

# EQUALITY & RIGHTS ALLIANCE

[www.eracampaign.org](http://www.eracampaign.org)

## About the Equality and Rights Alliance

The Equality and Rights Alliance 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.

## Introduction

The Equality and Rights Alliance is supportive of the ambition of the Minister for Jobs, Enterprise and Innovation, for reform of the statutory employment redress framework. As a coalition of organisations working to address equality and human rights concerns, our main focus is the proposed measures to subsume the powers and functions of the Equality Tribunal within the new Workplace Relations Commission structure and the impact of this on individuals seeking redress under the Employment Equality Acts 1998-2012 and the Equal Status Acts 2000- 2011.

On consideration of the broad thrust of the Workplace Relations Bill 2014, insufficient consideration has been given to the unique nature of equality cases, the particular role of Equality Officers within the Equality Tribunal, and the need for an accessible, inquisitorial infrastructure that can address the high levels of under-reporting of discrimination in Ireland.

It is important to underscore that cases of discrimination extend beyond workplace relations. They cover discrimination in terms of access to employment and to the provision of a broad range of goods and services under the Equal Status Acts 2000-2011. Specific legislation prohibiting discrimination in employment, access to employment and the provision of goods and services draws from EU Equal Treatment Directives and a body of established case law at European level.

From an equality perspective, the starting point for any consideration of the proposals for the Workplace Relations Commission 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 discrimination, with 12.5% of people in Ireland over the age of 18 stating that they have experienced discrimination in regard to employment or the provision of goods and services.<sup>1</sup> More worryingly, the research found

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<sup>1</sup> Frances McGinnity, Dorothy Watson and Gillian Kingston (2012) "Analysing the Experience of Discrimination in Ireland Evidence from the QNHS Equality Module 2010" joint publication for the Equality Authority and the ESRI

that only 10% of those who experienced discrimination took any formal action as a result,<sup>2</sup> in addition, those groups most likely to experience discrimination are the least likely to report it.

Accessibility is central to ensuring the new Workplace Relations Commission does not further aggravate the current situation of under-reporting. The Equality Tribunal had a valuable and strong commitment to accessibility and it is important that this should be mainstreamed into the new structures. The Equality Tribunal has years of specialist expertise in the field of addressing discrimination. It does not operate like an ordinary Court in that it investigates cases and Equality Officers have considerably wide reaching powers. It is not reliant on legal arguments presented by the complainant or the respondent. Cases of discrimination are unique in that the burden of proof passes to the respondent once the complainant has made a prima facie case of discrimination. It is not apparent that any of these important features of the Equality Tribunal will be preserved within the emerging structures.

The Equality and Rights Alliance provide the following observations on the Workplace Relations Bill 2014 for consideration:

### **1. Discretion of Adjudication Officers to permit accompanying person**

Section 41(11) refers to the Adjudicator Officer having discretion regarding whether to permit a person (other than a party to a complaint) to accompany the complainant or respondent at the hearing and to represent the complainant or respondent at the hearing. There is no such equivalent provision under the current equality legislation and such a provision may be in breach of EU Directives and the EU Charter of Fundamental Rights.

The Gender Recast Directive, the Framework Directive and the Race Directive require that EU Member States put in place the necessary judicial and administrative procedures to allow for an effective remedy. If lawyers or any representation can be excluded (as appears to be the case under S41(11)) this could prevent a complainant adequately arguing their claim and gaining an effective remedy.

The Irish Human Rights and Equality Commission designate has a mandate to “work towards the elimination of discrimination”<sup>3</sup> and is the designated body under the EU Race Directive. Article 13 of the Race Directive requires Member States to ensure that the designated body has the competence to provide “independent assistance to victims of discrimination in pursuing their complaints about discrimination”.<sup>4</sup> If lawyers or representatives from the IHREC can be excluded from a hearing, this is likely to breach the requirements of the EU Race Directive and the Equal Status Acts 2000-2011 and the Employment Equality Acts 1998-2012.

Article 47 of the Charter of Fundamental Rights of the European Union confers on every person the right to an effective remedy and to have “the possibility of being advised, defended and represented”. The European Court of Justice has attributed special importance to the principle guaranteed by Article 47 from an early stage in claims concerning alleged

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<sup>2</sup> Ibid pg. 63

<sup>3</sup> Employment Equality Act 1998 S39(a)

<sup>4</sup> COUNCIL DIRECTIVE 2000/43/EC of 29 June 2000: implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Article 13(2)

discrimination under the Equal Treatment Directive. It is questionable whether these rights can be protected if adequate representation is refused or not guaranteed.

**Recommendation:**

- The reference in S41(11) to Adjudication Officers having discretion regarding whether to permit a person (other than a party to a complaint) to accompany the complainant or respondent at the hearing and to represent the complainant or respondent at the hearing, should be deleted.

## **2. Handling of claims with broad scope**

Not all of the employment cases before the Workplace Relations Commission will fall neatly into one area. In instances where cases have a discrimination dimension and a general employment dimension it is unclear how adjudication officers will address such cases. There is no provision within S41 of the Bill for how the various claims will proceed for hearing. For example, will the alleged discrimination, where different standards of proof are required, be addressed separately to a general employment rights concern? At what stage will the complainant be forced to elect between a discriminatory dismissal and unfair dismissal claim? How will Adjudication Officers determine an equality claim where they have parallel investigative powers under S79 of the Employment Equality Act and then proceed to hear other aspects of the claim where no such power arises?

It is also the case that a potential discrepancy arises in regard to the power to compel witnesses. Under the provisions of the Workplace Relations Bill the Adjudication Officers cannot compel witnesses, however, S95 of the Employment Equality Acts 1998-2012 remains in force which prescribes the power of Equality Officers/ Director of the Equality Tribunal to compel witnesses.<sup>5</sup> This could lead to a situation where documents can be used for a discrimination claim where witnesses are compelled to appear but not be permitted to be compelled or the documents used for a claim, for example, under the Organisation of Working Time Act 1997. This artificial distinction will be unwieldy and needs to be clarified.

**Recommendations:**

- Section 41 of the Bill should be amended to provide that where claims have broad employment equality claims will receive a separate hearing in order for the right to an effective remedy to be guaranteed as required under the EU Charter of Fundamental Rights and EU Equal Treatment Directives.
- Section 41 of the Bill should be amended to allow for Adjudication Officers to compel witnesses for all claims before them.

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<sup>5</sup> While the post of Director of the Equality Tribunal will no longer continue following the enactment of the Workplace Relations Bill 2014, the power to compel witnesses will be transferred to the Adjudication Officers since the powers under the Employment Equality Acts S95 are provided to the Director of the Equality Tribunal and delegated to the Equality Officers by the Employment Equality Acts S75.

### **3. Right to an oral hearing**

There is a significant emphasis in the Workplace Relations Bill to dealing with a claim without having recourse to an independent hearing of the matter. This emphasis on dealing with claims by means other than a hearing is provided at first tier level by allowing the Director to refer the claim for resolution to: a case resolution officer, to mediation, or by way of written submission. While the parties to the claim can refuse to have the matter dealt with in this manner, for complainants under equality legislation who may be highly vulnerable, this adds another layer which they must navigate before they have the right to a hearing of the matter. In addition, there is a new provision in the Bill, which is not provided for in equality legislation, whereby the Labour Court can deal with an appeal of a decision by an adjudication officer by way of a written submission only, if this is considered appropriate. Again, the onus is on the parties to refuse to the matter being dealt with in this manner.

There are, therefore, a number of provisions in the Bill that serve to deflect the complainant away from an independent hearing of the claim. These provisions could be in breach of Article 47 of the Charter of Fundamental Rights of the European Union, the EU Equal Treatment Directives and Article 6 of the European Convention of Human Rights.

#### **Recommendation:**

- Section 41 should be amended to ensure an effective judicial process pursuant to the provisions of Article 47 of the Charter of Fundamental Rights, EU Equal Treatment Directives and Article 6 of the European Convention of Human Rights.

### **4. Appeal to the High Court on point of law**

The Workplace Relations Bill 2014, regrettably, proposes the deletion of sections 79(5A) and 79(7) of the Employment Equality Acts 1998-2012. These allow for the Equality Officer, the complainant or the respondent to appeal to the High Court on a point of law arising from the investigation (prior to any decision being made) by the Equality Tribunal or any decision of the Equality Tribunal prior to it being appealed to the Labour Court. By reason of these deletions this provision will not be provided to the Adjudication Officer or to the complainant or respondent at the first tier level but rather will only be provided to the Labour Court during any proceedings (S44(5)) or to a party to proceedings in the Labour Court (S47).<sup>6</sup>

#### **Recommendation:**

- The provisions of S44 should be amended to allow the Adjudication Officer and the complainant or respondent at the first tier level to appeal to the High Court on a point of law, as provided for by S79(5A) and 79(7) of the Employment Equality Acts 1998-2012.

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<sup>6</sup> Section 44 (5)

## 5. Equal Status claims

The Workplace Relations Bill 2014 is devoid of reference to claims under the Equal Status Acts 2000- 2011 and how such claims will be considered. There are several areas in the Bill where the lack of any reference to such claims is particularly noteworthy:

Section 41: presentation of complaints and referral of disputes:

- S41(4)(b) defines “relevant redress provisions” as referring to complaints “*of a contravention of an employment enactment*” or “*in relation to a dispute as to the entitlements of an employee under an employment enactment*”. There is no reference to redress as having any meaning regarding the contravention or dispute in regard to the provision of goods or services.
- S41(1)(2)(3) specifies who constitutes a “complainant” under the provisions of the Bill, and refers to a “complainant” being a person or specified person presenting a complaint that a provision of the Acts specified in Parts 1,2, or 3, set out in Schedule 5, has been contravened. However, there is no reference to either the Equal Status Acts 2000-2011 or the Employment Equality Acts 1998-2012 in Schedule 5.

Section 42: Dismissal of claims by an Adjudication Officer:

- S42(2)(a) notes that a person whose complaint is dismissed as frivolous or vexatious may “*appeal the dismissal to the Labour Court*”. There is no reference to Equal Status appeals to the Circuit Court.

Section 43: Enforcement of decision of Adjudicating Officer:

- S43(1) dealing with enforcement of decisions by an Adjudication Officer notes “*if an employer in proceedings in relation to a complaint or dispute referred to an Adjudication Officer under S41, fails to carry out the decision of the Adjudication Officer*”, there is no reference to failure of provider of a service or goods in this regard.

### Recommendation

- The Workplace Relations Bill should be amended to provide greater clarity regarding the process for handling claims under the Equal Status Acts 2000-2011

## 6. Awarding of costs

It is unclear whether S91 of the Employment Equality Acts 1998-2012, dealing with enforcement by the Circuit Court, is to be repealed by way of S43 of the 2014 Act. If this is the case, this will mean that there would be no provision to award costs as is currently provided for in S91 of the Employment Equality Acts 1998-2011 which is contrary to requirements under Article 47 of the Charter of Fundamental Rights to an effective remedy and EU Equal Treatment Directives to effective, proportionate and dissuasive sanctions.<sup>7</sup>

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<sup>7</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age or sexual orientation as regards

**Recommendation:**

- S43 of the Bill should be amended to allow for the awarding of costs by the District Court as part of an enforcement order to ensure that effective, proportionate and dissuasive sanctions are provided for as required under Article 47 of the Charter of Fundamental Rights and EU Equal Treatment Directives.

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employment and occupation and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.