction in the number of complaints of discrimination under the Equal Status Acts being referred to the WRC. In its 2020 Annual Report the WRC observed:

> "*The year witnessed a decline in complaint referrals under the Equal Status Acts 2000-2015. In 2020, some 305 referrals were made under the Acts, relating to 452 specific grounds. This is compared to 439 referrals in 2019 relating to 648 specific grounds: an annual reduction of just under 30% on referrals compared with 2019 and continues a trend first apparent in 2017.*
>
> *Within the overall referrals, some increases took place in relation to Civil Status (360%), Sexual Orientation (75%) and Disability (25%) on 2019."*[27]

5.5 This raises a serious question as to the efficacy of the present legislative regime for combating discrimination and requires further research to understand the reasons for this dramatic reduction. One obvious problem is that the nomenclature of the body charged with investigating complaints of discrimination does not suggest that it has anything to do with equality, but there are no doubt other factors responsible for the reduction.

5.6 The Society considers that, in light of the falling number of complaints under the Equal Status Acts, in addition to increasing the availability of representation, other additional measures should be taken to increase the impact of the legislation. It is noted for instance that, under Article 7(2) of the Race Equality Directive relating to defence of rights, a particular role is envisaged for associations and organisation or other legal entities to be involved in complaints of discrimination.[28] Under Irish Law, while there is a right of

[27] Annual Report 2020, Workplace Relations Commission at p. 23

[28] Article 7(2) states: "*Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive*."

audience for non-lawyers to represent litigants before the WRC which is welcome, there is no express provision to allow associations, organisations or other legal entities with a legitimate interest in combatting discrimination, to initiate complaints in their own name. Indeed, such complaints have been rejected by the previous Equality Tribunal and the present WRC despite the merit of the underlying complaints.[29] A "collective justice" approach that would allow organisations with a detailed knowledge of discriminatory practices to bring forward a complaint and relieve the individual of the burden of challenging the practice, particularly if they are in a vulnerable situation or fear reprisal for invoking the equality legislation, would be very worthwhile.[30] It may also be, in some instances, that there is no single individual that may identify themselves as a victim of the practice[31] but where, for example, a Trade Union would be well placed to represent the interests of members before the WRC. Equality legislation already allows IHREC to undertake such representative actions[32] and we see no clear reason why other *bona fide* organisations should not be empowered to bring forward such complaints.

5.7 This collective justice approach is permitted in a large number of other Member States. An expert report on gender equality law across Europe found that:

> "*When it comes to access to courts for anti-discrimination/gender equality interest groups or other legal entities that can act on behalf of or represent alleged victims of sex discrimination, this is provided for in quite a number of countries (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, France, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Portugal, Serbia, Spain, Sweden)*."[33]

5.8 This expanded role for *bona fide* organisations to bring complaints of discrimination on behalf of the constituency they represent commends itself, particularly in circumstances where there has been such a significant decline in complaints under the Equal Status

[29] See Cork Deaf Club v The Office of Public Works, Dec –S2017-039 and Gloria (Irelands Lesbian and Gay Choir) Vs Cork International Choral Festival, Dec – S2008-078

[30] This collective justice approach was recommended in the Research Report: Enabling Lesbian, Gay, and Bisexual Individuals to Access Their Rights Under Equality Law, Walsh, Conlon, Fitzpatrick and Hansson, November 2007

[31] See *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NY* (Case C-54/07) which concerned a complaint of discrimination taken by the Belgian Equality Body, in relation to a statement made by the director of a company regarding the employment of immigrants. In its judgment, the Court set out that under Council Directive 2000/43/EC, direct discrimination could be based on statements made by an employer and that it was not necessary for there to be a victim *per se*

[32] Section 23 of the Equal Status Acts provides that the IHREC enjoys a power to refer a complaint of prohibited conduct or discriminatory advertising to the Director of the WRC

[33] *A Comparative Analysis of Gender Equality law in Europe*, European network of legal experts in gender equality and non-discrimination, European Commission, 2020 at p.161

Acts. This “collective complaints” model is applied at Council of Europe level (under the Revised Social Charter) and allows for expert bodies to bring forward complaints relating to alleged breaches of the Charter with relevant evidence, which are then determined by an expert Committee. This collective model is particularly suitable where a policy or practice is involved which relates to a collective group, as against one individual.

Recommendation:

The Society recommends that, in addition to the IHREC, *bona fide* civil society organisations and Trade Unions should be given explicit locus standi to bring complaints of discrimination in their own name, and that the remedies available under the equality legislation should be modified accordingly.

6. Remedies under the Equality Legislation

6.1 Essentially, there are two forms of primary remedy available to successful complainants in discrimination cases - financial compensation and requiring the respondent to take a course of action. In the employment equality context, there may also be orders for re-instatement of an employee, although these orders are relatively rare for obvious reasons. The ability to order a "course of action" under the equality legislation is an innovation applied by Equality Officers or Adjudicators requiring a respondent to take a course of action to future proof against further discrimination of a similar kind.

6.2 The compensation available under the Equal Status Acts is capped at that of the District Court i.e. €15,000, or in the employment context - two years of salary, or in the context of access to employment - €13,000. However, a remedy can be sought for discrimination on the gender ground through the Circuit Court where there is no limit on the compensation that can be awarded. Therefore, the compensation under the Equal Status Acts is pitched at a relatively low level but even within this limitation, the general level of compensation granted by Adjudicators tends to be much lower than the €15,000 limit.

6.3 Under Article 15 of the Race Equality Directive the provision in relation to sanctions states as follows:

> *"Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them."*

6.4 Considering that the compensation payable under the Equal Status Acts is at the jurisdiction of the lowest court in the State, it is questionable whether the current limit on compensation is truly "effective, proportionate and dissuasive". A similar observation applies in respect of the limit on compensation where there has been a discriminatory refusal of access to employment. As noted above, while there is no cap in relation to the compensation that can be ordered in the Circuit Court for complaints of discrimination, in order to avoid the cap of compensation, the individual concerned is exposed to the risks of an adverse costs order, and will have more limited rights of appeal. There appears to be no legal barrier to raising the cap on the compensation that may be awarded in discrimination cases by the WRC.. It would also be useful, in considering compensation

by the WRC and other Courts on appeal, to have legislative guidance around the principles to take into account in determining the appropriate level of compensation, which also reflects the requirement of EU law that any sanction must be "effective, proportionate and dissuasive".

6.5 One such factor might be whether the discriminatory treatment relates to multiple grounds rather than just one. As matters stand, only a single award of compensation can be made in respect of any one complaint, even where the individual can prove they were discriminated against on multiple grounds. While the number of grounds engaged cannot be the sole determinant of the impact of an act or acts of discrimination, it would be better if the individual adjudicator or judge had discretion to take into account multi-ground discrimination when fixing an appropriate level of compensation.

> "*In Ireland, compensation can only be awarded on the basis of one discrimination ground even if more grounds are at issue in a particular case and it is doubtful whether 'real and effective compensation' is available, given that awards are capped even where there is discrimination on more than one ground.* "[34]

6.6 In relation to remedies for discrimination the CRPD Committee has emphasised that such remedies must be effective and that explicit consideration must be given to systemic issues:

> "*The explicit legal prohibition of disability-based and other discrimination against persons with disabilities in legislation should be accompanied by the provision of appropriate and effective legal remedies and sanctions in relation to intersectional discrimination in civil, administrative and criminal proceedings. Where the discrimination is of a systemic nature, the mere granting of compensation to an individual may not have any real effect in terms of changing the approach. In those cases, States parties should also implement "forward looking, non-pecuniary remedies" in their legislation, meaning that further effective protection against discrimination carried out by private parties and organizations is provided by the State party*."[35]

[34] *A comparative analysis of gender equality law in Europe*, European Commission, 2020, at p. 157
[35] CRPD Committee - General Comment No. 6 (2018) on equality and non-discrimination, 26 April 2018

Recommendation:

The Society recommends the review of the level of compensation for discrimination that may be awarded by the WRC (and other Courts on appeal) to ensure they are in line with EU law, and that a list of principles to be considered in determining the appropriate level of compensation be included in the equality legislation.

7. Intersectional Discrimination

7.1 In her expert report for the European Commission, Professor Sandra Fredman describes three ways in which discrimination can manifest. These are:

(i) **sequential multiple discrimination** which consists of separate acts of discrimination on separate grounds;

(ii) **additive multiple discrimination** which consists of discrimination arising from one incident but encompassing two distinguishable forms of discrimination; and

(iii) **intersectional discrimination** which she describes as a synergistic form of discrimination, in that it is the synergy between two or more protected grounds that gives rise to the discrimination.[36]

Fredman notes that, while the former two types of discrimination can be dealt with under current legal structures, intersectional discrimination poses more difficulties to traditional anti-discrimination law. An example of such intersectional discrimination might be the experience of a woman from an ethnic minority, where the discrimination the woman experiences cannot be ascribed solely to her gender or solely to her ethnicity, rather it is a combination of both. Fredman provides the following illustrative examples:

> "*Women, for example, experience gender discrimination in a wide variety of ways, depending on their class, race, ethnicity, sexual orientation, age, religion, and disability. Similar intersectional discrimination is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people, particularly if they are gay*."

7.2 The Parris case[37] is a relevant example of the limitations of EU law, and our domestic law, to deal with the issue of intersectional discrimination. The case concerned the entitlement of the partner of an older gay man to a survivor's pension on his death. By reference to the relevant legislation such an entitlement could not accrue, where the member of the pension entered into a civil partnership after age 60 (as happened in the case) as the possibility of entering a civil partnership was not available to the complainant before he turned 60. A reference was made to the CJEU to consider whether treatment which linked to a combination of grounds (age and sexual orientation)

[36] Intersectional discrimination in EU gender equality and non-discrimination law, Fredman, 2016
[37] David L. Parris v. Trinity College Dublin and Others, ECLI:EU:C:2016:897.

could amount to discrimination. Having considered the matter, the CJEU found that the Employment Equality Directive did not prohibit such discrimination. It held that:

> "*While discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established*."[38]

7.3 *Ms Z v A Government Department and the Board of Management of a Community School,*[39] is a decision of the previous Equality Tribunal which also involved a reference to the CJEU. The case again illustrates the limitations of our current equality legislation to deal with cases of intersectionality. The case concerned a woman who had a rare condition whereby she had healthy ovaries but she did not have a uterus thereby making it impossible for her to support a pregnancy. As such, the complainant and her husband decided to have a child through a surrogacy arrangement i.e. the child was genetically theirs although the woman was not the gestational mother. The woman was a teacher and, in anticipation of the birth and having to take care of her new-born child, she applied for maternity leave or the equivalent of adoptive leave as an alternative. She was refused such leave on the basis that she was not entitled to either under the relevant legislation. The Equality Officer decided to refer a number of questions to the CJEU for clarification as to whether Irish law was in compliance with the relevant directive in denying the woman any form of leave after the birth of her child. While the Equality Officer referred the relevant questions on the basis of the combined grounds of alleged discrimination, namely gender and disability, the CJEU considered the two grounds separately, first comparing Ms Z to a man who had become the father of a child born through a surrogacy arrangement and secondly, finding that Ms Z was not disabled for the purposes of the Employment Equality Directive. The Court did not take into account the unique disability concerned which could only be experienced by a woman and that it was the combination of being a woman and having the particular disability that gave rise to her disadvantage. The woman was essentially excluded from the protection of anti-discrimination law in the context of her employment.

[38] Ibid., at para 80.
[39] Ms Z v A Government Department & Anor, DEC-E2014-050.

7.4 The UNCRPD is the first human rights instrument to explicitly address the issue of intersectional discrimination. This is not surprising as traditionally, discrimination was considered to be specific to a particular ground and little consideration was given to how separate protected characteristics might interact to produce a separate unique form of discrimination or compound disadvantage**.** [40]

7.5 The CRPD Committee has provided clear guidance as to how the interaction of disability with other grounds must be taken into account in national law and has given an indicative list of grounds as follows:

> "*Protection against "discrimination on all grounds" means that all possible grounds of discrimination and their intersections must be taken into account. Possible grounds include but are not limited to: disability; health status; genetic or other predisposition towards illness; race; colour; descent; sex; pregnancy and maternity/paternity; civil; family or career status; gender expression; sex; language; religion; political or other opinion; national, ethnic, indigenous or social origin; migrant, refugee or asylum status; belonging to a national minority; economic or property status; birth; and age, or a combination of any of those grounds or characteristics associated with any of those grounds."*[41]

Recommendation:

The Society recommends that equality legislation should explicitly provide a remedy for intersectional forms of discrimination.

[40] For instance, the Convention on the Elimination of all Forms of Discrimination against Women conceives only of discrimination in terms of differential treatment to men and does not address the experience of women of different ethnicities, women experiencing poverty or women with disabilities

[41] General comment No.6 (2018) on equality and non-discrimination, CRPD/C/GC/6, at para 21

8. Exemptions and Exclusions

8.1 The equality legislation contains a range of exemptions and exclusions relating to different grounds and circumstances, including in respect of different respondents[42] and we would wish to make some general observations in respect of same.

8.2 The equality legislation, although somewhat broader than EU equality law, reflects the State's obligations under EU law and, as such, every exclusion, exemption and derogation from the principle of equal treatment should be scrutinised against the relevant directives to ensure that national law is always in compliance with same.

8.3 Care should also be taken to ensure that the principles and rights set out in the CFR are fully enshrined in domestic law. This observation has no less force in relation to the State's compliance with the ECHR and, in particular, evolving case law under Article 14.

8.4 Any derogation from the principle of equal treatment should impair the principle as little as possible, it must be justified by reference to a legitimate aim and be proportionate to achieving that aim. In other words, any limitation on equal treatment in the legislation should go no further than is absolutely necessary.[43]

[42] See sections 36 and 37 of the Employment Equality Acts and section 14 of the Equal Status Acts

[43] See Article 4 Council Directive 2000/78/EC (Framework Directive) and Article 4 of Council Directive 2000/43/EC (The Race Directive)

9. Conclusion

We hope that the Department finds these observations and recommendations to be helpful and will be glad to engage further on any of the matters raised.

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