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Response to the "Blueprint to Deliver A World-Class Workplace Relations Service" April 2012

Introduction

Equality and Rights Alliance (ERA) welcomes the opportunity to respond to the proposals set out in the "Blueprint to Deliver a World-Class Workplace Relations Service". For the purposes of this submission, ERA has a particular focus on the proposal to integrate the Equality Tribunal with the first instance body.

About Equality and Rights Alliance

ERA is a coalition of 171 civil society groups (NGOs, and trade unions), academics and individual activists working together to protect and strengthen the statutory equality and human rights infrastructure[1].

Response to Blueprint

ERA supports Minister Bruton's ambition for reform of this area and his goal of developing a "world class" work place relations service and employments rights framework.

There are some welcome proposals outlined in the Blueprint such as a focus on reducing delays by setting targets to schedule hearings within three months of complaints being lodged. Also, the Blueprint usefully recognizes the need for a new and more effective method of enforcing awards. Across Europe equality tribunal type bodies have faced this issue and follow-up has been prioritized in a number of instances. Unfortunately the Blueprint is silent on how this is to be done.

There are, however, a number of worrying proposals set out where, it would seem, insufficient consideration has been given to the unique nature of equality complaints and to the need for an accessible infrastructure for people seeking redress under the Employment Equality Act 1998-2008 and the Equal Status Act 2000- 2008[2].

From an equality perspective, the starting point for any consideration of the proposals for the Workplace Relations Service should be the issues of under-reporting and accessibility. There are remarkably high levels of under-reporting of incidents of discrimination. Research data from the CSO, analysed by the ESRI and the Equality Authority, indicates high levels of perceived discrimination and low levels of reporting

[1] For a list of our member organisations : http://www.eracampaign.org/about-us

[2] ERA has sent out the key issues in regard to the unique features of the Equality Tribunal that should be preserved within the new structures in our previous submission to the Department : **http://tinyurl.com/6bfsmx5**

discrimination. The groups most likely to experience discrimination are the least likely to report it[3].

Accessibility is central to ensuring the new body does not further aggravate the current situation of under-reporting. The Equality Tribunal has a valuable and strong commitment to accessibility and it is important that this should be mainstreamed into the new structures.

Key issues of concern regarding the Blueprint proposals from an equality perspective:

- Some of the proposals in the Blueprint may be in breach of EU anti-discrimination Directives and the EU Charter of Fundamental Rights:
    - There is no guarantee of an independent hearing of a claim at the first tier. The Blueprint allows the state to decide through legislation the most appropriate method of resolving disputes.
    - The proposals regarding the striking out of claims without a hearing and the need for claimants to send written submissions setting out why their claim should not be struck off, do not appear to take account of issues of accessibility for groups under equality legislation. Not every potential claimant will have the requisite literary capacity to deal with written submissions or the resources to access to legal advice for this purpose. The current investigative model of the Equality Tribunal is of assistance in this regard.
    - There is a requirement under the EU Directives to shift the burden of proof in cases of discrimination once the complainant has established different treatment. This procedure has been important in enabling people to bring forward cases of discrimination. It is necessary and important that it should continue but no reference is made to it in the Blueprint.

- The introduction of a €50 fee for making a complaint will act as a barrier to those without means and will serve as a disincentive to those already concerned about the risk of taking a case. This is particularly problematic in cases of discrimination relating to access to employment, dismissal and access to goods and services. The claimant may, for example, be a migrant worker who has not had their wages paid, or a person with a disability who has been denied access to employment and has no income other than social welfare. We strongly recommend that this fee would not be imposed.

- The Blueprint does not appear to have regard to the fact that the majority of potential claimants do not have access to legal advice or union support. This is

[3] Overall 12.5 per cent of the Irish population aged 18 years and over said that they had been discriminated against in the preceding two years. 9% reported discrimination accessing services and 7% reported Work-related discrimination. In 71% of cases discrimination was experienced on more than one occasion. 60% of those who experienced discrimination did nothing about it. Only 6% of those who experienced discrimination took any formal action including taking a case under equality legislation (Russell et al 2008 "The Experience of Discrimination in Ireland-Analysis of the QNHS Equality Module" the ESRI and the Equality Authority)

particularly true of potential claimants under the equality legislation who may not even be employees but have complaints concerning access to employment.

- The Blueprint is lacking in clarity as to whether an adversarial or investigative approach will apply to the hearing of cases. In one instance the Blueprint notes that the *'officers role will be to hold a hearing where both parties are given the opportunity to be heard and to decide on the matter'*[4] which indicates a more adversarial approach, yet in another section the Blueprint notes that *'hearings of the WRC will not follow strict rules similar to courts of law'* and *'adjudicators will have a level of discretion to determine their own procedures in the conduct of hearings*[5]*'*. It is critical that the investigative approach to equality cases is maintained. Equality Officers currently have a unique role in seeking the facts, investigating the facts, applying the relevant law and determining the issues. This investigative role is the cornerstone of the legislation.

- There is no reference in Table 3 'Complaints to be dealt with by inspection' to equal pay cases and the powers of the Equality Tribunal to inspect workplaces in hearing these cases. Such cases are difficult to prove and receive considerable and specific mention in the equality legislation.

- While the Blueprint very usefully underscores the need to develop a culture of compliance among employers, this stated commitment is not reflected in the detail. Also there is no reference to the equally critical requirements of effective and dissuasive remedies. European anti-discrimination law explicitly states the right of victims to effective, proportionate and dissuasive remedies. The proposed penalty of €150 for failure to provide for example a payslip or failing or refusing to record deductions would not appear to be an effective, proportionate or dissuasive remedy.

- The Blueprint makes no provision for any type of *Amicus curiae* intervention (which currently exists in the equality legislation). It is also regrettable that the opportunity has not been taken to make explicit provision a case to be taken as a test cases or group or class actions. These would represent a far more efficient use of limited resources than requiring every individual to lodge separate claims.

- The Blueprint allows the registrar to strike out claims 'which are not properly grounded'. This also favours parties with greater resources, capacity and access to legal advice. A claim should not be struck out simply on the basis of a time limit or a view that it is not properly grounded without an independent hearing of the matter. A proper case management system would allow for the proper but considered disposal of matters that are in the incorrect forum.

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[4] Pg 17

[5] Pg 18

- The conciliation and early resolution service suggested appear to be a diminution of the mediation service currently offered by the Equality Tribunal. The Blueprint notes that a "*range of intervention tools will be used including email and telephone communication and, only in exceptional cases meeting directly with the parties"*. This would not appear to be sufficient or appropriate for the mediation of equality claims.

- While uniformity of time limits is to be welcomed, the Blueprint proposes that time may only be extended to twelve months "in exceptional circumstances". This is a considerable diminution on the current provisions, for example, the Employment Equality Act allows time to be extended for up to twelve months for "reasonable cause". Overly strict time limits may lead people to lodge claims simply to comply with time limits and may inhibit resolution of claims.

Equal Status Complaints

A significant gap in the Blueprint is the absence of any mention of what is proposed regarding the equal status function of the Equality Tribunal. ERA believe that the equal status function of the Equality Tribunal should move to the new body.

ERA strongly recommend that equal status cases would not be transferred to the District Court. In 2003, cases under the Equal Status Act 200-2008 involving licensed premises were moved to the District Court under the Intoxicating Liquor Act 2003. Research on the impact of this transfer found that *"the changes in Jurisdiction has resulted in an almost complete reduction in complaints taken under the law in relation to prohibited acts of discrimination*"[6] .Between September 2004 and February 2005 only nine claims of such discrimination were lodged[7] compared to an average of 514 claims annually taken with the Equality Tribunal between 2000 to 2003[8].

The hearing of equal status cases in the District Court would result in a number of significant barriers of access and outcome for claimants:

- The adversarial nature of the District Court is in direct contrast to the more informal investigative model applied in the Equality Tribunal. This will act as a significant barrier to claimants seeking redress under the Equal Status Acts. In the Tribunal, unlike the District Court, neither the complainant nor the respondent has to mobilize or present legal arguments. They merely have to present the facts of the case and the equality officer then investigates these facts, applies the relevant law and makes a finding. This is key to the accessibility of the Equality Tribunal.

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[6] Gogan, S (2005) "From the Equality Tribunal to the District Court" research for the Clondalkin Travellers development group. Pg 5.

[7] Sunday Tribune, 'Travellers pub claims fall to nine' by Michael Clifford 19th June 2005.

[8] Gogan op cit pg 6

- The adversarial nature of the District Court lends itself to both respondents and claimants requiring legal representation. There is no broad right of representation before the District Court as there is before the Equality Tribunal. There is also no provision for granting civil legal aid to enable claimants to meet the costs incurred in taking such cases.

- Claimants and respondents before the District Court may be liable for the costs incurred by the other party. This is not the case for parties seeking redress to the Equality Tribunal.

- The lack of data on cases taken to the District Court would have a significant impact on building a body of case law in regard to equal status cases. The body of case law produced by the Equality Tribunal is extremely important in informing policy, practice and legislative development in the area of equality and anti-discrimination.