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D4.1. COMPARATIVE APPROACHES TO THE ENFORCEMENT OF THE RACE DIRECTIVE IN IRELAND

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A. INTRODUCTION

> This judgment is being delivered just over 100 years since the first Provisional Government for an independent Irish State was called into being. It is nonetheless salutary to reflect that one hundred years later a distinct group – the Irish Traveller community – still remains a vulnerable minority at the margins of Irish society. The members of that community have struggled for recognition of their own cultural identity and way of life.

1. So begins the judgment of Mr Justice Gerard Hogan in the Supreme Court's decision in *Clare County Council v McDonagh* [2022] IESC 2. While stated in a somewhat different context, his words are entirely applicable and true to the experiences of the Traveller Community in the provision of goods and services.

2. Given the proliferating levels of exclusion from the most basic of services and widespread discrimination and racism that the Irish Traveller Community faces in their daily lives, the legislative mechanisms available to them to combat and challenge such discrimination are critical to the reduction and elimination of racism. As well as the substantial challenges in accessing the provision of legal services, representation, and legal information access more generally, where Travellers do engage with and avail of the fora for the determination of discrimination complaints, they face significant further hurdles in the form of procedural barriers inherent to the Irish legal system and peculiar to the Equal Status Acts and related legislation.

3. These experiences are compounded for victims of discrimination who are Travellers, whereby they experience even more significant burdens in bringing forward legal challenges given their ethnicity - the Traveller Community experiences broad societal exclusion from services, including access to justice and legal remedy, demonstrating significant and proliferating unmet legal need.

4. The purpose of this report is to chart the practice of equal status law in Ireland, highlighting the difficulties that those alleging discrimination are faced with, and consider comparative alternatives from a variety of experiences across the Member States of the European Union, as well as the United Kingdom, so as to determine what best practice might look like.

B. CONTEXT

5. It has now been almost 23 years since Ireland transposed Council Directive 2000/43/EC of 29 June 2000, the Race Directive, into Irish law via the Equal Status Act 2000. At the time, then Minister for Justice, Equality and Law Reform hailed it as "a core element of [the Government's] equality agenda" and part of a wide-ranging programme of measures aimed at "the promotion of greater equality and the full participation of all groups in the economic, social and cultural life of this country."[1]

6. At the time of its passing in 2000 the legislation had been in development for quite some time following ill-fated referrals of the Equality Bill 1996 and Equal Status Bill 1997 to the Supreme Court.[2] In those cases the Supreme Court held that certain reasonable accommodation obligations were inconsistent with the Constitutional protections for private property. Since its commencement the legislation has been amended on a number of occasions, most notably by the Intoxicating Liquor Act 2003, which changed the forum for discrimination claims in or on licenced premises to the District Court, and by the Workplace Relations Act 2015, which replaced the Equality Tribunal with the Workplace Relations Commission.

7. While it is recognised that legislative perfection is unattainable, the last twenty years of the Equal Status Act have highlighted its strengths, shortcomings and contradictions. The purpose of this paper is not to exhaustively identify and address each issue that arises. Rather, this report aims to set out common problems that do emerge and to chart how other countries address them. For the purposes of this exercise, this report has examined the experiences of the United Kingdom, which post-Brexit, continues to apply the domestic legislation transposing the Race Directive, the Equality Act 2010. It will also consider practice from EU Member States such as Germany, Sweden, Malta, Spain, Denmark, Austria, the Netherlands, Belgium, Finland, France, Italy and Greece.[3]

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[1] Dáil Deb 20 May 1999 Vol 505 No 2.

[2] *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

[3] These countries have been selected on the basis of the accessibility of information relating to their equality regimes. Where a Member State has not been included, this is not intended to be a comment or reflection on the individual national system. A complete comparative analysis is beyond the scope of this report.

8. This report will start by considering the overarching principles arising from Union law and its related commentary, it will then plot the legislative landscape as it applies to the applicable substantive provisions in relation to discrimination in the provision of goods and services generally as well as the procedural framework for the determination of claims of discrimination in Ireland. It will then set out the procedural and substantive issues that arise in the practice and litigation of discrimination claims, comparing and contrasting the Irish approach to those in the aforementioned jurisdictions that are and were bound by the European Union's anti-discrimination *acquis*. The paper will then finally consider the discrete matter of redress and how it has been applied in Ireland and elsewhere.

C. PERSISTENT ISSUES IN LITIGATING EQUALITY

9. At the time of the transposition of the Race Directive into Irish law, it was particularly innovative in Ireland, not only providing for the first time a mechanism for redress for substantive discrimination in the provision of goods and services for protected characteristics (at the time all but the housing assistance ground) but also attempting to address the inherent difficulties in litigating such case – in particular, conceptualising both direct and indirect discrimination, providing for the reversal of the burden of proof, prohibiting victimisation, designating bodies for the promotion of equal treatment allowing legal standing for associations and other legal entities and obligating effective, proportionate and dissuasive sanctions.

10. Translating the ideals of the Race Directive into reality is, of course, another matter entirely. the Race Directive allows a margin of appreciation to national authorities in choosing form and methods of implementation, however it remains binding as to the result to be achieved. While, Member States have a generous latitude in the transposition of directives, as will be set out below, there are a markedly different approaches taken across the Union (even to extent that questions as to whether or not the parts of the Race Directive have been transposed at all arise).

11. Notwithstanding the amount of leeway and discretion that Member States have in choosing how to transpose the Race Directive, Member States are still subject to the fundamental principles of Union law. National courts are obliged to ensure the

implementation of Union law, subject to the principle of national procedural autonomy, and in accordance with the principle of equivalence,[4] and the principle of effectiveness.[5] These requirements are inherent to the "*fundamental right to effective judicial protection constitute*[s a] *general principle* […] *of Community law*."[6] To that end, EU law recognises a general right of access to a judicial body for the resolution of disputes deriving from EU law and so Member States are obligated to ensure that the rights and entitlements of the Race Directive are accessible to those who fall within its personal and material scope.

12. Since the Race Directive's implementation deadline of 19 July 2003, much has been said of the past 20 years of the practice of equality law. In many respects, critiques of the Race Directive's implementation have been consistent, suggesting a lack of appetite across Member States to address these difficulties. As noted by the Fundamental Rights Agency in 2013:

> *A 2012 FRA report on access to justice in cases of discrimination identified a variety of obstacles to victim support.* […] ***Among these are scarce human, financial and time resources of those providing legal advice and assistance as well as limited accessibility to and availability of a lawyer to provide legal advice and assistance.*** *Costs of legal advice and assistance and strict criteria governing legal aid also pose obstacles. Moreover, scarce resources of equality bodies and intermediaries also limit the potential of these entities, as do more interpersonal factors such as a lack of understanding of what should be involved in support to victims of discrimination, including emotional, personal and moral aspects. Formal provision of emotional, personal and moral support could reduce risks involved in providing other forms of support through staff taking on responsibilities beyond the call of duty in areas where they are not necessarily adequately trained or supported.* ***FRA research has also shown that the complexity of legal procedures can pose a barrier to accessing justice, and that it has implications for the costs of***

[4] That the domestic procedural rules enforcing Union law cannot be less favourable than those applied to similar domestic law actions.

[5] That national procedural rules cannot be used to defeat the exercise of rights conferred by Union law or make their exercise excessively difficult. See, *inter alia*, Case C-312/93 *Peterbroeck Van Campenhout SCS & Cie v Belgian State*, 14 December 1995, at [12], Case C-45/76 *Comet v Produktschap voor Siergewassen*, 16 December 1976 at [12]-[16], Case C-96/91 *Commission v Spain*, 9 June 1992 at [12] and Case C-78/98 *Preston and Other, 16 May 2000 at* [31] and [57]. In

[6] See, *inter alia*, Case C-154/04 and C-155/04 *Alliance for Natural Health and Others*, 12 July 2005 at [126], and Case C-432/05 *Unibet,* 13 March 2007 at [37], Case C-378/07 *Angelidaki*, 23 April 2009, Case C-362/06 P *Sahlstedt v Commission*, 23 April 2009.

> ***procedures.*** […] *These restrictive requirements concern either the form or content of introductory documents needed to initiate court proceedings and/or to specific pre-trial procedural steps again required to start court proceedings.* [7] [emphasis added]

13. These FRA reports indicate that issues such as access to legal aid, the inherent complexity of national procedural rules, the lack of support for victims and the underfunding of equality bodies are common themes across Europe in the implementation of the Directive.[8]

14. While the difficulties posed in substantively establishing discrimination are myriad, the specific decisions taken by Member States in transposition obviously have a profound effect on the ability of complainants to access justice – even simply to the extent of having the substance of their claim heard.

> *Limited legal standing, insufficient guarantees of equality of arms for complainants vis-à-vis defendants, and limited application by judges of the shift in the burden of proof also undermines such access. Moreover, where there is in general an insufficient level of sensitivity and not enough is done in order to protect complainants and witnesses from victimisation, access to justice is equally endangered. Overly lengthy procedures in the system of justice also play a major role, as does uncertainty among complainants at the outset of a case about the length of the procedure. Where some quasi-judicial-type equality bodies do not have the means to issue binding decisions or where there is a lack of suitable tools beyond penalties and compensation or insufficient powers to remedy a situation, such as to reinstate people to their pre-discrimination situation, access to justice is also hindered. Similar factors are the low levels of compensation awarded, limited follow-up on the enforcement of decisions or rigid rules of procedures that are less suitable for cases of discrimination. Insufficient resources available for equality bodies and other institutions with an equality remit are also reducing the potential to fight discrimination.*[9]

15. As the FRA set out in a wide-ranging study as far back as 2011, Similar issues persist across the Union. These include the deterrent effect of both length of proceedings and

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[7] Fundamental Rights Agency, *Opinion 1/20123 EU Equality Directives* (1 October 2013) at 16, accessible via: https://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf.
[8] *ibid.*
[9] *ibid* at 19.

high legal costs in some jurisdictions.[10] Indeed, costs, both in relation to lawyer and court fees, is an often an insurmountable barrier to access to justice, given that complainants may not have sufficient means available. Where the value of the claim is low, the fear of incurring costs, given the prevalence of the 'loser-pays' rule across the Union, acts as a significant disincentive. This is compounded by ongoing limited access to civil legal aid, following post-Financial Crisis austerity. The core implication being that those with limited financial means often have no recourse to equality litigation. .[11]

16. The availability and the quantum of redress varies tremendously depending on the national context. The actual amounts awarded will often be relative to the national standard of living and subject to specific ceilings on payment, such as in Ireland.[12] Article 15 of the Race Directive states that redress must be 'effective, proportionate and dissuasive', which will of course be relative and context-driven,[13] however, it appears that very modest awards are the norm.[14]

17. Ethnographic research has identified common threads of complaint and issues among victims of discrimination, those who proceed to make complains in discriminations cases, lawyers and organisations representing complainants and bodies established for the promotion of equal treatment.[15] In particular, recognising:

    i. the format of equality legislation and complaints mechanisms as well as structures in terms of geographical proximity to complaint mechanisms,
    ii. the usability, fairness and effectiveness of procedures,
    iii. access to legal advice and assistance and provision of other forms of support, such as emotional, personal and moral,

[10] Fundamental Rights Agency, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2011) at 42-51, accessible via: https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf
For the specific context of Irish Traveller experiences in the District Court see Court S Morgan-Williams, F Donson 'Courts as a Site of Redescrimination: Experiences of the Traveller Community in the Irish District Court' (2023) L Flower, S Klosterkamp (Eds.) (eds). *Courtroom Ethnography*. London: Palgrave/Springer International Publishing AG.
[11] *Supra* n.10 at 23 and Fundamental Rights Agency, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2011) at 42-51, accessible via: https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf and Fundamental Rights Agency, *The Racial Equality Directive: Application and Challenges* (2012) at 21, accessible via https://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf.
[12] Fundamental Rights Agency, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2011) at 58.
[13] See Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării,* 25 April 2013, at [61]-[71] and Case C-30/19 *DO v Braathens Regional Aviation AB*, 15 April 2021.
[14] Fundamental Rights Agency, *Opinion 1/20123 EU Equality Directives* (1 October 2013) at 24, accessible via: https://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf.
[15] Fundamental Rights Agency, *Access to Justice in Cases of Discrimination in the EU: Steps to Further Equality* (2012), accessible via: https://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf.

iv. rights awareness and accommodation of diversity

as core issues consistently identified within equality litigation across Member States.[16]

18. Accordingly, it would seem that many of the issues identified in this report are common not just to Ireland but arise in different ways across the Member States – while some are particular to the Irish experience.

D. THE LEGISLATIVE LANDSCAPE

I. Equal Status Acts 2000-2018

19. It is prudent to begin by describing the legislative scheme that applies in Ireland. The Equal Status Acts 2000-2018 ('the ESAs') are the cornerstone of domestic equal status law, transposing not just the Race Directive, but also the Council Directive 2004/113/EC, the Gender Goods and Services Directive, as well as providing for protections beyond those found in Union law. The ESAs are split into five parts, the first three of which are the most relevant to set out.

Part I - Preliminary Issues

20. Part I of the ESAs provides for the definition of discrimination, as well as applicable definitions. Sections 3(1), in relevant part, defines 'discrimination' as:

> [D]*iscrimination shall be taken to occur—*
>
> *(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) or, if appropriate, subsection (3B), in this Act referred to as the 'discriminatory grounds') which—*
>
> *(i) exists,*
>
> *(ii) existed but no longer exists,*
>
> *(iii) may exist in the future, or*
>
> *(iv) is imputed to the person concerned,*

[16] *ibid* at 7-9.

(b) where a person who is associated with another person—

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination, or

(c) where an apparently neutral provision would put 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.

21. Section 3 accordingly provides for both direct and indirect discrimination, as well as discrimination by association, where a person is treated less favourably than another person would be treated in a comparable situation where a protected ground is associated with them. It also covers imputation, where someone treats another person less favourably than another person in a similar situation because someone has incorrectly assumed they fall under a protected ground.

22. Section 3(2) provides for the discriminatory grounds or 'protected grounds'– gender, civil status, family status, sexual orientation, religion, age, disability, victimisation, housing assistance, race and membership of the Traveller Community. In respect of membership of the Traveller Community, it provides:

> *that one is a member of the Traveller community and the other is not (the "Traveller community ground")*

23. Section 2(1) defines Travellers as:

> *The community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.*

Part II - Discrimination and Related Activities

24. Part II of the ESAs proceeds then to set out the law in relation to discrimination in the disposal of goods and services, accommodation, educational establishments, clubs, advertising, as well as sexual and other harassment. It additionally makes it an offence to procure or attempt to procure prohibited conduct.

25. Discrimination in the context of educational establishments – defined as including preschool services, primary and post-primary schools, as well as further and third-level education – while broadly prohibited, contains exceptions in relation both to gender, facilitating single-sex schools, and religion, facilitating denominational schools.[17]

26. Clubs too are given unique statutory provision under sections 8 to 10. Where a club engages in discrimination, any person may apply to the District Court to determine if it is discriminating, which may result in the suspension of its registration. A club in this context is defined as one that has applied for or holds a certificate of registration for the purposes of the Registration of Clubs Acts 1904 to 1999, that is a club licensed to sell alcohol to members and visitors. Such clubs are not entitled to discriminate in the provision of goods and services to the public but are entitled to maintain membership criteria that would otherwise be considered discriminatory. For example, the club is for a specific group, such as of a particular religion or gender. Non-registered clubs – that is, clubs without a license to sell alcohol – that provide goods and services to the public and not just to members – are covered by the orthodox provisions of the ESAs.

27. Section 11 crucially prohibits harassment and sexual harassment where the victim of such harassment avails or seeks to avail of a good or service, accommodation or access to education. Section 11(5) defines harassment and sexual harassment as:

> *(i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and*
> *(ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,*

[17] Section 7(1) of the Equal Status Act 2000.

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

Discriminatory advertising is also prohibited pursuant to section 12. It is prohibited to publish, display or cause to be published or displayed, an advertisement which indicates an intention to discriminate, harass or sexually harass or might reasonably be understood as indicating such an intention.

28. Part II additionally provides for a number of exemptions from the material scope of the ESAs in relation to, amongst others, immigration-related activities of the State, preferential treatment of positive measures intended to promote equality, and insurance-related measures. Section 14(1)(a) additionally exempts any enactment or order of a court from constituting discrimination – in essence entirely exempting legislation from the material scope of the ESAs, which appears to not find any basis in the Race Directive.[18]

29. Section 15 provides that any action taken in good faith by or on behalf of the holder of a licence or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the provisions of the Licensing Acts, 1833 to 1999, shall not constitute discrimination.

Part III - Enforcement

30. Part III provides for the procedural aspects of enforcement of the ESAs, also dealt with in detail below.

31. Where a person, a 'complainant', alleges that they have been subjected to prohibited conduct – that is discrimination or harassment – they may make a complaint to the Workplace Relations Commission ('WRC') and seek redress.[19] Prior to doing so, the person must first notify the 'respondent', the person alleged to have engaged in the prohibited conduct, within two months of the incident of the nature of the allegation

[18] J Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (ICCL, 2012) at 50-32.
[19] The exception to this is where a complaint relates to the gender ground, in which case the appropriate forum is the Circuit Court.

and of their intention to complain to the WRC should they be dissatisfied with the respondent's response. They may also question the respondent so as to obtain material information. This two-month period may be extended to four months "*for reasonable cause*" by the WRC and exceptionally, where fair and reasonable in the particular circumstance of the case to do, the WRC may disapply the notification requirement, having regard to the extent the respondent is aware of the circumstances of the prohibited conduct and any risk of prejudice.[20]

32. Once either the respondent has replied to the notification, or a month has elapsed since the notification was made, the complaint may be referred to the WRC but not more six months since the incident, extendable to 12 months again for "*reasonable cause*". Such an extension or refusal to extend is appealable to the Circuit Court within 42 days. Per section 26, where a respondent fails to reply to a notification, supplies false or misleading information or supplies information that would not assist a person in determining whether to refer the complaint to the WRC or not, inferences may be drawn in the determination of the complaint – that is, choosing the most likely explanation from the facts at hand.

33. Part III makes provision for mediation, which is held in private and the terms of settlement of which are binding on the parties. If either party contravenes any such term, the contravention shall be actionable in court per section 24 of the ESAs and section 39(6) of the Workplace Relations Act 2015, as well as investigation of the complaint by the WRC upon referral – referred to as adjudication. Adjudication by an Adjudication Officer is subject to both Part III, as well as the provisions of the Workplace Relations Act 2015, as amended, set out below in detail.

34. Following the decision of the Supreme Court in *Zalewski v Workplace Relations Commission* [2021] IESC 24, the Workplace Relations (Miscellaneous Provisions) Act 2021 amended the ESAs to expressly provide that an adjudication shall be held in public unless determined there are the existence of special circumstance. While the ESAs do not define "*special circumstances",* the WRC has provided guidance as to examples, including complaints involving minors, circumstances where a party has a disability or medical condition, which they do not wish to be revealed, or cases

[20] Section 21(3)(d) of the Equal Status Act 2000.

involving issues of a sensitive nature such as sexual harassment complaints.[21] Following *Zalewski,* evidence must also be given on oath or affirmation per section 25(2B)(a).[22]

35. Sections 33 to 37A provide for additional powers for adjudication officers, including the power to enter premises and obtain information reasonably believed to be relevant to their functions under the ESAs, and to compel persons to furnish information to the WRC and to attend to answer questions. Failure to comply with such instructions and the obstruction of an adjudication officer are offences.

36. Section 38A of the ESAs provides for the burden of proof, transposing Article 8 of the Race Directive. It states that where in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.

37. Section 27 of the ESAs provides for redress. This can take either or both of two forms:

> *(a) an order for compensation for the effects of the prohibited conduct concerned; or*
> *(b) an order that a person or persons specified in the order take a course of action which is so specified.*

38. Compensation is capped at the maximum amount that could be awarded by the District Court in civil cases in contract, currently set at €15,000 per section 15 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013. It is arguable that such a cap runs contrary to the requirement within Article 15 of the Race Directive that sanctions for discrimination must be effective, proportionate and dissuasive.

39. An order to take a course of action which is so specified is undefined within the ESAs but has been interpreted by the WRC in various decisions so as to include undertaking equality training, per *Brennan v KOA Kitchen* ADJ-00038210, and the creation or re-evaluation of policies, per *Kalinova v Bellerophon Ltd* ADJ-00031408.

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[21] See Workplace Relations Commission, '*WRC Guidance on Workplace Relations (Miscellaneous Provisions) Act 2021',* accessible via https://www.workplacerelations.ie/en/complaints_disputes/adjudication/workplace-relations-miscellaneous-provisions-act-2021/

[22] Section 25(2B)(a) of the Workplace Relations Act 2015, as amended by the Workplace Relations (Miscellaneous Provisions) Act 2021.

40. Sections 29 and 30 obliges the decisions of the WRC to be in writing and if the parties request it or the WRC sees fit, include a statement of reasons for that decision, as well as being supplied to the parties and published. In practice, written decisions with the reasons therefor are issued for all complaints and these are published on the WRC's website.

41. Per section 28, appeals may be taken against decisions of the WRC to the Circuit Court within 42 days of the date of decision and has the same powers of redress. No further appeal lies from a decision of the Circuit Court other than an appeal to the High Court on a point of law.

42. Where a party wishes to enforce a decision of the WRC or mediated settlement, the provisions of section 43 of the Workplace Relations Commission Act 2015 apply, as set out in further detail and considered below.

Part IV - General Provisions

43. Finally, Part IV sets out a number of miscellaneous provisions, including details as to the various offences created within the ESAs, expenses and the making of regulations.[23] Most relevant within Part V is section 32, which provides for vicarious liability. This states that anything done by a person in the course of his or her employment or by an agent for another person with their authority shall be treated as done by that person's employer, whether or not it was done with the employee's knowledge or approval, or by that other person. In the case of an employer, it is a defence to show that they took took such steps as were reasonably practicable to prevent the employee from doing that act or acts of that description.

II. Intoxicating Liquor Act 2003

44. While the ESAs regulate the establishment and enforcement of discrimination claims generally, they do not apply in the specific instance of where discrimination or harassment on the basis of a protected ground occurs "*on, or at the point of entry to, licensed*

[23] Part IV previously referred to the Equality Authority, which has since been repealed and replaced by the Irish Human Rights and Equality Commission Act 2014.

premises". This is regulated by section 19 of the Intoxicating Liquor Act 2003 ('the 2003 Act').

45. At the time of its introduction in Dáil Éireann in 2003, no distinction between discrimination on or off a licenced premises existed, with all cases being heard by the former Equality Tribunal and subject to the ESAs. With the 2003 Act, the government ostensibly proposed the transfer of jurisdiction to the District Court in order that all licensing-related matters be before that court and to strengthen the range of penalties available, so that the District Court may "*bring to heel*" licensees for discriminatory practices. Then Minister for Justice, Equality and Law Reform Michael McDowell denied the government was "*trying to get at the equality industry* […] *at the behest of publicans*".[24] However, as Walsh notes, the proposal arose not on foot of concerns from the victims of discrimination or equality bodies, rather it arose directly as a result of lobbying and "*pressure exerted*" by the vintners associations.[25] Indeed, as was noted in response at the time, the transfer of jurisdiction to the District Court is in direct contradiction to the very reason for the establishment of the Equality Tribunal and undermines the central purpose of making accessible a course of redress for those who suffer discrimination.[26]

46. As the TEJP have noted elsewhere, the result of this change has been a significant reduction in the number of such cases being taken.[27] The removal of the Equality Tribunal's jurisdiction has, in particular, had a disproportionate impact on Travellers, as prior to the introduction of section 19 of the 2003 Act, the majority of cases of discrimination on licensed premises were taken by Travellers. Indeed, Travellers are 38 times more likely to suffer discrimination in accessing pubs than the white Irish

[24] Joint Committee on Justice, Equality, Defence and Women's Rights Vol 1 No 28 (11 June 2003) https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_equality_defence_and_womens_rights/2003-06-11/2/

[25] Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (ICCL, 2012) at 11.

[26] Joint Committee on Justice, Equality, Defence and Women's Rights Vol 1 No 28 (11 June 2003).

[27] 'Courts as a Site of Redescrimination: Experiences of the Traveller Community in the Irish District Court' S Morgan-Williams, F Donson (2023) 'Courts as a Site of Redescrimination: Experiences of the Traveller Community in the Irish District Court', L Flower, S Klosterkamp (Eds.) (eds). *Courtroom Ethnography*. London: Palgrave/Springer International Publishing AG. [Details] (2022). See also, 'Barriers to Access to Justice for Members of the Traveller Community: Responding to Discrimination in Accessing Goods and Services' (2022) In:D Newman, F Gordon (eds). *Access to Justice in Rural Communities*. Oxford: Hart.

population.[28] Specifically, this amounts to a 98% reduction in cases pre-2003.[29] Between September 2004 and February 2005 only nine claims of such discrimination were lodged compared to an average of 514 claims annually taken with the Equality Tribunal between 2000 to 2003.[30] The 2022 report of Irish Human Rights and Equality Commission ('IHREC') reviewing the operation of section 19, recommended that urgent steps need to be taken by the Government to bring the complaints mechanism available for claims in respect of discrimination which occurs on or at the point of entry to a licensed premises in line with the redress mechanism that is available in respect of such claims in all other forums – that is, within the WRC.[31]

47. The 2003 Act defines the concepts of discrimination (excepting accommodation-related discrimination) and harassment by reference to the ESAs but provides little other detail as to the extent to which the ESAs apply, particularly the detailed provisions relating to the notification and initiation of complaints, and the burden of proof, or even if they apply at all.

48. The central distinction between equal status complaints under the ESAs and the 2003 Act is, of course, the forum for enforcement. Section 19(2) provides that person who claims that prohibited conduct has been directed against him or her on, or at the point of entry to, licensed premises may apply to the District Court for redress. As set out above, a similar approach is taken under the ESAs in the case of registered clubs.

49. Section 3 provides that the District Court may make such order as it considers appropriate in the circumstances, including (and implicitly not limited to):

> *(a) an order for compensation for the effects of the prohibited conduct to be paid to the applicant by the licensee,*

[28] FLAC, *Submission to the IHREC Consultation Review of section 19 of the Intoxicating Liquor Act 2003* (July 2021), accessible via https://www.flac.ie/assets/files/pdf/flac_submission_to_the_ihrec_consultation_review_of_section_19_of_the_intoxicating_liquor_act_2003.pdf

[29] Michael Clifford, 'Travellers' pub claims fall to nine' (*Sunday Tribune*, 19th June 2005) (print edition), cited in ERA Response to the 'Blueprint to Deliver A World-Class Workplace Relations Service' (April 2012) accessible via https://www.workplacerelations.ie/en/publications_forms/blueprint_consultation_responses_-_may_2012.pdf

[30] *ibid.*

[31] IHREC, *Report of a review of section 19 of the Intoxicating Liquor Act 2003 carried out pursuant to section 30 of the Irish Human Rights and Equality Commission Act 2014* (February 2022) at 64, accessible via https://www.ihrec.ie/app/uploads/2022/08/Review-of-the-Intoxicating-Liquor-Act-pursuant-to-section-30-of-the-IHREC-Act-Final.pdf.

(b) an order that the licensee of the licensed premises concerned take a course of action specified in the order,
(c) an order for temporary closure of the premises […].

50. As with the ESAs, the maximum compensation is the District Court's contract jurisdiction of €15,000 and appeals may be brought to the Circuit Court to a decision of the District Court and no further appeal lies, except to the High Court on a point of law. Section 19(9)(a) additionally makes provision for vicarious liability ion terms similar to section 42 of the ESAs.

51. Section 19(5) provides that an order may, if the Court thinks fit or if any of the parties requests it, include a statement of the reasons for the decision. In practice, in contrast to the WRC, the decision and reasons are typical given *ex tempore* – that is, at the time of hearing the complaint – and without the issuance or publication of a written decision.

52. Somewhat oddly, section 19(11)(a) provides that the ESAs shall cease to apply in relation to prohibited conduct occurring on, or at the point of entry to, licensed premises on or after the commencement of this section. How that interacts with the other applicable provisions of the ESAs, for example section 15 - that any action taken in good faith by or on behalf of the holder of a licence for the sole purpose of ensuring compliance with the provisions of the Licensing Acts shall not constitute discrimination – is entirely unclear. As will is set out below, this has led to the application of many of the provisions of the ESAs by analogy, despite section 19 seeming to expressly except their application.

III. Workplace Relations Act 2015

53. Finally, for the sake of completeness, it is necessary to set out the provisions of the Workplace Relations Act 2015, which regulates the Workplace Relations Commission and its adjudication officers in the determination of claims under the ESAs, as set out above. For the purposes of the ESAs, Part 4 - Complaints and Disputes is the key section.

54. Section 38 provides for the appointment of mediation officers as considered appropriate, and section 40 provides for the appointment of adjudication officers. Provision is also made for the terms and removal of adjudication officers and that they shall be independent in the performance of his or her functions. The 2015 Act does not stipulate the qualifications of adjudication officers, only that they are eligible for appointment following an open competition for that purpose. In practice, adjudication officers do not need to be legally qualified, an aspect of the 2015 Act that was upheld by the Supreme Court in *Zalewski*, although often have experience in employment-related fields.[32] Adjudication officers are either independent contractors engaged on a contract for service basis and paid on a per diem rate or employed as civil servants on permanent assistant principal contracts.[33]

55. Section 43 of the Act provides for the enforcement of decisions of the WRC, which are not in themselves self-executing. Where a respondent fails to carry out a decision of the WRC in accordance with its terms before the expiration of 56 days from the date on which the notice in writing of the decision was given to the parties, the complainant can apply to the District Court to make an order for the respondent to carry out the decision. The District Court can also, where it considers appropriate, order the respondent to pay interest on compensation owing at the rate referred to in section 22 of the Act of 1981, in respect of the whole or any part of the period beginning 42 days after the date on which the decision of the adjudication officer is given to the parties and ending on the date of the order. Such an application must be made on notice to the respondent and in the relevant district where the respondent ordinarily resides or carries on their business.

56. Where the District Court orders enforcement of a decision of the WRC, the complaint is entitled to their costs for the application, in line with the Legal Services Regulation Act 2012 and Order 53 of the District Court Rules. A complainant can then avail of any of the various enforcement mechanisms available, such as seizure by the sheriff.

57. Adjudication hearings of the WRC may take place in person or remotely. Pursuant to SI 359/2020 Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (Section

[32] *Zalewski v Workplace Relations Commission* [2021] IESC 24 at [137] (O'Donnell CJ).
[33] Workplace Relations Commission, Annual Report 2022 (2023) at 11, accessible via https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2022.pdf

31) (Workplace Relations Commission) (Designation) Order 2020, the WRC has been designated pursuant to section 31 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 as a body to hold hearings before it by remote hearing by means of electronic communications technology. Section 31(1) and (2) provide that the WRC may hold hearings remotely unless the WRC of its own volition or following the making of representations by a person concerned, is of the opinion that to do so would be unfair to the person or would otherwise be contrary to the interests of justice.

E. PROCEDURAL ISSUES

58. As is apparent from the statutory provisions and intersecting and differing legislative schemes set out above, the bringing of a claim for discrimination is hardly straightforward, involving differing time limits, fora and opaque rules depending on the place and form of the alleged prohibited conduct. As stressed elsewhere by the TEJP and reflected in research findings, this difficulty both with access and identifying the correct jurisdiction has resulted in significant barriers to justice for ethnic minority victims of discrimination, such as members of the Traveller Community.[34]

59. This jurisdictional morass is difficult to reconcile with the stated purposes of the Race Directive. Recitals 19 and 20 state there must be "*adequate means of legal protection*", an "*effective level of protection*" and "*the effective implementation of the principle of equality*" and, as set above, the application of the fundamental principles of Union law. Given the variety of legal traditions across the Member States, the question then arises as to what Ireland can learn from the manner in which the Race Directive has been transposed elsewhere so as to enable the effective enforcement of the Directive. This section will set out the prevailing criticisms of the Irish approach and contrast them with those done across the Union and the UK.

I. Time Limits and Procedural Formalities

60. As set out above, the ESAs contain a number of relevant time limits for the bringing of complaints to the WRC. First, under section 21(2)(a) the complainant must notify

[34] *Supra* n.10, n.27 and see also S Morgan-Williams, *Barriers to Justice for Irish Travellers: Rediscrimination within the Irish Equality System.'* (2022) *'Barriers to Justice for Irish Travellers: Rediscrimination within the Irish Equality System.'*. Traveller Equality & Justice Project, Cork, Ireland.

the respondent within two months of the incident of its nature and the intention of the complainant to proceed to complain to the WRC where resolution is not forthcoming. This is extendable by a further two months by the WRC for reasonable cause. Second, following this, a complaint cannot be referred to the WRC later than six months from the date of the incident, again extendable to 12 months for reasonable cause.

61. The Race Directive itself contains no detail or stipulations as to the requirement to notify a respondent at all, nor does it contain any time limits for the initiation of proceedings. In this regard, consistent with the principle of subsidiarity and national procedural autonomy and the purposes of a directive, Article 7 provides, in relevant part:

> 1. *Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.* […]
>
> 2. [Paragraph 1 is] *without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.*

62. That is not to say that Member States have absolute free reign in the concrete imposition of time limits when transposing. The European Court of Justice has on a number of occasions highlighted that while time limits exist to ensure certainty and finality, there must be a balance struck in ensure adequate access to justice, and time limits may not prevent the right to proceed before a court.[35]

63. The narrowness of the notification period raises questions as to the ability of victims of discrimination to effectively defend their rights and access judicial protection and redress under the Race Directive. The extent to which a victim may be aware of the

[35] See, *inter alia*, Case C-45/76 *Comet BV v. Produktschap voor Siergewassen*, 16 December 1976; Case C–208/90 *Emmott v Minister for Social Welfare and Attorney General,* 25 July 1991; Case C–410/92 *Johnson v Chief Adjudication Officer*, 6 December 1994; Case C–63/08 *Pontin v T-Comalux SA*, 29 October 2009, Case C–246/09 *Bulicke v Deutsche Büro Service GmbH*, 8 July 2010; Case C–406/08 *Uniplex (UK) Ltd v NHS Business Services Authority*, 28 January 2010.

notification period and be in a position to comply with it is absolutely crucial to their ability to access justice. The purpose of the notification period in itself, in contrast to other areas of civil litigation just a tort or contract where there is no direct analogy, is highly questionable. Even in the context of the transposition of the Race Directive in the sphere of employment, there is no such requirement. As Employees who are the victims of workplace discrimination can simply make a complaint to the WRC within six months.[36]

64. The presumed rationale of this is to facilitate the immediate and prompt resolution of issues prior to proceeding to adjudication. However, in practice it constitutes a real and considerable bar to challenging discrimination for protected classes of persons – many of whom may vulnerable, lacking in means or unfamiliar with their rights. In practice, the two-month period (or at best, four-month period) means that the failure to notify constitutes a *de facto* statute bar and shorter time limit to bringing proceedings.

65. Of course, the WRC retains a discretion to extend both the notification period and the period within which to bring a complaint by a further two and six months respectively for reasonable cause which insulates it from criticism to a certain extent. However, both the interpretation and application of 'reasonable cause' has been inconsistent and no data is provided regarding the rate at which extensions are provided. The interpretation of reasonable cause is typically taken from *Cementation Skanska v Carroll* DWT38/2003, an employment case, before the Labour Court. The Court in considering whether reasonable cause exists, noted that it was for the complainant to show that there were "*reasons which both explain the delay and afford an excuse for the delay"*:

> *The explanation must be reasonable, that is to say that it must make sense, be agreeable to reason and not be irrational or absurd. In the context in which the expression 'reasonable cause' appears in statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present the claim within the six-month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter*

[36] See section 77(5) of the Employment Equality Act 1988, as amended.

of probability, that had those circumstances not been present he [or she] would have initiated the claim in time.

66. This has been interpreted variously to mean that there must be some identifiable factor that prevented notification or the making of a complaint within the time limit, and not simply a lack of awareness of it. Such an interpretation places the burden firmly on the complainant to show why the time limit was missed, however marginal, rather than on the respondent to demonstrate prejudice. However, the WRC has also applied a more lenient standard, applying the dicta of O'Malley J in *G v Department for Social Protection* [2015] IEHC 419 at [161] where she referred to the ESAs as being a "*remedial social statute*" that "*should be construed widely and liberally*". See, *inter alia*, *A Bride v A Hotel* ADJ-00037223 and *Kalinova v Bellerophon Ltd* ADJ-00031408.

67. Further to the periods within which a respondent must be notified and the complaint made to the WRC, is the fact and manner of notification itself. Section 21(2) requiring a complainant to notify the nature of the allegation and their intention to complain to the WRC if dissatisfied with a respondent's response, or lack thereof. While section 21(5) empowers the Minister for Justice to make regulations prescribing the form to be used for such a notification and its response, the Minister has not done so and instead the WRC has adopted 'ES.1' and 'ES.2' forms for those purposes, which may be used. While there is no obligation to use the forms, (see *Galway-Mayo Institute of Technology v Employment Appeals Tribunal* [2007] IEHC 210 at [24]), respondents may object, questioning whether section 21(2) has been complied with where they have not, or attempt to make preliminary objections as to whether the nature of the allegation has been fully disclosed. For example, this can arise if the notification format used does not refer to the particular legislative phraseology found in the ESAs, such as expressly stating they had been harassed. The imposition of procedural rigidity and increasing adversariality, discussed further below, act to further preclude access to justice for discrimination.

68. In relation to notification, from the Member States examined and the UK, there appears to be no identifiable obligatory requirement to notify a proposed respondent in advance of the bringing of proceedings or the making of a complaint, or less a specified period within which to do so. As will be set out below, almost all countries

examined maintain redress systems that are either wholly or partially, in conjunction with complaints mechanisms to equal treatment bodies, situated in their normal or courts systems. That is, where a person alleges discrimination, this is determined by a court rather than a tribunal or other quasi-judicial body, who then determines what sanction applies if required. Accordingly, this means that it may be that pre-action notification in some form is an existing requirement of their national procedural civil litigation rules, but there does not appear to be any equal status-specific form of notification that acts as a condition precedent to proceedings. The lack of express requirement in equality legislation for a defined period of notification calls into questions its necessity at all and may tend to suggest that other jurisdictions need to consider it or, if they did, considered it as a barrier to justice.

69. In contrast to notification, there is an extremely wide spectrum of applicable time periods for the bringing of complaints themselves across the countries examined, and, like Ireland, differences where it relates to goods and services or employment. Broadly, the countries examined tend to either make no distinction between the applicable time limit for discrimination complaints and for other civil causes of action, such as in tort or contract, and those that like Ireland maintain a specific period in this area. In Germany, the General Act on Equal Treatment specifies that complaints where redress is sought must be brought within two months of the alleged incident and there is no provision for an extension.[37] In Greece, the three-month limit in Greece is very strict, regardless of the sector.[38] In England, Wales and Scotland, the Equality Act 2010 provides for a six month time limit in the bringing of proceeding period is extendable if 'just and equitable' to do so.[39] In Sweden, the Discrimination Act equally has a specific time limit of two years from the date on which the prohibited act occurred.[40] Similarly, Finland also provides for a two-year period under its Non-Discrimination Act.[41]

70. In relation to the latter approach, the Danish Act on Limitations does provides that there is an absolute three-year period of limitation, which means that a procedure must

[37] Allgemeines Gleichbehandlungsgesetz §21 Abs. 5 AGG (BGBl. I, 1897).
[38] European Network of Legal Experts in Gender Equality and Non-Discrimination, A comparative analysis of non-discrimination law in Europe (2022) at 86, accessible via https://www.equalitylaw.eu/downloads/5812-a-comparative-analysis-of-non-discrimination-law-in-europe-in-2022.
[39] Equality Act 2010, section 118(1)(a) and (b).
[40] Diskimineringslag (2008:567), Chapter 6, section 6.
[41] Yhdenvertaisuuslaki 1325/2014 section 26.

be initiated three years at the latest, after the unlawful violation has occurred.[42] In the Netherlands, where it relates to a discriminatory administrative act, in principle, an appeal must be lodged within six weeks of the day after the day on which the contested decision was delivered.[43] As discrimination or harassment constitutes a tort in Dutch law, civil legal procedure provides the action must be initiated before the general five-year limitation period has expired.[44]

71. Accordingly, given the notification requirement, Ireland is very firmly at the bottom-end of limitations periods for making complaints for redress in the countries examined. While there is clearly quite a degree of divergence in approaches, plainly a number of jurisdictions have determined that a generous time period does not represent an imbalance between the rights of the complainant and of the respondent in discrimination cases and such an approach is consistent with that taken in the employment discrimination context.

II. Legal Aid

72. While the Race Directive does not expressly make provision for legal representation or legal aid, access to legal aid has been identified in European Union law as falling within the right to an effective remedy under Article 47 of the Charter, and the rights of the defence, a fundamental principle of EU law now enshrined within Article 48. As well as this, access to legal aid could arguably fall within the right to good administration under Article 41. The jurisprudence of the European Court of Human Rights also applies under Article 6, right to a fair trial (access to justice) Article 13, the right to an effective remedy, and Article 14 with Article 8, protection from discrimination and the right to family and private life respectively.

73. While the Court of Justice of the European Union has not expressly located an entitlement to civil legal aid for those who cannot afford it for the purposes of the Race Directive, there are a variety of cases in other areas that would suggest this is the case mutatis mutandis – see, *inter alia,* Case C-169/14 *Sanchez Mocillo and Abril García*, Case C-199/11 *Europese Gemeenschap v. Otis NV and Others*, C-279/09 *DEB Deutsche*

[42] Forældelseslov, Sections 3 and 4, Consolidated Act No. 1238 of 9 November 2015
[43] Algemene wet bestuursrecht, Article 6(7)
[44] *Burgerlijk Wetboek* Article 3:310

Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland and *Airey v Ireland* (App No 6289/73).

74. In Ireland, the civil legal aid system is administered by the Legal Aid Board under the Civil Legal Aid Act 1995, as amended and its related regulations. For normal civil court proceedings, in order to qualify for civil legal aid, one must meet a means test and a merits test. To satisfy the means test, one must have earnings and assets under a particular threshold. To satisfy the merits test, one must demonstrate that, as a matter of law, there are reasonable grounds for instituting, defending, or, as may be the case, being a party to, the proceedings. Additionally, that they are reasonably likely to be successful in the proceedings, assuming that the facts put forward by them in relation to the proceedings are proved. It must also be shown that proceedings are the most satisfactory means by which the result sought by the applicant or a more satisfactory one, may be achieved. Finally, having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant it.[45]

75. Section 29(2)(b) of the 1995 Act provides that that outside of the explicitly delineated courts, legal aid may be awarded for a case "conducted in any court or before any tribunal for the time being prescribed by the Minister […] *if provided by a ministerial order*". As to date this has not occurred, and so civil legal aid does not extend to the WRC. Accordingly, the complainants under the ESAs are unable to obtain representation by the Legal Aid Board in this regard. Notwithstanding this, the Legal Aid Board can provide legal advice to complainants under the ESAs – that is written or verbal advice as to their particular circumstances.[46]

76. Accordingly, where a victim of discrimination cannot afford legal representation, in light of the high cost of legal services in Ireland, they will have little choice but to represent themselves.[47] This clearly disincentivises the making of complaints, resulting in an obvious inequality of arms where a respondent is likely in a position to afford and indeed instruct legal representation. This, compounding the barriers to accessing

[45] Section 28(2) of the Civil Legal Aid Act 1995.
[46] Section 25 and 26 of the Civil Legal Aid Act 1995.
[47] See Kelly Review Group, *Review of the Administration of Civil Justice Report* (2020) at 267, which relies upon World Bank Group, 'Doing Business 2020 - Country Profile Ireland' (2020), accessible via https://www.gov.ie/pdf/?file=https://assets.gov.ie/100652/b58fe900-812e-43f2-ad8d-409a86e7c871.pdf#page=null

justice facing victims of discrimination. While the presence of lawyers in the system inexorably leads to increases in the very formalistic and adversarial processes that this report seeks to critique, it is simply inescapable that those who are legally represented have better outcomes before the WRC.[48]

77. To add to this, the WRC also does not have any jurisdiction in relation to the awarding of legal costs. While in the context of civil proceedings, costs are typically awarded to the successful party,[49] private legal practitioners may be willing to engage in conditional fee arrangements whereby they agree to waive their fee if they lose thus providing representation to those who may have reasonable prospects of success. Yet no such incentive arrangements exist in the WRC under the ESAs. This results in complainants either determining not to pursue complaints or having to navigate a complex legal scheme at worst unaided, or at best supported by an advocate.[50]

78. As noted above, and discussed in more detail below, the majority of jurisdictions examined locate their discrimination redress procedures comfortably within their court systems. While this is not necessarily "best practice", it appears to broadly mean that there are no separate rules applicable in relation to civil legal aid for discrimination cases – for better or for worse – and that complainants are subject to the orthodox application of those rules, as if they were applying for civil legal aid in any other area. Absent detailed comparative ethnographic research into both the reality of civil legal aid systems across Europe and their application to complainants in discrimination cases, it is difficult to know with any degree of certainty whether the existence of civil legal aid is of practical use. However, save for section 19 and cases related to registered clubs, civil legal aid simply does not exist in Ireland for discrimination litigation. It is somewhat trite to say then that even a poorly functioning or unevenly applied system is better than none at all.

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[48] See Donnelly, Hofer, Korn, LeBlanc, Stallings, Trebucq and Webb, *A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland* (Trinity College Dublin, 21 April 2021) at [9]-[10] and Appendix – WRC cases under the Employment Equality Act, accessible via https://www.flac.ie/assets/files/pdf/a_report_on_the_absence_of_legal_aid_for_employment_equality_cases_in_ireland34.pdf. While the report relates to employment equality case before the WRC, rather than equal status cases, it is difficult to identify any principled reason why this would differ for the latter.

[49] See discussed below in further detail in relation to the jurisdiction of the Intoxicating Liquor Act 2003.

[50] See the Equal Access Project developed by the Free Legal Advice Centres (FLAC) and the Irish Network Against Racism (INAR) to equip advocates with skills and knowledge to represent claimants before the WRC, accessible via https://www.flac.ie/news/eap/

79. Of the jurisdictions examined, almost all had provision for civil legal aid in discrimination cases, subject to the particular means and/or merits tests applicable in each country. For example, in England and Wales, discrimination in goods and services cases in the County Court were legally aided subject to a means test per sections 8-12 and section 43 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Normal civil legal aid was also available in Germany,[51] Malta,[52] Denmark,[53] France,[54] Italy,[55] and Greece.[56] A number of countries examined do seem to have very minimal or limited access to civil legal aid available, calling into question their practical accessibility – for example, Sweden,[57] the Netherlands,[58] and Belgium.[59] Relatedly, in several jurisdictions, the instruction of lawyers in certain courts was obligatory, whereby persons could not represent themselves, which brought with it representation and provision of civil legal aid where required.[60]

III. The Adjudication Process

80. Fundamental to Ireland's transposition of the Race Directive is the adjudication process itself at the WRC. While initially intended to be more informal than the civil courts system so as to take complainants into a more inquisitorial rather than adversarial environment, creeping procedural rigidity in the interpretations and applications of the ESAs and the Workplace Relations Act 2015 themselves, and arising from a number of court cases such as *Zalewski* have resulted in intimidating vista for the victims of discrimination.

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[51] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Germany 2022* at 79, accessible via https://www.equalitylaw.eu/downloads/5713-germany-country-report-non-discrimination-2022-3-26-mb

[52] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Malta 2022* at 63 https://www.equalitylaw.eu/downloads/5738-malta-country-report-non-discrimination-2022-1-25-mb

[53] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Denmark 2022,* accessible via https://www.equalitylaw.eu/downloads/5714-denmark-country-report-non-discrimination-2022-1-41-mb

[54] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – France 2022* at 88*,* accessible via https://www.equalitylaw.eu/downloads/5734-france-country-report-non-discrimination-2021-pdf-1-88-mb-2

[55] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Italy 2022,* accessible via https://www.equalitylaw.eu/downloads/5771-italy-country-report-non-discrimination-2022-1-14-mb

[56] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Greece 2022* at 66*,* accessible via https://www.equalitylaw.eu/downloads/5807-greece-country-report-non-discrimination-2022-1-47-mb

[57] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Sweden 2022* at 65, accessible via https://www.equalitylaw.eu/downloads/5729-sweden-country-report-non-discrimination-2022-1-49-mb

[58] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Netherlands 2022*, accessible via https://www.equalitylaw.eu/downloads/5769-netherlands-country-report-non-discrimination-2022-1-33-mb

[59] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Belgium 2022* at 95, accessible via https://www.equalitylaw.eu/downloads/5770-belgium-country-report-non-discrimination-2022-1-84-mb

[60] See, for example, France above at 87.

81. While the Irish courts have over a long line of cases underlined the importance and centrality of procedural rights,[61] the recent decision of the Supreme Court in *Zalewski,*[62] has of been particular impact. In a challenge to the constitutionality of the procedures in the Workplace Relations Act 2015, the Court held that as the WRC was administering justice within the meaning of Articles 34 and 37 of the Constitution, certain aspects of that Act were therefore unconstitutional. These included the lack of provision of the giving of evidence under oath or affirmation and the lack of penalty for perjury, and that its proceedings were not by default held in public. As well as this, the Court upheld a number of provisions, such as the enforcement of WRC decisions in the District Court and that adjudication officers need not be legally qualified. This resulted in a variety of changes per the Workplace Relations (Miscellaneous Provisions) Act 2021, set out above.

82. The result of these various procedural cases, including *Zalewski,* has been to ossify procedural rigidity into almost every aspect of quasi-judicial decision-making in Ireland, often prioritising procedural rights at the expense of substantive rights and turning processes intended to be inquisitorial, informal and flexible, into ones that are adversarial, formal and rigid. Even a forum that was professedly intended and designed to be accommodating, malleable and unaffected could not escape the inexorable rising tide of strict Irish proceduralism.

83. As set out above, section 25 of the ESAs requires the investigation of the complaint by an adjudication officer appointed by the Director of the WRC. While this phraseology may suggest a flexibility to the process by which the complaint is determined, in practice, complaints are adjudicated in an adversarial or quasi adversarial manner taking on a more court-like approach. Parties may make written submission in advance of the hearing of the complaint, the hearing of the complaint will (at least in respect of a respondent) typically involve legal representatives, the complaint will give their evidence on oath or affirmation first as to the circumstances of the complaint and is subject to cross-examination by the respondent. The respondent may then give evidence and in turn be subject to cross-examination by the

[61] See *inter alia, Re Haughey* [1971] IR 217, *Glover v BLN Ltd* [1973] IR 388, *Kiely v Minister for Social Welfare (No.* 2) [1977] IR 267, *McDonald v Bord na gCon* [1965] IR 217, which emphasised the right to be heard, to notice, and to make representations,
[62] *Zalewski v Workplace Relations Commission* [2021] IESC 24.

complainant. All parties may be asked questions by the adjudication officer throughout and the hearing will typically conclude with oral legal submissions and concluding remarks by both parties. While none of these aspects are in themselves problematic *per se*, they are emblematic of the court-style process that the WRC is supposed to avoid, particularly given that the complainant may not be legally represented.

84. Complainants will also face the variety of preliminary objections identified above – for example, whether or not the notification period has been complied with, whether the referral of the complaint was made to the WRC in time, whether they have reasonable cause to extend time, whether the notification complies with the requirements of section 21(2), whether they have identified the legal identity of the respondent correctly. This is all before even considering a complainant's ability to adequately represent themselves and put forward a sufficient basis to shift the burden of proof to the respondent.[63]

85. Of the jurisdictions examined, all situate their adjudication processes for discrimination in relation to goods and services firmly within their general courts or administrative courts system, albeit that many maintain separate tribunal or other quasi-judicial-type systems for discrimination in the field of employment and labour disputes. As well as providing for recourse through the courts system, a number additionally maintain parallel administrative processes for the determination of disputes, sometimes under the auspices of the national body established for the promotion of equal treatment under Article 13 of the Race Directive. The manner in which these bodies function differ significantly, with some being empowered to make binding determinations as to cessation of discrimination, and some non-binding functions although, depending on the country, these determinations enjoy an almost coercive or moral effect. Complaints to these bodies are often without prejudice to an entitlement to pursue court proceedings for redress, however many are not suspensory of the applicable national time limits for the making of complaints.

86. In the England and Wales, a discrimination complaint is taken in the County Court, in contrast to employment-related complaints which are taken in the specialist

[63] See section 38A of the ESAs and *Mitchell v Southern Health Board* [2001] 12 ELR 201.

Employment Tribunal.[64] In Germany, Malta, Sweden, Denmark, Austria, Finland, the Netherlands, Belgium, France, Italy and Greece, complainants similarly proceed in the their civil courts system, or their administrative courts where it relates to a decision or action of the State, in some cases.[65] Notably, Spain appears to be an outlier to the extent that there are only sanctions available in the field of employment and for disability, but not in the other material areas of the Race Directive on the grounds of racial or ethnic origin, albeit that criminal sanctions do exist, calling into question the adequacy of the transposition.[66]

87. A number of countries examined additionally maintain parallel systems of complaint to non-court bodies who may issues opinions or decisions as to the content of the dispute, albeit that often those determinations are of no legal effect and the bodies have no jurisdiction to issues sanctions. In the Netherlands, the Netherlands Institute of Human Rights is an independent quasi-judicial body who can hear complaints, typically where the parties are not legally represented, and then issue opinions in relation to them. While the opinions do not have any binding force, a complainant can proceed to pursue a monetary remedy in court in which the opinion can be authoritative.[67]

88. In Finland, the National Non-Discrimination and Equality Tribunal has the jurisdiction to prohibit the continuation of conduct that is discriminatory or victimising or can confirm a settlement between parties to a dispute. Its decisions are binding and can be appealed against to an administrative court. The Tribunal may also order a party to fulfil particular obligations and impose a conditional fine, whereby the complainant can return to request its imposition if the Tribunal's order has not been complied with. The Tribunal may issue an order for injunctive relief to prohibit the continuation or repetition of discrimination.[68]

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[64] Equality Act 2010, section 114 and 120.

[65] See *Germany 2022* at 79, *Malta 2022* at 63, *Denmark 2022* at 75, *France 2022* at 88, *Italy 2022* at 48, *Greece 2022* at 66, *Sweden 2022* at 65, *Netherlands 2022* at 69, *Belgium 2022* at 95, *Finland 2022* at 9-10 and 45-46, and European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Austria 2022* at 52, accessible via https://www.equalitylaw.eu/downloads/5726-austria-country-report-non-discrimination-2022-1-16-mb

[66] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Spain 2022* at 83-84, accessible via https://www.equalitylaw.eu/downloads/5761-spain-country-report-non-discrimination-2022-1-57-mb

[67] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Netherlands 2022* at 69, accessible via https://www.equalitylaw.eu/downloads/5769-netherlands-country-report-non-discrimination-2022-1-33-mb

[68] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Finland 2022* at 9-10 and 45-46, accessible via https://www.equalitylaw.eu/downloads/5733-finland-country-report-non-discrimination-2022-1-04-mb

89. In Denmark, as well as the option to pursue a complaint in court, the Danish Board of Equal Treatment is empowered to issues binding decisions and can even award compensation, and its decisions can be appealed before the civil courts. The Board is entitled to take the case to court if the discriminating party is not willing to pay.[69]

IV. Issues Specific to the Intoxicating Liquor Act

90. The bifurcation of the equal status system between the District Court in relation to licensed premises (and in relation to registered clubs) and the WRC for all other instances of prohibited conduct, creates additional procedural difficulties and hurdles to the victims of discrimination.[70]

91. First, is the forum itself creates issues for complainants – the District Court is expressly legalised, adversarial, and subject to defined rules and processes. Even to the extent that the WRC provides flexibility in its processes, no such flexibility applies in the District Court. Where there may be some limited chance of a respondent not being legally represented at the WRC – for example, utilising an advocate or human resources representative instead – there is practically no chance of this in the District Court. Additionally, the District Court doing justice in public means that complainants must give evidence in open court, in the busiest jurisdiction in the country – in the local area where they have been subjected to discrimination or harassment. The experience can therefore have a (re)traumatising effect on complainants.[71]

92. Second, is the lack of clarity surrounding the process and framework for the determination of section 19 complaints in the District Court. It remains entirely unclear how the ESAs and section 19 interact and what aspects apply, and which do not apply. There is no express transposition of the shifting of the burden of proof set out in Article 8 of the Race Directive. Given that the District Court rarely gives written judgments and there appear to be no published written judgments of the District Court

[69] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Denmark 2022* at 8-9 accessible via https://www.equalitylaw.eu/downloads/5714-denmark-country-report-non-discrimination-2022-1-41-mb

[70] Ref to TEJP 2022 and upcoming research reflecting how this effects Traveller perceptions of operation of the Equality system? E.g recent research reflects the implications of this upon socially-excluded groups experiencing high levels of discrimination such as the Traveller Community. For more see: TEJP,

[71] See TEJP report #

in relation to section 19 at all, how the District Court actually determines section 19 cases is entirely opaque, differing significantly from district to district, particularly given that the low number of section 19 cases nationwide mean district judges may be unfamiliar with them.[72]

93. Third, is the additional lack of procedural clarity as to the manner in which these cases are determined. Section 19 does not make any express specification for notification or time limits, and District Court judges often apply an *ad hoc* six-month initiation limit, applying the approach of the WRC and ESAs, that has no basis in legislation or the rules of court. As well as this, there continues to be a lack of clarity relating to what Court fees are payable by a complainant when initiating section 19 cases, as there is no express provision for them, with many districts applying *ad hoc* fees. Data requested under the Freedom of Information Acts from the Court Service by TEJP in 2022 found that within the districts in Cork and Kerry the fees requested for stamp in section19 notice of applications ranged from €25-€185. However, the Courts Service District Court Directorate later confirmed that the correct amount is €85. This lack of clarity is emblematic of the difficulties in taking section 19 cases and lack of clarity for courts staff arising from low levels of litigation arising – which in itself discourages complaints.[73]

94. Fourth, there is significant procedural rigidity within section 19 itself. As set out above, the District Court has jurisdiction in relation to prohibited conduct "*on, or at the point of entry to, licensed premises"*. Accordingly, it first falls to a complainant to prove that the alleged conduct occurred inside or at the point of entry to the licensed area of the premises, with complainants having to undertake searches to ensure that the premises is licenced and that the alleged conduct physically occurred within the licensed area – this can even involve having to attend the District Court office for the district in which the premises is licenced and take up physical copies of the floor plans used when the respondent had applied for the license. Even expecting complainants to do so, this can cause difficulties where the respondent has a mixed-use premise that has both licenced and non-licenced areas – such as a hotel. This may mean – counterintuitively - that a

[72] IHREC, *Report of a review of section 19 of the Intoxicating Liquor Act 2003 carried out pursuant to section 30 of the Irish Human Rights and Equality Commission Act 2014* (February 2022) at 43-46, accessible via https://www.ihrec.ie/app/uploads/2022/08/Review-of-the-Intoxicating-Liquor-Act-pursuant-to-section-30-of-the-IHREC-Act-Final.pdf.
[73] See TEJP report

complainant who has been the subject of discrimination in relation to the booking of a hotel room may have to bring proceedings in the District Court where the refusal took place within the licenced area, despite that if the same booking was taken over the phone they would have to bring proceedings in the WRC, or a complainant who has been the subject of discrimination in the sale of alcohol may have to bring proceedings in the WRC where the refusal took place at, say, the entrance to the hotel rather than the entrance of the hotel bar. Indeed, where ambiguity exists as it often does, it may mean that a complainant must initiate proceedings in both the WRC and District Court simultaneously.

95. Fifth, in contrast to the WRC, civil legal aid is available in the District Court in relation to section 19 complaints. While this is of course very welcome, it can lead to oddities. As in the instance above, where a person has been granted civil legal aid for section 19 proceedings and there is ambiguity in relation to where the prohibited conduct occurred, and it is determined by the. District Court that the prohibited conduct did not occur in or at the point of entry to the licenced premises, and so it has no jurisdiction, this would mean that if the complainant has initiated a complaint under the ESAs in the WRC, they would not be legally represented there.

96. Finally, is the matter of costs. In contrast to the WRC, where a complainant is unsuccessful in relation to their complaint, as set out above, costs will be awarded against them and they risk a bill for the respondent's legal team that could be in the thousands of euros. While the general principle that costs are awarded to the winning party works to discourage frivolous or vexatious claims, it discourages even meritorious claims where the complainant is of limited means as they may be unwilling to take the risk, particularly too if they do not qualify for civil legal aid and be able to afford legal representation. The rationale for this principle does not carry through either in circumstances where there is no such risk at the WRC.

97. Not one of the jurisdictions examined had a separate forum for determining discrimination on or at the point of entry to licenced premises, or related to licenced premises of alcohol in anyway, or an analogous exception to the normal determination of such complaints for particular distinct thematic or geographic reasons. While a number, if not all, of the jurisdictions examined had separate procedural rules and

some separate tribunals or specialised courts for employment-related discrimination, for example in England and Wales discrimination in goods and services go to the County Court, whereas discrimination in employment is dealt with by the Employment Tribunal,[74] there was nothing comparable to the Irish regime under the 2003 Act. Section 19 appears to be a uniquely Irish solution to an Irish problem, or at least a uniquely Irish solution looking for a problems.

98. In relation to the matter of costs, as set out above, as the majority of countries examined situate their enforcement mechanisms within their court systems, as well as those that also maintain parallel processes that do not make provision for the award of compensation, the allocation of costs is dependent on the orthodox rules of civil procedure. As noted by the Fundamental Rights Agency, the vast majority of European systems utilise a 'loser-pays' approach, known in Ireland as costs following the event.[75] For the countries examined, Sweden deserves a particular mentioned however as the Swedish Discrimination Act expressly makes an exception for this rule in Swedish civil procedure in the case of goods and services cases and provides that each party may be ordered to bear its litigation costs, if the party that lost the case had reasonable grounds for bringing the dispute to court.[76]

99. While ostensibly this appears to constitute a reasonable solution to ameliorate the harshness of the loser-pays rule, it appears that in practice its application is an exception rather than the rule and there is little clarity about how the courts apply this exception.[77] In principle, it does demonstrate that a more appropriate balance is capable of being struck so as to no disincentivise victims from pursing complaints on the basis of the risk of losing alone, however narrow.

F. REDRESS AND ENFORCEMENT

I. Effective, Proportionate and Dissuasive Sanctions

100. Article 15 of the Race Directive provides:

[74] Equality Act 2010, section 120.
[75] See Fundamental Rights Agency, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2011) at 59-61 and Figure 13, accessible via: https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf
[76] See *Diskimineringslag* (2008:567), Chapter 6, section 7 and Swedish Code of Judicial Procedure, Chapter 18, section 1.
[77] European Network of Legal Experts in Gender Equality and Non-Discrimination, *Country Report – Non-Discrimination – Sweden 2022* at 65, accessible via https://www.equalitylaw.eu/downloads/5729-sweden-country-report-non-discrimination-2022-1-49-mb

> *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.* […]

101. Both the WRC and District Court can award financial redress up to €15,000 – the District Court's maximum jurisdiction in contract. While ostensibly, this monetary jurisdictional limit may seem not insignificant, it acts in itself as a barrier to truly effective redress given that redress when awarded very rarely reaches the upper limit of the amount allowable. Compensation awarded by the WRC typically tends to be quite modest and much closer to the lower end – often between €1,000 to €3,000.

102. The existence of such a limited jurisdiction calls into question whether the redress awardable can be truly effective, proportionate, and dissuasive. This can mean that even where a respondent has been found to have engaged in prohibited conduct there may be little incentive to change, where the quantum of compensation is likely to be low, even leaving aside entirely the very low risk of actually losing.

103. Undoubtedly, an order to "take a course of action" has the potential to be a striking remedy, amounting in many respects to a nearly unrestricted power akin to a mandatory injunction where the Adjudication Officer can instruct the respondent to take whatever measure is deemed appropriate to resolve the discrimination, such as undertaking trainings or ceasing certain actions. In practice, the use of this remedy is under-utilised, with adjudication officers preferring to impose financial penalties instead. It may be that absent any guidance or guidelines from the WRC or the courts on the limits and exercise of this power, adjudication officers are unclear as to how or in what circumstances it should be used.

104. As has been the case in relation to the other issues examined, the approaches taken to redress in the countries considered also somewhat varied in relation to the remedies available – albeit that almost all examined provided for some form or monetary compensation where discriminatory conduct was established – and were especially varied in relation to the quantum of redress provided, which as noted above by the

Fundamental Rights Agency, may reflect be relative to the national standard of living and subject to specific ceilings on payment, as well as the differing traditions of the country.[78]

105. As a whole, no single national enforcement system appears to be truly all-encompassing. Essentially, they are all mostly based on an individualistic and remedial – rather than a preventative – approach. As noted above, in Spain, penalties have been established in the employment field and for disability but not in the other fields covered by the Race Directive. There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Sweden and the United Kingdom.[79]

II. Enforcement

106. As set out above, decisions of the WRC are not in themselves self-executing and capable of enforcement, rather where a respondent does not comply, it then falls to a successful complainant to seek enforcement in the District Court. Obviously, this is in itself cumbersome, a complainant would need to navigate complexities of the legal system both to actually get the order enforced – which means all of the costs that entails – and thereafter, for example, engage the sheriff. While in *Zalewski,* the Court noted that the requirement to have the order enforced by a court was an important factor in determining that the Workplace Relations Act 2015 was constitutional, the complexity of this process is undeniable.

107. In the case of a failure to comply with an order to take a course of action, the question also arises as to how a successful complainant can go about seeking enforcement – potentially seeking enforcement of the order in the District Court in the usual way and thereafter seeking attachment and committal for contempt.

[78] Fundamental Rights Agency, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2011) at 58.
[79] European Network of Legal Experts in Gender Equality and Non-Discrimination, A comparative analysis of non-discrimination law in Europe (2022) at 102-105 accessible via https://www.equalitylaw.eu/downloads/5812-a-comparative-analysis-of-non-discrimination-law-in-europe-in-2022

108. Given that as the jurisdictions examined all situate their redress mechanisms within their court system and subject to their rules of civil and/or administrative procedure, it may be again that additional enforcement of judgments in favour of victims of discrimination via the courts thereafter does not arise and they may have a more straightforward means of accessing redress. While this has been identified as part of the reason for the constitutionality of the 2015 Act, under section 43, the Workplace Relations Commission has the power to seek enforcement of an award on behalf of a successful complainant, where the decision of the adjudication officer has not been carried out. The extent to which the WRC actually utilises this power seems to be quite limited – with only nine enforcements undertaken in relation to Equal Status decisions since 2018 - and should be expanded for ESAs.[80]

G. CONCLUSION

109. As noted from the outset, it is apparent when reviewing the implementation of the Race Directive that no one system is perfect. However, that is not to say that we cannot learn from our European neighbours and endeavour to improve insofar as possible the process by which discrimination complaints are determined. We should aim to do this so as to ensure the dignity of victims, the rights of all involved, and to crucially attempt to realise the aims of the Race Directive – that is to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin and to ensure a common high level of protection against discrimination in all the Member States.

110. From the countries examined, the following observations and conclusions can be made:

a. First, the notification and referral time limits within the ESAs appear to be firmly at the lower end of those across Europe. Given the narrowness of these periods, it seems the reality that these have the effect of precluding access to justice and while there is remit for the periods to be extended, in order to be practicable, they would be extended considerably further.

[80] Workplace Relations Commission, Response to Freedom of Information Request (24 August 2023).

b. Second, while the majority of jurisdictions locate their enforcement and redress mechanisms within their civil or administrative court systems, this procedural rigidity is ameliorated by legal aid systems that extend to discrimination in goods and services cases, as well as a number of countries maintaining parallel less formal quasi-judicial complaints mechanisms that have some limited power to make findings or award redress. While in Ireland, despite the creeping procedural ossification, the inquisitorial and more flexible Workplace Relations Commission remains preferrable, however legal aid should immediately be extended to it. The lack of availability of legal representation demonstrably negatively impacts victims of discrimination and that legal aid is available for the Intoxicating Liquour Act cases and not elsewhere is incoherent. This requirement has become all the more urgent given the decision of the Supreme Court in *Zalewski* and the resultant increasing formalism of the WRC.

c. Third, no jurisdiction examined bifurcates their enforcement mechanisms for alcohol or licencing-related matters and other forms of discrimination and indeed none appear to do so within categories of goods and services at all. Locating licenced premises discrimination in the District Court is opaque, intimidating and with little rational basis. There should be no distinction between forms of goods and services discrimination with regard to the forum for enforcement.

d. Fourth, there are wide discrepancies across Europe in relation to the quantum and form of redress provided. The modest awards in this jurisdiction are by no means unusual compared to other countries, however there is a lack of engagement with their effectiveness, proportionality, and dissuasiveness. Ordering a course of action has the capacity to be a useful and powerful mode of sanction but its potential remains unexplored. Further guidance and use of these power should be examined. The cumbersome mechanisms for enforcement of awards of redress by the Workplace Relations Commission adds needless expense and complexity to what is supposed to be a more flexible forum. While this has been identified as part of the reason for the constitutionality of the 2015 Act, the Workplace Relations Commission should significantly expand seeking enforcement of ESA decisions on behalf of successful complainants.

111. This report has sought to identify common barriers that arise in the litigation of equal status cases in Ireland and to examine the approaches taken elsewhere in order to identify what solutions, if any exist. As noted by the UCC TEJP in its report on Barriers to Justice for Irish Travellers Seeking to Challenge Discrimination, the practical operation of the current system and the very significant barriers to accessing it not only undermines access to justice for marginalised groups, but effectively rediscriminates vulnerable victims.[81] The procedural issues identified in this report act to further perpetuate inequalities and further entrench societal exclusion and can act to defeat the purpose of the Race Directive entirely.

112. To that end, and indeed even as an extension of the principle of sincere cooperation owed by Ireland to the other Member States and to the Union itself, it is crucial therefore that action is taken to reform of the equal status framework, ensuring that vulnerable groups are adequately provided for and protected, and it may be that inspiration for reform can be taken from interrogating the experiences of our neighbours. The on-going review of the ESAs provides a unique opportunity to reorientate the framework for a more equal and effective system, and it is clear there are a variety of ways that this can be achieved.

[81] UCC TEJP, *Barriers to Justice for Irish Travellers Seeking to Challenge Discrimination* (2 May 2022) accessible via https://www.ucc.ie/en/media/projectsandcentres/tejp/IRCNFReportFinal2022(1).pdf