

Equality Coalition
Submission on the Equality Bill 2004

March 2004

The Equality Coalition includes:

Age and Opportunity, Ireland
Amnesty International (Irish Section)
Community Workers Co-operative
Dominican Justice Alliance
European Anti-Poverty Network (EAPN)
Focus Ireland
Forum for People with Disabilities
Free Legal Advice Centre (FLAC)
Gay and Lesbian Equality Network (GLEN)
Integrating Ireland (Comhlamh)
Immigrant Council of Ireland (ICI)
Irish Council for Civil Liberties (ICCL)
Irish National Organisation for the Unemployed (INO)
Irish Refugee Council (IRC)
Irish Traveller Movement (ITM)
National Women's Council of Ireland (NWC)
National Lesbian and Gay Federation (NLGF)
National Traveller Women's Forum (NTWF)
NEXUS
North Side Law Centre
One Family
One Parent
Outhouse
Pavee Point
The Wheel
Treoir

Contents

<u>Equality Coalition.....3</u>	<u>Equality Coalition in Northern Ireland, which comments in particular on the enforcement of the statutory duty to promote equality under Section 75 of the Northern Ireland Act, 1998. The Equality Coalition recalls that Chapter Six of the Good Friday Agreement requires the Irish Government to “ensure at least equivalent protection of human rights as will prevail in Northern Ireland” and that this obligation extends to all equal protection against discrimination.3</u>	<u>EB Section 9: Promoting equality for people with disabilities.....8</u>	<u>EB Section 57: Sanctions15</u>
<u>The Equality Coalition is an alliance of groups and organisations concerned with equality issues. It evolved out of a recognised need to monitor Irish anti-discrimination law, to safeguard the legislation against efforts to row back or undermine its provisions, and to campaign for the improvement of existing measures. The Equality Coalition comprises non-governmental organisations spanning the various constituencies whose rights are protected by the Employment Equality Act (EEA) 1998 and the Equal Status Act (ESA) 2000. The organisations share the common goal of creating a more equal society and see legislation as a key means of achieving this vision. In that regard we mirror and complement the work of the</u>	<u>1. Introduction4</u>	<u>Recommendation.....9</u>	<u>Recommendation15</u>
	<u>2. Equality Bill 2004: Accessibility and format ...5</u>	<u>EB Section 10: Reducing protection against discrimination in accessing employment ..9</u>	<u>5. What amendments are missing from the EEA and ESA?.....16</u>
	<u>3. Amendments to Employment Equality Act (EEA), 19986</u>	<u>Recommendation10</u>	<u>Functions of the State. .16</u>
	<u>EB Section 3: Discrimination in access for employment7</u>	<u>EB Section 22: Positive action on equal opportunities10</u>	<u>Recommendation16</u>
	<u>Recommendation.....8</u>	<u>Recommendation11</u>	<u>The abolition of laws and practices contrary to the principle of equal treatment.....16</u>
		<u>EB Section 35: Sanctions11</u>	<u>Recommendation16</u>
		<u>Recommendation11</u>	<u>Trade unions and non-governmental organisations16</u>
		<u>EB Section 45 - Indirect discrimination13</u>	<u>Recommendation17</u>
		<u>Recommendation13</u>	<u>Reducing protection for Travellers and people with disabilities17</u>
		<u>EB Section 47: Rolling back Equality Tribunal decisions.....13</u>	<u>Recommendation.....17</u>
		<u>Recommendation.....14</u>	<u>Statutory positive duties17</u>
		<u>EB Section 49: Reducing protection from discrimination for asylum seekers and other vulnerable groups.....14</u>	<u>Recommendation.....18</u>
		<u>Recommendation.....15</u>	<u>Inclusion of new grounds18</u>
			<u>Recommendation18</u>
			<u>Sexual orientation.....18</u>
			<u>Recommendation.....18</u>
			<u>References19</u>

Glossary of terms

EA	Equality Authority
ECHR	European Convention of Human Rights
ECtHR	European Court on Human Rights
ECJ	European Court of Justice
EEA	Employment Equality Act, 1998
ESA	Equal Status Act, 2000
EU	European Union

Equality Coalition

The Equality Coalition is an alliance of groups and organisations concerned with equality issues. It evolved out of a recognised need to monitor Irish anti-discrimination law, to safeguard the legislation against efforts to row back or undermine its provisions, and to campaign for the improvement of existing measures. The Equality Coalition comprises non-governmental organisations spanning the various constituencies whose rights are protected by the Employment Equality Act (EEA) 1998 and the Equal Status Act (ESA) 2000. The organisations share the common goal of creating a more equal society and see legislation as a key means of achieving this vision. In that regard we mirror and complement the work of the Equality Coalition in Northern Ireland, which comments in particular on the enforcement of the statutory duty to promote equality under Section 75 of the Northern Ireland Act, 1998. The Equality Coalition recalls that Chapter Six of the Good Friday Agreement requires the Irish Government to “ensure at least equivalent protection of human rights as will prevail in Northern Ireland” and that this obligation extends to all equal protection against discrimination.

1. Introduction

1.1 The Equality Bill 2004 will make significant changes to

Ireland's equality framework and the Equality Coalition broadly welcomes it. The main purpose of the Bill is to implement new principles from European Union (EU) Council Directives on equal treatment on race¹, employment² and gender.³ A minimum threshold or floor of rights and anti-discrimination measures will be established throughout the EU with the transposition of these Directives. However, the Equality Coalition does not believe that the Equality Bill transposes or fully implements obligations emanating from the EU Directives. Further, what many perceive as a technical piece of legislation will actually reduce protection from discrimination for vulnerable groups.

1.2 The Employment Equality Act (EEA) 1998 prohibits discrimination in relation to employment on the basis of: gender, family status, marital status, age, disability, sexual orientation, religious belief, race and membership of the Traveller community. The Equal Status Act (ESA) 2000 outlaws discrimination on the same grounds with regard to goods, services and education. While the range of grounds covered by Ireland's existing equality law compares favourably with other EU countries, in virtually all other respects we lag behind our European counterparts. A particular weakness is that the Acts essentially rely on an individualistic justice model, which means that they can generally only be triggered if an individual is discriminated against and willing to take a case against an employer or service provider. Other jurisdictions, including the UK and Northern Ireland, have acknowledged that such a model is inadequate⁴ because even the most blatant discrimination goes

unchallenged unless a claim is pursued. This places an unrealistic burden on people who are already vulnerable because of their minority group status, in fact many may not even be aware of their rights. Further, as demonstrated by experience of the Irish legislation to date, voluntary initiatives, such as the equality reviews envisaged under the EEA 1998, will only be taken up by bodies that are already committed to equality objectives. In recognition of such difficulties several of our European counterparts have included statutory *duties* to promote equality within their legislative packets. These duties, which are directed at the public sector, have the merit of being designed to prevent discrimination occurring in the first place and of shifting the onus for compliance from individuals to the source of the problem, that is, the practices of employers and service providers.

1.3 The Equality Bill 2004 represents an opportunity to enhance Ireland's equality legislation and this has been recognised by the Equality Authority (EA).⁵ Disappointingly the Government has chosen to ignore many of the EA's substantive recommendations. Instead it has published a minimalist piece of legislation, which is largely unintelligible to non-lawyers (see section 2 below). The Government has failed to take account of best practice by neglecting to oblige employers and service providers to take *proactive* steps to address inequalities. Such steps, which could include the adoption of public sector statutory duties⁶ (section further sections 5.8-9) and mandatory positive

27th February 2003.

⁵ Equality Authority. (2003b) *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union 'Race' Directive (RD), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD)*, Equality Authority: Dublin.

⁶ In light of previous Supreme Court decisions, in particular that in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 1, imposing such duties on private service providers and employers might be considered a violation of the constitutional private property guarantee. There is

¹ The Race Directive (2000/43/EC).

² The Framework Employment Directive (2000/78/EC).

³ The Gender Equal Treatment Directive (2002/73/EC).

⁴ For examples of such developments see Equality Authority (2003a) *Mainstreaming Equality: Models for a Statutory Duty*, Report of Conference,

action schemes (see sections 13.4-5), are vital if the anti-discrimination law is to achieve any real change.

- 1.4 Sections of the Bill causing most concern relate to the reduction in protection for certain groups. If passed in its current form, the Government will be able to discriminate against asylum seekers and certain migrants in relation to any aspect of policy or provision. The Equality Tribunal investigates and issues decisions in anti-discrimination cases and the Bill actually attempts to reverse findings of the Tribunal. This marks the Government's third attempt to regress and tamper with our unified equality legislation, continuing a dangerous precedent, and crucially violating the principle of non-regression within the Directives.
- 1.5 The Equality Coalition calls on all members of the Oireachtas to support our recommended amendments, drafted to support the full implementation of the EU Directives and the Good Friday (Belfast) Agreement obligation to promote equivalent rights North and South. We also call on all members of the Oireachtas to oppose sections of the Bill which will undermine protection against discrimination and redress available to victims of discrimination.

2. Equality Bill 2004: Accessibility and format

- 2.1 Commentators suggest that the kind of society people want ultimately determines the nature of equality objectives adopted.⁷

however, no constitutional difficulty with public sector obligations.

⁷ Equality Studies Centre. (1995) *A Framework for Equality Proofing: A paper prepared for the National Economic and Social Forum*, Equality Studies Centre: University College Dublin.

The experience of individuals and groups who are systematically discriminated against is central to discussions on equality. They bring an expertise which complements that of policy, legal and other analysts. However, the debate on equality needs to be accessible to ensure that minority groups and society as a whole can engage in these discussions.

- 2.2 The Equality Coalition would question the Minister for Justice, Equality and Law Reform's management of the legislative process. The Coalition is concerned at the manner, in which this Bill has been introduced, as well as its style and format. Introduced with little publicity and no public consultation with grounds representing marginalised groups, the Bill is completely inaccessible to non-lawyers and non-specialists. Moreover although the Government consulted the EA and the National Consultative Committee on Racism and Interculturalism (NCCRI), most of their recommendations were ignored.
- 2.3 The Government chose to amend two pieces of legislation with one Bill and failed to supply a consolidated version of either. In addition, it appears the Minister for Justice, Equality and Law Reform and his department have ignored recommendations from the EA and the Law Reform Commission on drafting and format.

- 2.4 The EA recommended to Government that the structure of the EEA should be simplified, clarified and rationalised, and the Bill drafted in plain English to make it more accessible. This has not been done.

2.5 The Law Reform Commission has made many important recommendations on legislative drafting. Where a statute amends a previous provision, the Commission recommends that the entire text of the amended provision should be set out.⁸ Legislation needs to be written in plain English and technical language or jargon should only be relied on where necessary.⁹ According to the Commission, given that the law ultimately governs ordinary citizens, it should be readily accessible and comprehensible to the well-educated layperson.¹⁰ The Minister and his department have ignored these recommendations as well.

3. Amendments to Employment Equality Act (EEA), 1998

3.1 The Equality Bill 2004 includes 41 proposed amendments to the EEA 1998. Most are technical in character, while others are more substantive. The Coalition has chosen to comment on the most important.

3.2 The Equality Coalition welcomes a number of the proposed amendments specifically those transposing definitions from the Directives or relating to procedural changes. In particular we welcome:

- **Section 7** which inserts a new definition of business partnership after section 14 of the EEA to protect individuals in business partnerships from discrimination. These individuals were previously excluded from protection.
- **Section 8** a new, broader, more effective definition of sexual and other harassment from the Directives.
- **Section 36** which incorporates a new definition of the burden of proof, and will permit more effective prosecution of cases of discrimination.
- **Section 28**, which amends section 74 of the EEA, to expand the definition of individuals who are protected against victimisation, to include employees, who are witnesses in proceedings under the EEA and ESA; employees who oppose behaviour, which is unlawful under the EEA and ESA, and employees who give notice of an intention to take action.
- **Section 36**, which amends section 98 by penalising employers for dismissing the additional categories of employees (*see above*) for exercising their rights.
- Finally, **section 39** which amends section 99 by allowing for the award of expenses where a person is obstructing or impeding an investigation.

⁸ See Recommendation No. 15, Law Reform Commission. (1999) *Consultation Paper Statutory Drafting and Interpretation: Plain Language and the Law*, Law Reform Commission: Dublin, p. 126.

⁹ See Recommendation No. 6, *ibid*, pp. 125.

¹⁰ *Ibid*, pp.125.

EB Section 3: Discrimination in access for employment

3.3 **Section 3 of the Equality Bill 2004 amends section 2 of the EEA 1998.** It inserts a new definition of ‘employee’ to include “any person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment”. Members of former regulatory bodies are also now included in the definition of employee. However, the proposed amendment includes a blanket provision enabling employers to discriminate against prospective employees who are applying for work in a person’s home for the provision of personal services.

3.4 The Equality Coalition recognises that Seanad Éireann already made changes to the Bill to eliminate some of the original exemptions for individuals working in the private sphere or home. According to the EA’s Legal Unit, most discrimination in employment is experienced by migrant workers involved in the delivery of personal services in people’s homes.¹¹ The change made in the Seanad will now mean that this vulnerable group of persons will be able to rely on protection from discrimination during the currency of their employment.

¹¹ Barry, E. ‘Overview of Existing Equality Legislation in Ireland, the EU Race Directive, and preview of the Equality Bill 2004’, paper delivered to a seminar organised by the Traveller Legal Unit (Irish Traveller Movement) and the Bar Council entitled, *Europe, Discrimination and Travellers*, the Distillery Building, Saturday 13 March 2004.

3.5 However, the Equality Coalition is critical of the remaining exemption because most discrimination in employment takes place at the initial recruitment stage. In practice, the current section will enable persons requiring services to mistreat and reject job applicants because of their own personal prejudices and the Equality Coalition considers this to be unacceptable. The Coalition does accept that discriminatory standards are important for some areas of personal services. However, discriminatory standards have to be justified as rationally connected to the work or service and be reasonably necessary. Moreover, the Coalition fails to see how respect for private and family life can be used as justification for a total blanket ban measure to enable employers to engage in discriminatory practices. Similar exemptions do not appear in the Directives and there is no precedent for it in jurisprudence from the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). Furthermore, this section indirectly discriminates against women, as they are generally dominant in the provision of personal services.

3.6 There is a considerable degree of overlap between this section and the question of ‘bona fide occupational requirements’. Under EU law derogations from the principle of equal treatment may be permissible where the gender or other relevant characteristic of an employee constitutes a genuine and determining occupational requirement¹². The European Court of Justice (ECJ) has held that any such derogation or exception must be interpreted strictly. *Commission v UK*¹³ involved a challenge to the UK Sex Discrimination Act 1975 which allowed employers to discriminate between men and women with regard to employment in a private household and where an undertaking employed less than six staff. The ECJ held that the exception in the UK legislation was over-inclusive. It took the view that

¹² See Article 4 of both the Race and Framework Directives and Article 2(2) of the Gender Equal Treatment Directive 76/207.

¹³ Case C-165/82 [1983] ECR 3431.

while for certain kinds of employments in private households sex might be a relevant factor, this was not always the case. In other words, the Court found that any type of absolute exclusion violates the equal treatment principle. The blanket licence to discriminate envisaged under section 3 clearly falls foul of such ECJ decisions.

3.7 Under Irish law as it stands gender may amount to a *bona fide* occupational requirement. Pre-existing law thus provides sufficient protection for persons who may want to be cared for by a person of the same gender. The EEA provides that where the duties of the post involve personal services and it is necessary to have both men and women engaged,¹⁴ sex can constitute an occupational requirement. The 1998 Act also provides, that where the post involves the performance of services of a personal nature, such as care of the elderly in their home, the sex of the employee can constitute a determining factor¹⁵. The new Directives enable Member States to extend such occupational exemptions to grounds other than gender but in light of the case law mentioned above any attempt to do so would have to be carefully drafted so as not to offend the overarching principle of equal treatment. No such provisions have been included in the current Bill. In summary, we consider the personal services exemption to be unnecessary and in breach of EU law.

Recommendation

- Delete the following text in definition of ‘employee’ in section 3 of the Equality Bill.

¹⁴ Section 25(4)(a).

¹⁵ Section 26(2).

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

EB Section 9: Promoting equality for people with disabilities

3.8 **Section 9 amends section 16 of the EEA** in relation to the nature and extent of employer’s duties to reasonably accommodate people with disabilities. These changes stem from Article 5 of the Framework Directive which requires employers to take “appropriate measures” to enable people with disabilities to: (i) have access to employment, (ii) participate or advance in employment and (iii) undergo training. Such measures need not be undertaken where they ‘would impose a disproportionate burden on the employer.’

3.9 The Equality Coalition broadly welcomes this new section, as it potentially puts a greater onus on employers to promote equality for disabled people. However we have two serious reservations about the section as drafted. First, the wording employed is vague and ambiguous and so will be difficult to implement in practice. A second and related issue concerns the vast number of factors employers can take on board when assessing whether making changes imposes a ‘disproportionate burden’. For example, employers can consider: (i) the financial and other costs entailed, (ii) the scale and financial resources of the employer’s business, (iii) the number of persons who would benefit from the measures, (iv) any disruption that would be caused by them, (v) the nature of any benefit or detriment that would accrue to any person likely to be affected by them, (vi) the possibility of obtaining public funding or other assistance, and (vii) any benefit that would accrue to the employer.

3.10 Of these only factors (i), (ii) and (vi) are mentioned in the recitals to the Framework Directive. No rationale has been advanced for

fleshing out this section by including vague and ill-defined considerations such as levels of ‘disruption’. The Equality Coalition is concerned that the current section purports to provide ‘out’ clauses for employers that are not envisaged under the Directive. Perhaps more significantly the range of factors mentioned will cause confusion in practice leading to greater levels of non-compliance and litigation. In addition, the Coalition does not accept that when employers are assessing disproportionate burden, they should be able to consider the number of persons who would benefit from the measures. If this section were aimed at promoting equality for men and women an exemption of this nature would not be permitted. For example, if an employer had a staff of 20 people and only two were women, would it be satisfactory for the employer not to provide a women’s toilet even though only two people would benefit? Why should the rights of disabled people be considered in this way?

3.11 The Equality Coalition recommends that there should be a higher standard of compliance for the public sector and larger companies given the resources they have at their disposal.¹⁶ The net cost to the employer should be determined *after* state grant aid and technical assistance have been factored in. These changes are necessary and vital in order to make a difference to disabled people’s access and participation in employment.

Recommendation

- In section 9- which amends section 16, delete in new section 3-(a) (iii)(iv)(v) and (vii).
- Insert in section 9 under in new section under (3)-(c):

(d) Employers in the public sector and or with staff members of more than 100 employees¹⁷ must make special efforts in this regard and the Equality Authority shall provide guidelines to implement measures commensurate with the resources at their disposal.

Insert as 9-(d):

The net cost to employers shall only be assessed after public funding and other assistance has been deducted.

EB Section 10: Reducing protection against discrimination in accessing employment

3.12 Amending section 17 of the EEA, section 10 of the Equality Bill substitutes a subsection on compliance with statutory requirements. It removes protection of the EEA from persons who are not ‘nationals’. Confusingly nationals are defined in this subsection as persons who are lawfully resident in the State. Normally “nationals” refer to Irish citizens, however.

¹⁶ The EA also made this recommendation.

¹⁷ Similar provisions exist in Canada’s Employment Equity Act.

3.13 Persons who are not legally resident in the state include: international students who may have overstayed their visas, migrants during bridging periods¹⁸ and persons working in the informal economy. This section also specifically removes the protection of the EEA from asylum seekers and persons with applications for leave to remain even though they are legally resident in the state.

3.14 The Equality Coalition believes this section should be deleted for the following reasons. Firstly, any attempt to reduce protection in the current Bill is a violation of the principle of ‘non-regression’ in the Directives. All three state that:

*This Directive lays down minimum requirements.... The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.*¹⁹
(authors’ own emphasis).

Secondly, the Government gave a certain number of asylum seekers the right to work in 1999.²⁰ Why should this group of individuals not be protected from discrimination if they have been given permission to work by the State? Thirdly, the proposed amendment does not take account of the reality of the migratory experience. On occasion migrants can

¹⁸ On occasion, migrant workers can lose their Employment Permits through no fault of their own and when this happens they are generally not classified as legally resident. Migrant workers sometimes try to secure other employment and a new employer may be in the process of making an application for a new permit. This period is generally referred to as a ‘bridging period’.

¹⁹ See for example, Recital No. 25, Race Directive or Recital No. 28, Framework Employment Directive.

²⁰ In 1999, former Minister for Justice, John O’Donoghue gave asylum seekers the right to work who had been in the State for more than one year before the 26 July 1999.

sometimes fail to comply with certain immigration registration requirements. A humane and just equality schemes should not automatically exclude them. Fourthly, persons working in the informal economy are already in a precarious situation and subject to much exploitation. Removing them from the protection of the EEA will only further marginalise them.

Recommendation

- In section 13 replace: *(indirect discrimination on the gender ground)* with *(indirect discrimination on all grounds)*

EB Section 22: Positive action on equal opportunities

3.15 **Section 22 substitutes a new paragraph for section 33 on positive action.** The proposed section reads:

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

- (a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than the gender ground),*
- (b) to protect the health or safety at work of persons with a disability, or*
- (c) to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment.*

3.16 The Equality Coalition does not believe this section goes far enough. A statutory obligation must be imposed on employers to engage in positive action in the workplace. A major weakness in Ireland’s equality legislation is its reliance on the individualistic justice model. In this model the discrimination must already have occurred and an individual claimant be willing to pursue an anti-

discrimination case. In addition, it fails to address the underlying inequalities in the workplace which positive action is essential for.

3.17 The Equality Coalition also believes that section 33 in the EEA imposes more of an obligation upon employers to act in a positive manner and should remain intact. Further, section 33 takes account of positive action in the recruitment stage and this is one of the major weaknesses with the new section being introduced.

Recommendation

- Delete section 22.

EB Section 35: Sanctions

3.18 The Directives basically codify jurisprudence from the European Court of Justice (ECJ) on sanctions and remedies. Binding in Irish law, the ECJ has ruled that awards should be effective in order to have a deterrent effect and be adequate in relation to the damage sustained. In the context of gender equality, the ECJ condemned German implementing legislation that only provided compensation for actual loss suffered rather than including potential losses.²¹

According to the Directives:

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

²¹ See Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR I 891. Cited in Higgins, I. (2003) 'Enforcement and the New Equality Directives' in Costello, C. and Barry, I. (eds) *Equality in Diversity The New Equality Directives*, Ashfield Publications/Irish Centre for European Law/Equality Authority: Dublin.

*compensation to the victim, must be effective, proportionate and dissuasive.*²²

3.19 **Section 35 of the Equality Bill amends section 82 of the EEA** on redress that may be ordered. It states that the maximum amount of compensation in the EEA applies even if a complainant was discriminated, harassed or sexually harassed on more than one ground.

3.20 The EEA does not comply with standards in the ECJ jurisprudence or with the Directives. The maximum sum that can be awarded to claimants against respondents by the Director and Labour Court is £10,000 (€12,697) in circumstances where the claimant was discriminated in the recruitment process. The maximum sum that can be awarded against respondents by the Director and Labour Court where the claimant has been discriminated against while employed is up to 104 times the claimant's weekly salary. These sums would not be considered effective, proportionate and dissuasive by ECJ standards.

3.21 Despite this fact, the Equality Bill does not include any proposed amendments in this regard. Therefore, the Equality Coalition strongly recommends that this ceiling on compensation and remuneration that can be awarded by the Director or Labour Court be removed. Moreover, the Coalition also recommends that all anti-discrimination cases should have the option of going to the Circuit Court. Again, this would enable Ireland's equality scheme to comply with EU law and eliminate certain hierarchies that exist.

Recommendation

- In section 35 which amends section 82, delete new inserted section (6)-(a).

²² For example, Article 15, Race Directive and Article 17, Employment Directive.

- Substitute the following section as new section 4 of the EEA:

(4) There is no maximum amount which may be ordered by the Director or Labour Court by way of compensation under subsection (1)(c) or by the Court under subsection (2)(b).

- Insert as new section:

All cases of alleged prohibited conduct should have the option of going to the Circuit Court for redress.

4. Amendments to Equal Status Act (ESA), 2000

4.1 The Equality Bill 2004 includes 16 proposed amendments to the ESA 2000. Several are technical in character, while others are more substantive.

4.2 The Equality Coalition welcomes a number of the proposed amendments transposing definitions from the Directives or relating to procedural changes.

- **Section 48** amends section 11 of the ESA to substitute a new definition on sexual and other harassment from the Directives (same definition as section 8 inserts into the EEA).
- **Section 51** amends section 21 of the ESA and allows the Director to extend time limits where the respondent deliberately misrepresents the facts of the case to a complainant.
- **Section 56** amends section 25 of the ESA to allow an individual or body authorised on behalf of a complainant to represent them in proceedings.
- **Section 53** inserts an appeals procedure where claims are dismissed as frivolous, vexatious and misconceived or relates to a trivial matter.
- **Section 60** inserts a new definition for the burden of proof to permit more effective prosecution of cases of discrimination. (same definition as section 36 inserts into the EEA).

EB Section 45 - Indirect discrimination

4.3 **Section 45 amends section 3 of the ESA** in order to reflect the definition of indirect discrimination in the Directive (2000/43/EC). The Equality Coalition does not believe that the definition within the Equality Bill fully transposes the definition within the Directive. The Directive definition takes account of the potential for disadvantage and differs slightly. It reads: “where an apparently neutral provision, criterion or practice would put persons of...”. Section 45 of the Equality Bill does not take account of the potential for disadvantage, rather the disadvantage or discrimination must have already occurred. Section 45 (c) states:

where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

The Equality Coalition believes this section must be amended to reflect the Directive definition.

Recommendation

- Replace “puts” in section 45(c) with “would put”.

EB Section 47: Rolling back Equality Tribunal decisions

4.4 **Section 47 amends section 7 of the ESA** in relation to educational establishments. This proposed amendment allows the Minister for Education and Science to discriminate on the basis of race (nationality) when providing further and higher education grants. In practice this section will prevent migrant workers, persons with complementary protection and long-term resident migrants from securing further/higher education grants.

4.5 This section is in direct response to a decision from the Equality Tribunal in 2003.²³ The Tribunal decided that further and higher education grants are a service and that ‘non-nationals’ who are denied access to this service are being directly discriminated against. In its decision, the Tribunal advised the Minister for Education and Science that his current scheme was discriminatory and should be amended accordingly. Instead of taking on board the Tribunal’s recommendation, the Government has decided to amend the ESA.

4.6 The Equality Coalition acknowledges that the Department of Education and Science recently expanded the number of categories of third country nationals eligible for the higher/further grants. However, the Department only recently extended access because it legally had to. Previously spouses of Irish or other EU nationals from outside the EU were not treated as EU citizens in relation to further/higher fees and grants. This was in breach of EU Community law on EU migrants²⁴ who relocate to other EU Member States for work purposes. The non-EU partners of EU citizens are the most privileged beneficiaries of EU Community law after EU citizens themselves, as their rights are derived from their EU partner. Until the Department amended its scheme, it was in breach of the Treaty of Rome and Regulation 1612/18.

4.7 While the Department’s literature suggests that people with leave to remain on humanitarian grounds have the same access as EU nationals, this is untrue as well. Humanitarian leave to remain does not actually exist. The Minister for Justice, Equality and Law Reform can grant leave to remain under section 3 of the Immigration Act 1999. However, when the Minister informs an

²³ *Two complainants –v- the Department of Education and Science* (DEC2003- 042/043).

²⁴ See for example, Article 48-60 Treaty of the European Union. Regulation 1612/68 provides rights to education and work.

individual in writing they have been granted leave to remain, he does not indicate that it is leave to remain on humanitarian grounds. For that reason, the Department and education providers do not treat this category of persons as EU nationals for education purposes. The current section will adversely affect long-term resident migrants who came to Ireland with Employment Permits or Visas, international students, persons with business permission, migrant parents of Irish citizen children and their other children who are not Irish and persons with leave to remain. There is no defence for discriminating against these categories of persons if they have satisfied other basic criteria, for example, have three years residency in Ireland.

4.8 The Equality Coalition is strongly against this section and recommends that it should be deleted for the following reasons. Firstly, the Equality Coalition points out that this proposed amendment is in direct contravention to the principle of non-regression in the Race Directive, Employment Directive and Gender Directive. Hence, the proposed section 47 is completely unacceptable and must be deleted because it reduces protection on the basis of race in the area of education.

4.9 Secondly, the proposed section is a major blow to public interest litigation and indicates the Government's willingness to change legislation when it does not agree with the outcome or decision from an independent decision-making body. Thirdly, the Department of Education and Science has published two white papers in recent times which make clear that the principle of equality should underpin educational practice in Ireland.²⁵ Fourthly, there is nothing to be gained in monetary terms from this section. Any saving on government spending will be marginal and in fact the potential costs to the Exchequer of this

²⁵ See for example, Department of Education and Science (1996) *White Paper on Education: Charting Our Education Future*, Government Stationary Office and Department of Education and Science (2000) *White Paper on Adult Education: Learning for Life*, Government Stationary Office.

discriminatory practice is likely to be extremely significant. Impacting negatively on migrant workers, long-term resident migrants and their children, a whole sector of society will be effectively excluded from further and higher education. This section also creates an uneven playing field for migrant workers currently in the workplace, for example, where a Masters in Nursing Degree is needed to achieve or compete for promotion at work. Migrant workers and long-term resident migrants make significant contributions to the Irish economy by working and paying taxes and this should be recognised.

Recommendation

- Delete section 47.

EB Section 49: Reducing protection from discrimination for asylum seekers and other vulnerable groups

4.10 **Section 49 amends section 14 of the ESA** and removes protection of the ESA from persons who are: asylum seekers, former asylum seekers and persons with applications for leave to remain. This proposed section allows central and local government, public authorities and other statutory agencies to discriminate against this category of persons in relation to certain measures and activities.

4.11 The Equality Coalition is astonished at this cynical attempt by government to reduce protection for a vulnerable group of persons at the same time as transposing a Race Directive. Again, the Equality Coalition reminds the Government that this too violates the principle of non-regression in the Directives. Continuing a dangerous trend of chipping away at Ireland's unified equality regime, this section is also incompatible with Ireland's international and domestic human rights obligations.

Section 14-(a)(iii) of the ESA provides that nothing in the Act shall be construed as prohibiting “any convention or other instrument imposing an international obligation on the State”.

4.12 Article 2 of the Convention on the Rights of the Child, 1989 protects all children against discrimination. Signatory states are obliged not to discriminate on the basis of the child’s or his or her parent’s legal status or nationality. Section 49 in the Equality Bill fails to take account of this obligation.

4.13 The European Convention on Human Rights (ECHR) has finally been given further effect in Irish law through the ECHR Act 2003.²⁶ The Convention affords protection to all individuals within the jurisdiction of contracting states irrespective of nationality and legal status. Article 14 protects against discrimination but it is also parasitic right, in that the obligation not to discriminate relates only to the rights and freedoms located in the Convention. However, the Equality Coalition foresees incidences where a discriminatory practice against this vulnerable group of persons could breach one of the Convention rights. Again, Section 49 fails to take account of this international and domestic legal obligation.

Recommendation

- Delete section 49.

EB Section 57: Sanctions

4.14 **Section 57 amends section 27 of the ESA** and refers to redress and remedies. It provides that the maximum amount of an award can only be applied in a case even if the complainant was discriminated against on more than one ground. It also prevents orders for compensation being made in favour of the EA. However, this amendment does not raise the ceiling on

compensation in or enable cases on all nine grounds to proceed directly to the Circuit Court. A maximum of IR£5,000 (€6,349) can only be awarded to complainants by the Equality Tribunal against service providers and educationalists. ECJ jurisprudence requires a much higher sum and for that reason the Equality Bill is seriously deficient in this area.

Recommendation

- Substitute section 57 with the following:

There is no maximum amount which may be ordered by the Director or Labour Court by way of compensation

All cases of alleged prohibited conduct should have the option of going to the Circuit Court.

²⁶ The ECHR Act came into force on 31 December 2003.

5. What amendments are missing from the EEA and ESA?

5.1 A significant number of substantive amendments need to be added to the Equality Bill in order to transpose the Directives and to fulfil Ireland's obligations under the Good Friday (Belfast) Agreement, 1998.

Functions of the State

5.2 Paragraph 1 of Article 3 of the Race Directive provides that the Directive shall apply to all persons as regards both public and private sectors including public bodies in relation to: (e) social protection, including security and health care; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public including housing.

5.3 This is one of the most significant features of the Race Directive and if implemented fully, would mean that functions of the State should be included in the definition of "service" in the ESA 2000. The Equality Coalition recommends that the definition of service in the ESA be amended to include functions of the State. The EA had made a similar recommendation to the Minister for Justice, Equality and Law Reform. Nonetheless, there are no proposed amendments in the Bill reflecting this.

Recommendation

- Replace definition of "service" in section 2-(1) of the ESA 2000 with:

"service" means a service or facility, functions of the State which is available to the public generally or a section of the public, and, without prejudice to the generality of the foregoing, includes-

The abolition of laws and practices contrary to the principle of equal treatment

5.4 Article 14 of the Race Directive included an obligation on Member States to take necessary measures to ensure that "any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished". This has not been implemented by the proposed amendments in the Equality Bill 2004.

Recommendation

- Insert as amendment to ESA 2000:

Any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished and void.

Trade unions and non-governmental organisations

5.5 The three Directives require Member States to ensure that associations, organisations and legal entities with a legitimate interest in ensuring compliance with the provisions of the Directives, may engage in any judicial remedies and/or administrative procedure provided for either on behalf of or in support of the claimant. This is the first time an obligation of this nature has been included in EU Directives governing equality.

5.6 Trade unions and NGOs representing groups within the nine protected categories have legitimate interests in initiating proceedings. However, there is no provision in the Bill for trade unions and NGOs to initiate case on behalf of the individual or represent them in the District and Circuit Court. This is a glaring and unacceptable omission and the Equality Coalition makes the following recommendations.

Recommendation

- Insert new section amending the EEA and the ESA to allow for:

Trade unions, non-governmental organisations or other legal entities with a legitimate interest in addressing discrimination under the nine grounds may engage, either on behalf or in support of the complainant, with his or her approval in any administrative or judicial procedure to seek redress in respect of prohibited conduct.

Reducing protection for Travellers and people with disabilities

5.7 The Equality Coalition recommends that section 15 of the ESA should be deleted in its entirety. It represents a major dilution in protection on the basis of race and is not permitted. Section 15-(1) enables hoteliers to discriminate against individuals in relation to accessing their services where they decided that “the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the goods or services are being sought..”. In reality this section is primarily used to deny Travellers and people with disabilities access to hotels and the onus is on the claimant to establish their good character. This section is clearly discriminatory and does not appear in the Race Directive.

Recommendation

- Delete section 15(1) and 15(2).

Statutory positive duties

5.8 The Equality Bill does not include any sections amending the EEA and ESA to incorporate a positive duty to promote equality directed at public sector employers and service providers. This omission runs counter to Ireland’s obligations under the Good Friday (Belfast) Agreement, which requires equivalent human rights and anti-discrimination protection North and South. . Section 75 of the Northern Ireland Act 1998 imposes equality duties on public authorities and implementation is overseen by the Equality Commission of Northern Ireland (a statutory body). Compliance with these duties is secured through publication of ‘equality schemes’, which demonstrate to the Commission’s satisfaction how the public authority will promote equality of opportunity between certain different individuals and groups. The Equality Authority mirrors the NI Equality Commission in this jurisdiction and it has called for the introduction of a parallel system here. As a Coalition, we strongly recommend that the EA should be put in a position to monitor implementation of the statutory duty through evaluation of action plans and so on.

5.9 The production of action plans by employers and service providers will mean that a proactive and preventative approach to equality issues is embraced. Such plans can be used to report on various matters including the diversity or representativeness of an employer’s workforce. Where an employer reports that, for example, women are severely under-represented at a given grade, upon reference to the Equality Authority such a finding might give rise to a positive action scheme aimed at remedying the situation. Under the Bill positive action is permitted but not required. The Equality Coalition recommends that the implementation of mandatory positive action schemes.

5.10 It is worth mentioning that the Equality Bill even fails to impose any statutory duty even when required by one of the Directives. Article 19 of the Gender Directive states that a statutory obligation should be placed upon the public sector in relation to gender.

Recommendation

- The Equality Coalition recommends that the Government should draft and present to the Oireachtas provisions relating to the introduction of a statutory duty having due regard to its obligations under the Good Friday (Belfast) Agreement and Article 19 of the Gender Directive.

Inclusion of new grounds

5.11 The Equality Coalition strongly supports the EA's recommendations that four new grounds merit protection from the EEA and the ESA: socio-economic status, criminal convictions, trade union membership and political opinion.

Recommendation

- Insert in section 6(2) of the EEA under (i):
 - (j) socio-economic status*
 - (k) criminal convictions*
 - (l) trade union membership*
 - (m) political opinion*
- Insert in section 3(2) of the ESA under (j):
 - (k) socio-economic status,*
 - (l) criminal convictions*
 - (m) trade union membership*
 - (n) political opinion*

Sexual orientation

5.12 The EA recommends that the narrow definition of family in section 2(1) of the EEA be amended to include heterosexual, unmarried and same sex couples. The Equality Coalition believes that this is a particular area meriting special recognition.

Recommendation

- In section 2(1), insert under the heading of family status:
 - 'marital status' includes heterosexual, unmarried and same sex couples.*

References

- Barry, E. (2004) 'Overview of Existing Equality Legislation in Ireland, the EU Race Directive, and preview of the Equality Bill 2004', paper delivered to a seminar organised by the Traveller Legal Unit (Irish Traveller Movement) and the Bar Council entitled, *Europe, Discrimination and Travellers*, Distillery Building, Saturday 13 March.
- Department of Education and Science (1996) *White Paper on Education: Charting Our Education Future*, Government Stationary Office
- Department of Education and Science (2000) *White Paper on Adult Education: Learning for Life*, Government Stationary Office.
- Equality Authority (2003a) *Mainstreaming Equality: Models for a Statutory Duty*, Report of Conference, 27th February 2003.
- Equality Authority. (2003b) *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union 'Race' Directive (RD), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD)*, Equality Authority: Dublin.
- Equality Studies Centre. (1995) *A Framework for Equality Proofing: A paper prepared for the National Economic and Social Forum*, Equality Studies Centre: University College Dublin.
- Law Reform Commission (1999) *Consultation Paper Statutory Drafting and Interpretation: Plain Language and the Law*, Law Reform Commission: Dublin.
- Higgins, I. (2003) 'Enforcement and the New Equality Directives' in Costello, C. and Barry, I. (eds) *Equality in Diversity The New Equality Directives*, Ashfield Publications/Irish Centre for European Law/Equality Authority: Dublin.