

Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses

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Paper 2 of series: Setting Standards for the Irish Equality and Human Rights Infrastructure



Foreword

This paper on “Access to Justice and Under-Reporting of Discrimination and Human Rights Abuses” is the second in a series of publications to inform and enable the work of the Irish Human Rights and Equality Commission. Under-reporting is of a scale in Ireland that threatens to undermine the potential of our equality and human rights infrastructure.

There is a challenge to prioritise this issue in the work of the Irish Human Rights and Equality Commission and, indeed, in the work of all civil society organisations concerned with equality and human rights.

This paper has been published by the Equality & Rights Alliance (ERA), a coalition of civil society groups and activists. ERA was established in August 2008 and works to strengthen political commitment to an effective and resilient equality and human rights infrastructure in Ireland, and to provide strategic leadership in protecting, strengthening and critiquing the equality and human rights infrastructure.

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1. Introduction

This paper examines the issue of under-reporting of discrimination and human rights abuses in Ireland. It explores the barriers people experience in taking formal action regarding their experiences of discrimination and human rights abuses. It identifies the responses to under-reporting that could usefully be developed by the various elements of the equality and human rights infrastructure.

The legal provisions which prohibit discrimination are the Equal Status Acts (2000- 2011) prohibiting discrimination in the provision of goods and services, and the Employment Equality Acts (1998- 2011) prohibiting discrimination in regard to all aspects of employment (including advertising, terms and conditions, promotion and dismissal). The Intoxicating Liquor Act 2003 includes provisions prohibiting discrimination by licensed premises. Discrimination is prohibited on nine grounds: gender, age, race, religion, family status, civil status, disability, membership of the Traveller community and sexual orientation.

The Irish State has obligations to respect, protect and fulfil human rights under international UN human rights conventions to which the State is a party. Key instruments which Ireland has ratified are: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC).¹ In addition there are obligations under the European Convention on Human Rights which was partially incorporated into domestic law in 2003.

The systems of redress regarding discrimination and human rights abuses include the following institutions:

- The Equality Tribunal
- The Equality Authority
- The Irish Human Rights Commission
- The civil and criminal courts
- The Labour Court
- The Ombudsman's Office
- The Ombudsman for Children's Office

This paper will focus principally on the Equality Authority, the Irish Human Rights Commission (IHRC), and the Equality Tribunal given their specialist remit to address discrimination and human rights concerns. These institutions are under-going merger processes which are scheduled to be completed by the end of 2013.² This offers an opportunity to re-think approaches to some of the key issues that have limited the impact of the equality legislation and human rights standards. One such key issue is that of under-reporting of discrimination and human rights abuses.

1. Two further instruments, which have yet to be ratified are the Convention on the Rights of People with Disabilities (CRPD), and the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families.
2. The Equality Authority and the IHRC are to be merged to form the Irish Human Rights and Equality Commission. The Equality Tribunal is being merged with other systems of redress to form the Workplace Relations Commission.

2. Levels of Discrimination and Human Rights Abuses in Ireland

2.1 Discrimination

The incidence of discrimination was examined in 2004 and again in 2010 by the Central Statistics Office with the inclusion of a module on equality in their Quarterly National Household Survey (QNHS).³ These surveys represent the first nationally representative samples of self-reported discrimination and are a useful benchmark to measure levels of discrimination across the whole population and over time. One weakness with the QNHS data on discrimination, however, is the absence of data on discrimination against LGBT people and Travellers.

Headline figures from the 2010 QNHS on discrimination indicate that:

- 12% of the Irish population (this equates to approximately 389,000 people) over the age of 18 stated they had experienced discrimination within the previous two years (6% experiencing discrimination in relation to employment and 7% experiencing discrimination in accessing goods and services).⁴
- The highest rates of discrimination reported are by people from non-White ethnic backgrounds (29%), unemployed people (22%), non-Irish nationals (20%), people who are not Catholic (18%) and people with a disability (14%).⁵
- The most common equality grounds people identified under, regarding their experiences of discrimination, were race/ethnicity/nationality (22%), age (16%), and gender (8%).⁶ 40% felt that their experience of discrimination did not fit under any of the protected grounds in Irish equality legislation.⁷
- Women are overall more likely to report discrimination than men, particularly in employment (6% of women reported discrimination whilst at work, compared to 4% of men).⁸

There was no change in the overall rate of reported discrimination between 2004 and 2010, which remained at 12%. Between 2004 and 2010, however, a rise was noted with regard to the reported impact of discrimination. Those reporting that the discrimination had a serious effect on their lives increased from 25% in 2004 to 32% in 2010. In addition there was a “significant increase” of risk of serious discrimination for the Black minority ethnic group between 2004 and 2010.⁹ During this six-year period reported discrimination under the race/ethnicity/nationality ground increased from 16% to 22%.¹⁰

An analysis of the 2004 QNHS data on discrimination found that “the groups who most commonly experience subjective discrimination are disabled people, the unemployed, young people, respondents from minority ethnic groups, non-Irish nationals, lone parents, and those who are separated.”¹¹

While the CSO QNHS data do not provide information on the experiences of Travellers and LGBT people, other national data samples provide information on the experiences of these groups. The Traveller All Ireland Health Survey of over five thousand Travellers in the Republic found that 42% reported that they 'often' or 'very often' felt discriminated against.¹²

An EU Fundamental Rights Agency (FRA) study published in May 2013¹³ on LGBT people's experience of discrimination in the previous twelve months found that:

- 47% of Irish LGBT people had experienced harassment or discrimination,
- 18% of Irish LGBT people had experienced discrimination in seeking employment,
- 35% of Irish LGBT people had experienced discrimination in accessing goods or services.

Overall, the FRA LGBT survey found that those most at risk of discrimination across the EU were lesbian women, young LGBT people (18-24 yrs) and LGBT people on lower incomes.¹⁴

An EU wide study by FRA published in 2009 on the experiences of people with an immigrant or ethnic minority background found the following in relation to experiences of discrimination (in the previous twelve months):

- 54% of Sub-Saharan Africans living in Ireland had experienced discrimination (26% experienced discrimination in the workplace and 12% in accessing accommodation),¹⁵
- 26% of Central and East Europeans living in Ireland had experienced discrimination.¹⁶

A national study conducted in 2009 surveyed over two thousand Irish women to examine their experiences of paid employment during pregnancy. While 70% of the women surveyed said that their employer was supportive during their pregnancy, a significant number, 30%, reported unfair treatment during pregnancy. At the more extreme end, 5% of the women surveyed were dismissed during pregnancy.¹⁷

2.2 Human Rights abuses

There are no data available on prevalence rates regarding human rights abuses in Ireland. Reports by civil society groups, have, however, highlighted human rights issues for different groups in Irish society and this provides an insight into some of the key human rights concerns.

People in institutional settings:

Groups that are most vulnerable to human rights abuses in institutional settings are older people, prisoners, children and adults with intellectual disabilities, and people living in residential psychiatric services.¹⁸

A survey of over three thousand staff working in 64 care homes for older people in Ireland asked about abusive and neglectful behaviour respondents had witnessed by another staff member against a resident. 58% had observed one or more neglectful behaviours (such as not bringing a person to the toilet when asked and ignoring a resident when called), 27% had observed at least one psychologically abusive act (mainly shouting at residents), and 12% had observed at least one act of physical abuse (mainly being restrained beyond what was expected).¹⁹

The Irish Penal Reform Trust has consistently raised concerns regarding the treatment of Irish prisoners. Key human rights issues identified are overcrowding, slopping out, the lack of effective complaints and monitoring mechanisms, and the use of prisons for immigration detention purposes.²⁰ In addition, the detention of boys between the ages of 16 to 18 in an adult prison facility has been condemned by the Ombudsman for Children's Office and the Council of Europe Committee for the Prevention Of Torture.²¹

A number of inquiries and investigations have been undertaken highlighting the extent of physical, sexual and emotional abuse experienced by adults and children with disabilities.²² However, despite the findings of these investigations, children and adults with disabilities remain in unregulated, uninspected residential services.

Women:

Key human rights concerns for women include:

- Violence and abuse. One in seven Irish women has suffered severe abuse by a male intimate at some time in their life ²³; one in four women have experienced some form of sexual abuse in their lifetime and one in five has experienced sexual assault as adults.²⁴
- Lack of reproductive rights. Safe and legal abortion is not available to Irish women. This interferes with women's right to health, life and non-discrimination.

Travellers:

Key human rights concerns for Travellers include: ²⁵

- Poor education, health and employment situation,
- Inadequate access to accommodation and sub-standard living conditions,
- Institutionalised racism,
- Lack of recognition as an ethnic group.

Migrants and Asylum Seekers:

Key human rights concerns include: ²⁶

- The system of direct provision for asylum seekers, ²⁷
- The efficiency of the family reunification process,
- The process and practice used to deport children and adults,
- The lack of access to welfare rights due to the Habitual Residency Condition,
- Trafficking of migrants for the purposes of sexual exploitation and forced labour,
- Issues with the administration of justice, including lack of independent appeals process regarding immigration and naturalisation decisions,
- Issues regarding the constructive expulsion of Irish citizen children where their parents are subject to deportation,
- lack of access to education and employment opportunities for people in the asylum process, and
- The exploitation of domestic migrant workers and undocumented migrants.

People with disabilities

Key human rights concerns include:

- Barriers of access, participation and outcome preventing the full participation of people with disabilities in Irish society,
- Mistreatment of people with disabilities in residential care settings, ²⁸
- Lack of autonomy afforded to people with intellectual disabilities over many aspects of their daily lives,
- High levels of sexual abuse experienced by women with disabilities, ²⁹

3. Central Statistics Office, Quarterly National Household Survey on discrimination, July 2011 : http://www.cso.ie/en/media/csoie/releasespublications/documents/labourmarket/2010/qnhs_equalityq42010.pdf last accessed June 20th 2013
4. IBID PG 1
5. IBID pg 3
6. 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, pg 32
7. It is estimated that approx 2% in the 'other' category constitute the sexual orientation, religion and Traveller equality grounds.
8. McGinnity et al (2012) op cit , pg 18
9. McGinnity et al (2012) op cit , pg xii
10. McGinnity et al (2012) op cit , pg 32
11. Helen Russell, Emma Quinn, Rebecca King O'Riain and Frances McGinnity (2008) "The Experience of Discrimination in Ireland -Analysis of the QNHS Equality Module", pg 51, research on behalf of the ESRI and the Equality Authority
12. Kelleher, Cecily et al (2010) All Ireland Traveller Health Study: Our Geels Summary of Findings report: http://www.dohc.ie/publications/aiths2010/ExecutiveSummary/AITHS2010_SUMMARY_LR_All.pdf?direct=1 School of Public Health, Physiotherapy and Population Science, University College Dublin , pg 46
13. EU FRA (2013) "EU LGBT survey European Union lesbian, gay, bisexual and transgender survey" http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf
14. EU FRA (2013) IBID pg 16
15. EU FRA (2009) "EU MIDIS- European Union Minorities and Discrimination" http://fra.europa.eu/sites/default/files/fra_uploads/664-eumidis_mainreport_conference-edition_en_.pdf (pgs 37,43,44)
16. IBID PG 37
17. Helen Russell, Dorothy Watson and Joanne Banks (2011) "Pregnancy at Work- A National Survey" The Crisis Pregnancy Programme and the Equality Authority pg xi <http://www.esri.ie/UserFiles/publications/BKMNEXT191.pdf>
18. Key human rights concerns have been raised in a number of reports and investigations into care settings and state care including: the Commission of Investigation 2009 (report into the mistreatment of older people in the Leas Cross nursing home); the Report of the Independent Review Group into Child Deaths (in the care of the state) 2012; Report by Inspector of Mental Health 2012; Report of Enquiry by the IHRC on the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for Persons with a Severe to Profound Intellectual disability March 2010.
19. Jonathan Drennan, Attracta Lafferty, Margaret Pearl Treacy, Gerard Fealy, Amanda Phelan, Imogen Lyons, Patricia Hall (2012) "Older People in Residential Care Settings Results of a National Survey of staff-Resident interactions and conflicts" Health Service Executive as part of the work of the National Centre for the Protection of Older People (NCPOP) at University College Dublin.
20. IPRT Submission to the United Nations Special Rapporteur on Human Rights Defenders 2012.
21. IBID pg 5
22. Report of the Commission to Inquire into Child Abuse (2009); McCoy Report (2007); Hynes Report (2009); Leas Cross Review (2007)
23. Watson, Dorothy and Parsons, Sara (2005) "Domestic Abuse of Women and Men in Ireland-Report on the National Study of Domestic Abuse" National Crime Council of Ireland
24. McGee et al (2002) "Sexual Abuse and Violence in Ireland" Dublin Rape Crisis Centre
25. The Irish Traveller Movement (undated) "Submission to the First National Report by Ireland, as required under Article 9 of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD) "
26. See for example: Submission by NASC, Doras Luimní and the Irish Refugee Council for the Twelfth Session of the Working Group on the Universal Periodic Review: March 2011; Submission by the Immigrant Council of Ireland for the Twelfth Session of the Working Group on the Universal Periodic Review: 2011; Submission by Migrant Rights Centre Ireland to the Irish Government's Consultation Process on Progress on the Implementation of the International Convention on Economic, Social and Cultural Rights 11th November 2011.
27. see for example, FLAC 2009 "One Size Doesn't Fit All- a legal analysis of direct provision ten years on"
28. A recent inspection of a mental health centre in Waterford highlighted the lack of protection of the human rights of patients with intellectual disabilities. It found people with an intellectual disability 'engaged in rocking, self stimulating behaviour, sleeping or just sitting'. Report of the Inspector of Mental Health Services into St. Senan's Hospital, Waterford, November 2012.
29. Of the 184 survivors of sexual violence with disabilities who attended Rape Crisis Centres between 2008 and 2010, 47% had an intellectual disability. RCNI "Sexual Violence Against People with Disabilities- Data collection and barriers to disclosure" October 2011

3. Reporting Discrimination and Human Rights Abuses

3.1 The Equality Tribunal

The Equality Tribunal is the quasi-judicial body established to adjudicate on cases of discrimination under the Employment Equality Acts (1998-2011) and the Equal Status Acts (2000-2011).³⁰

Table 1 outlines the total annual referrals/claims of discrimination brought to the Equality Tribunal since 2000. Total referrals/claims are further broken down according to claims under the Employment Equality Acts (EE) and those under the Equal Status Acts (ES). The final two columns give an indication of the equality grounds which feature most predominantly each year (under both employment equality and equal status areas). In each of these columns, the four most commonly cited grounds under which claims are made are abbreviated as follows: M= Multiple grounds,³¹ ; R= Race ground; D= Disability ground; A= Age ground G= Gender ground; T= Traveller ground.

Table 1. Number of referrals to Equality Tribunal³²

Year	Total referrals Made to ET	Referrals: EE Act	Referrals: ES Act	Complaints Under EE Acts by grounds 4 Highest left to right:	Complaints Under ES Acts by grounds 4 Highest left to right:
2011	671	517	154	M,R,D,G	D,M,T,R
2010	821	714	107	R,M,D,G	D,M,T,R
2009	906	780	126	R,M,D,G	D,M,T,R
2008	996	842	154	R,M,D,G	D,M,T,R
2007	852	667	185	R,M,D,G	D,M,T,R
2006	628	462	166	R,M,D,G	D,M,T,R
2005	631	408	223	M,G,R,D	M,D,A,T
2004	483	297	185	M,G,R,A	D,M,A,R
2003	1,078	361	717	M,G,R,A	T,M,D,R
2002	1,289	300	989	M,G,D,A	T,M,D,A
2001	1,114	260	854	G,M,R,D	T,M,A,R
2000	147	139	8 ³³	G,M,A,D	N/A

The first key issue of note is the significant decrease in cases referred to the Equality Tribunal from 996 in 2008 to 671 in 2011 (a 33% decrease). This is driven by the fall in employment related cases from 842 in 2008 to 517 in 2011 (a 39% decrease). There is no evidence to suggest that this decrease is a result of a decrease in discrimination. In fact this period coincides with the significant cuts to the Equality Authority and a significant decrease in the visibility of the equality infrastructure. This does suggest that the issue of under-reporting, already evident in the low numbers of cases referred to the Equality Tribunal, is actually getting worse.

The second issue of note is the virtual collapse of casework under the Equal Status Acts from an initial high of 989 claims in 2002 to 107 and 154 claims in 2010 and 2011 respectively. A partial explanation for this may lie in the transfer of power (in 2003) from the Equality Tribunal to the District Court to hear cases of discrimination against licensed premises. The steady decline in equal status claims is juxtaposed with a yearly increase in employment claims up to 2008.

The dominance of the race, disability, gender and Traveller grounds in claims of discrimination in access to employment and in access to goods and services is notable. The pre-dominance of claims made under 'multiple grounds' is also of note and underscores the need for equality legislation to evolve sufficiently to deal with issues of intersectional discrimination.³⁴

Between 2004 and 2011 the most commonly reported ground for discrimination under the Equal Status Acts was the disability ground (with the exception of 2005, where it was the second highest). Between 2006 and 2011, the most commonly reported ground for discrimination in the area of employment was the race ground (with the exception of 2011 when race was the second highest).

3.2 The Equality Authority

The Equality Authority has powers under equality legislation to provide information to the public on their rights, provide legal assistance to those making complaints of discrimination, institute proceedings in its own name, and conduct an equality review or enquiry. In deciding what legal cases to assist, the Equality Authority assesses each application according to a set of criteria.³⁵ Table 2 outlines the legal case work of the Equality Authority between 2000 and 2011 using data from the available annual reports.

Table 2. Equality Authority legal casework activity³⁶

Year	Total No. to whom Legal assistance granted	Cases in-hand
2011	23	289
2010	15	332
2009	21	878
2008	68	736
2007	32	737
2006	67	853
2005	42	754
2004	35	889
2003	36	1,353
2002	110	1,284
2001	Figure not noted	1,080
2000	202	202

It is noteworthy that following the budget cuts in 2009 the level of casework activity in the Equality Authority has dropped significantly. This suggests levels of under-reporting have increased as a result of the decreased visibility and capacity of the equality infrastructure.

Between 2000 and 2011 the two protected grounds of disability and membership of the Traveller community dominated the casework activity of the Equality Authority under the Equal Status Acts. Every year from 2000 to 2011 the four protected grounds of membership of the Traveller community, disability, race and age constituted the highest number of equal status cases supported.

Between 2000 and 2011 the four protected grounds of race, age, gender and disability have dominated the casework activity of the Authority under the Employment Equality Acts. Every year from 2000 to 2011 the four protected

grounds of race, age, disability and gender constituted the highest number of employment equality cases supported.

Since its establishment the Equality Authority has not conducted any enquiries; resource issues would appear to have been the main factor in this regard.

3.3 The Irish Human Rights Commission

The IHRC has powers under the Human Rights Commission Act 2000 to provide legal assistance for proceedings involving law or practice relating to human rights, institute proceedings in its own name to vindicate the human rights of a person or class of persons in the state, conduct an enquiry, and apply to act as *amicus curiae*.³⁷ Under S11 of the Act, the IHRC also has the power to institute class-action type proceedings, a power which it has not used to-date.

Table 3 outlines the legal work of the IHRC between 2003 and 2011 using data from the available annual reports. On average about four hundred what are termed ‘communications’ are received yearly by the IHRC from members of the public regarding human rights issues. The bulk of the communications each year tend to centre on areas pertaining to civil and political rights. A significant number of communications each year fall outside the remit of the IHRC.

Table 3 illustrates the exceptionally low number of cases granted legal assistance; eight in nine years. The annual reports of the IHRC do not indicate reasons for not granting legal assistance so it is not possible to ascertain the main issues in this regard. Key factors are likely to be the limited resources of the IHRC and the criteria set out in the HRC Act 2000. Research commissioned by the Equality and Rights Alliance in 2009 noted the following in regard to the small number of cases taken by the IHRC since its establishment:

“It is difficult to credit the possibility that of the several hundred incoming cases each year, more did not lend themselves to onward action, especially those rooted in the lived experiences of people in the area of economic, social and cultural rights (even granted the difficulty of progressing such cases under Irish law). Some informants believed that the bar for a case to be considered was set so high as to make the chance of pursuing a legitimate human rights grievance unreasonably low; and that the procedures for applicants were discouraging. It may well be that some of the ‘bar’ is beyond the Commission’s control and is set in statutory exclusions. Board minutes show that this is an issue with which the Commission has struggled.”³⁸

Table 3: Legal work of the Irish Human Rights Commission

Year	No. of communications to the IHRC	No. of legal assistance requests considered	No. of cases where legal assistance granted	No. of enquiry requests considered	No. of enquiries commenced	No. of Amicus Curiae
2011	522	36	3	NA	0	6
2010	464	11	2	13	0	2
2009	463	7	1	6	0	6
2008	467	17	0	23	1	5
2007	342	8	0	17	0	7
2006	306	5	1	7	0	3
2005	290	16	1	18	1	3
2004	274	12	0	29	1	3
2003	95	64	0	Unclear in annual report	0	0

Since its establishment the IHRC has conducted three enquiries into the following issues:

- Enquiry into the contributory old age pension system in 2004.
- Enquiry into claim of mistreatment at Dublin airport by non-Irish national in 2005.
- Enquiry into intellectual disability services at a residential care setting in 2008.

Under-resourcing has been an issue for the IHRC in conducting enquiries. Regarding its 2008/9 enquiry into a disability care setting, the IHRC has noted that due to the budget 2009 cuts it was unable to conduct public hearings or involve a number of experts as part of the process in this enquiry.³⁹

30. The Equality Tribunal is to be merged with other systems of redress under employment law, to form a new Workplace Relations Commission (WRC).
31. Where a claim is made on more than one ground, the Equality Tribunal records it under the Multiple Ground category only, i.e. such claims are not also recorded separately under each relevant ground.
32. Data from the annual reports of the Equality Tribunal 2000 to 2011 (most recent available at time of writing)
33. The Equal Status Act 2000 came into force in October 2000, hence the very low number of claims that year.
34. The Equality Tribunal annual reports do not offer a breakdown of the grounds contained within the 'multiple ground' categories, so it is not possible to further analyse those claims. Nor is there any analysis of what percentage of those referrals on 'multiple grounds' were unable to be processed where the claim of discrimination was based on the intersection of multiple identities (which is outside the scope of protection under current legislation).
35. A list of the criteria applied is available on the Authority's web side: <http://equality.ie/en/Information/Criteria-for-Representation/> last accessed June 17 2013.
36. Information obtained from the Equality Authority annual reports available at time of writing (2000 to 2011).
37. See Sections 8 to 11 of the Human Rights Commission Act 2000
38. Brian Harvey and Kathy Walsh (2009) "Downgrading Equality and Human Rights: Assessing the Impact" pg 63 Equality and Rights Alliance , Ireland
39. IHRC (March 2010) Enquiry Report on the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for Persons with a Severe to Profound Intellectual Disability, pg 8

4. Under-Reporting of Discrimination and Human Rights Abuses

The CSO QNHS 2010 on discrimination found that 60% of those who had experienced discrimination took no action (formal or informal) and only 10% took any formal action (including legal action). The findings from the 2004 survey were similar; 60% of respondents had taken no formal or informal action and only 9% had taken any formal action (including legal action).⁴⁰

In their EU-wide LGBT survey which included Irish respondents, the FRA found that only 10% of the people surveyed who experienced discrimination in the previous year took any formal action.⁴¹ The FRA 2009 survey on the experiences of people with an ethnic and minority background found that only 16% of Sub-Saharan Africans and 21% of Central and East Europeans living in Ireland took any formal action in regard to their experiences of discrimination.⁴²

The FRA study noted the following regarding under-reporting:

“The findings present a very bleak picture of high levels of non-reporting of discrimination by all minority groups interviewed. The repercussions of this are significant, simply put: reports of discrimination are not being registered, either at the place where the discrimination occurs or at the offices of bodies or institutions that have a legal mandate to respond....there is a mismatch between the law in the books and the law in practice.”⁴³

40. McGinnity et al (2012) op cit pg 63

41. EU FRA (2013) op cit pg 20

42. EU FRA (2009) op cit pg 51

43. IBID pg 51

5. Barriers to Accessing Justice

A range of barriers prevent people from accessing justice regarding the discrimination or human rights abuses they experience. The key barriers to access can be grouped according to support barriers and structural barriers.

5.1 Support Barriers

Issues of disempowerment:

Research on discrimination highlights a number of related and overlapping barriers to reporting cited by victims that collectively point to issues that come under a general heading of 'disempowerment'.⁴⁴ The key issues cited in this regard are:

- The perception that reporting the incident will do nothing to change the situation,
- The perception that there is no point in reporting incident(s), since discrimination/abuse is so commonplace for certain groups,
- The perception that incident(s) is not worth reporting / down-playing the seriousness of incident(s),
- The perception that person will not be treated fairly if they report,
- Fear of negative consequences of reporting,
- Fear of disclosing sexual orientation/gender identity,
- Lack of trust in statutory bodies.

Lack of knowledge about rights and redress pathways:

EU FRA research on awareness of rights and systems of redress found that 51% of Sub-Saharan Africans and 29% of Central and East Europeans living in Ireland were unaware of any law protecting them from discrimination in the three areas of employment, goods and services, or housing. The research also found that 61% of Sub-Saharan Africans and 90% of Central and East Europeans had never heard of the Equality Authority, and 63% of Sub-Saharan Africans and 88% of Central and East Europeans had never heard of the Equality Tribunal.⁴⁵

The Eurobarometer 2012 survey asked people if they became a victim of discrimination or harassment would they know their rights. Only 44% of Irish respondents said they knew their rights in this regard.⁴⁶

The CSO QNHS 2010 found that 20% of those who had experienced discrimination had no knowledge of their rights under Irish equality legislation. McGinnity et al in their detailed analysis of the 2010 QNHS noted

that: “Knowledge of rights, as in 2004(survey), was strongly associated with education, and was lower among vulnerable groups including the youngest and oldest age groups, people of non-white ethnicity, non-Irish nationals and people with a disability.”⁴⁷

Resource barriers:

Civil Legal aid is not available to people seeking redress from discrimination under equality legislation. While, in theory, legal representation is not required to take a case to the Equality Tribunal, in reality, respondents to a claim of discrimination are likely to have legal representation to defend their case which can put claimants at a disadvantage if they do not equally have the means to be legally represented.

Legal costs are borne by both sides in the Equality Tribunal. There is no fear on the part of claimants, therefore, that they might have to bear the respondents costs should they lose their case. This, however, does not apply to the District Court where equal status hearings against licensed premises are heard under the Intoxicating Liquor Act 2003. Research on the impact of this transfer of power to the District Court 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.”⁴⁸ Between September 2004 and February 2005 only nine claims of such discrimination were lodged⁴⁹ compared to an average of 514 claims annually taken with the Equality Tribunal between 2000 and 2003.⁵⁰

Appeals in relation to equal status cases are heard in the Circuit Court and here too the issue of costs arises for claimants who might lose on appeal.

5.2 Structural Barriers

Deficits in legislation:

Equality legislation offers partial protection and to a limited number of groups. The absence of a socio-economic ground leaves a significant gap in protection from discrimination. As noted previously, in the CSO QNHS data, 40% of people who had experienced discrimination did not fall within the nine protected grounds under the current law. The lack of justiciable economic, social and cultural rights leaves a significant gap in human rights protection. This is of particular concern in the current economic context of austerity and fiscal consolidation.

Protection from human rights abuses is undermined by the failure to incorporate key treaties, to which Ireland is a party, into domestic law, thus making them unenforceable in the courts. In addition, the European Convention on Human Rights has only been partially incorporated into domestic law. Ireland has also failed to ratify a number of international standards⁵¹ and maintains

reservations in regard to aspects of key treaties.⁵²

There are exemptions in current equality legislation preventing people under the nine protected grounds from taking cases. The Employment Equality Acts, for example, do not fully cover employment in a private domestic setting. Under the Equal Status Act S14, there is a general exemption that anything mandated by an Act of the Oireachtas or EU law is allowed. The scope of the Equal Status Acts does not cover the functions of the State, which means that areas such as immigration control and policing are exempt from the legislation. An exemption in the Equal Status Acts allows public authorities to treat certain non-Irish nationals differently, on the basis of their nationality, where they are outside the state or unlawfully present in the state (for the purposes of the Immigration Act 2004) or in accordance with any provision arising from their entry or residence in the State.

The lack of a statutory positive duty on the public sector, such as exists in Britain and Northern Ireland, means that there is no onus on public bodies to proactively take equality and human rights issues into consideration in policy-development and service planning and delivery.

There are time limits set in equality legislation regarding the taking of complaints (with the exception of claims involving equal pay). The Employment Equality Acts require that the complaint of discrimination must be lodged within six months of the occurrence of the discriminatory action. The Equal Status Acts require that the complaint must be lodged within six months of the occurrence of the discriminatory act and that the respondent must be notified in writing within two months of the occurrence of the incident.⁵³

A further barrier relates to appeals of equal status cases from the Equality Tribunal to the Circuit Court where barriers include the formal rules of evidence, the risks of having costs awarded and the lack of anonymity for complainants.⁵⁴

Lack of speedy, effective and dissuasive remedies:

The Equality Tribunal has consistently suffered from a significant backlog of cases, with cases taking up to three years from the time the complaint is lodged to the hearing date.⁵⁵

The ceilings on awards that can be made under equality legislation are not considered to be dissuasive or effective.⁵⁶ The ceiling on awards under the Equal Status Acts is €6,350. In regard to seeking redress under the Employment Equality Acts there is an upper limit of two year's pay for awards, an upper limit of €12,700 on awards regarding access to employment, and regarding equal pay claims an order for equal pay and arrears not exceeding three years applies (the exception to this is claims on the gender ground which the complainant can take to the Circuit Court, where no award limits apply).

Institutional capacity to address the scale of problem:

The key institutions charged with addressing discrimination and human rights abuses - the IHRC, the Equality Authority and the Equality Tribunal - have, since their establishment, suffered from under-resourcing. Resources to run public awareness campaigns to inform peoples of their rights under law have not been available to the bodies, nor have there been adequate levels of staffing or financial resources to assist and hear cases and conduct enquiries.

When the budget cuts were applied to the IHRC and the Equality Authority, in budget 2009, their capacity to offer legal assistance was further and significantly diminished.

In 2009 the budget of the Equality Authority was reduced by 43% and since that time its staffing levels have steadily decreased, with outgoing staff not replaced due to the public service embargo. It is estimated that by the time the Authority merges with the Human Rights Commission at the end of 2013 there will be approximately 12 staff remaining (down from 58 in 2008). The capacity of the Equality Authority to undertake legal work has greatly diminished since 2009 (as illustrated in Table 2).

In 2009 the budget of the IHRC was reduced by 32% and its staffing levels have declined significantly, with outgoing staff not replaced due to the public service embargo. The IHRC currently has 6 staff (down from 13 in 2008). Annual reports indicate that subsequent to the cuts in 2009, there has been no funding available to support its legal and enforcement work, with all legal assistance being offered on a pro-bono basis, a situation which is unsustainable in the longer-term.

44. see for example: EU FRA (2009) op cit ; EU FRA (2013) OP CIT pgs 21 and 24; Immigrant Council of Ireland (2011) "Taking Racism seriously, Migrants' Experience of Violence, Harassment and anti-social Behaviour in the Dublin Area"; Immigrant Council of Ireland <http://www.immigrantcouncil.ie/key-issues/anti-racism> last accessed June 17th 2013.

45. EU Fundamental Rights Agency (2010), 'Data in Focus Report 3: European Union Minorities and Discrimination Survey 2010, Rights Awareness and Equality Bodies', pg 12 http://fra.europa.eu/sites/default/files/fra_uploads/854-EU-MIDIS_RIGHTS_AWARENESS_EN.PDF pp 6,10

46. Eurobarometer No.393 Perceptions of Discrimination in the EU, Irish Fact sheet pg 2 http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_fact_ie_en.pdf last accessed August 14th 2013

47. McGinnity et al (2012) op cit (pg xii)

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

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

50. Gogan (2005) op cit pg 6

51. Including: the Optional Protocol to the Convention Against Torture; the Optional Protocol to the ICESCR; the UN Convention on the Rights of Persons with Disabilities; and the Optional Protocol on the Convention of the Rights of the Child on the sale of Children; and the Convention on the Rights of all Migrant Workers and their Families.

52. Such as Art 4 ICERD, Art 20 of the ICCPR which both cover incitement to hatred and racism (on the basis that they are incompatible with Article 40.6.1 of the Irish Constitution which provides for free speech.

53. The lodging of an Equal Status complaint can be extended to 12 months from the occurrence of the discriminatory act where 'reasonable cause' for the delay can be shown.
54. O'Connell, Donncha at al (2009) "FRA : Thematic Legal Study on the impact of the Race Directive" pg 12
55. Country Report: Ireland, for the FRA Report 2011, Access To Justice : http://fra.europa.eu/sites/default/files/fra_uploads/1533-access-to-justice-2011-country-IE.pdf
56. noted for example in the Equality Authority Annual Report 2005

6. Addressing Under-Reporting

The merged Irish Human Rights and Equality Commission (IHREC) will need to address under-reporting as a priority if it is to be effective and if it is to render the legal protections effective. The IHREC could usefully develop a specific strategy dedicated to reducing under-reporting. The work developed by the EU FRA on access to justice in cases of discrimination provides a useful framework for this action to address under-reporting.⁵⁷ This framework points to the need for this strategy to include action on:

Structures:

1. Access to a dispute resolution body

A key issue with regard to accessing a dispute resolution body is geographical proximity to systems of support and redress. The location of the IHREC in Dublin raises issues of accessibility for those outside the city and its environs. This has been addressed in the past by the Equality Authority through developing a partnership with local Citizen Information Centres and with the national Citizen Information Board. This partnership involves the provision of training to local information providers to enable referrals, the placing of information materials in local information centres and locating legal clinics in these centres. The IHREC needs to build on this tradition as part of its strategy to respond to under-reporting.

Procedures:

2. Fair proceedings

There is a need for an equality of arms between the complainant and the respondent in the hearing of cases. Respondents tend to have access to greater levels of resources and can often deploy a strong legal team to defend a case. It is important that claimants can match this in bringing forward their cases. The IHREC has a key role to play in securing an equality of arms and in this regard it needs to support a critical mass of casework in relation to discrimination and human rights issues as part of its strategy in relation to under-reporting.

3. Timely resolution

Timely resolution of cases is important as the excessively long waiting period to have a case heard can act as a significant deterrent to potential claimants. Timely resolution is hampered by the backlog of cases in the Equality Tribunal and in the higher courts. The IHREC needs to make a particular contribution here, by tracking and highlighting this issue and, more specifically, by seeking

to ensure that the merger of the Equality Tribunal into the Workplace Relations Commission serves to eliminate rather than increase the backlog.

4. Adequate redress

A key issue with regard to redress is the afore-mentioned ceilings imposed on awards that can be made under the equality legislation. In addition, the decision to take an equal status case against a licensed premises (such cases being heard in the District Court) must be weighted against the risk of having costs awarded should the case fail. The IHREC needs to seek change in the legislation to ensure that redress is, as required by the EU Directives, effective, proportionate and dissuasive and to seek a transfer of cases involving discrimination by licensed premises from the District Court back to the Equality Tribunal (Workplace Relations Commission).

5. Principles of efficiency and effectiveness

Barriers to efficiency and effectiveness arise from the limited human and financial resources available to the institutions of the equality and human rights infrastructure. The IHREC needs to be transparent in relation to the adequacy of its resources and to make the case for additional resources as required to ensure it can operate efficiently and effectively.

Another key issue arises from the deficits, identified above, in relation to the equality legislation and the human rights standards. The IHREC needs to bring forward proposals for the further development of legislation and standards in order to address these deficits as part of its response to under-reporting.

Supports:

6. Support for complainants

Under-reporting is exacerbated by a lack of personal and emotional supports available to complainants.⁵⁸ Supports of a personal and emotional nature need to be developed. The IHREC could usefully develop a strategy to stimulate and support the NGO sector to enable organisations to design and deliver such services.

Another key issue is the low levels of legal aid and assistance available to complainants. The levels of legal assistance provided by the IHREC must mark a significant increase on current levels of support. NGOs could be supported by the IHREC to provide legal assistance to complainants. While some NGOs are already working very effectively to provide legal assistance to claimants under the equality legislation,⁵⁹ such work needs to be properly resourced across the voluntary and community sector more broadly.

7. Awareness of rights

A key issue at the current time is the dearth of initiatives to raise awareness of rights among those experiencing discrimination and human rights abuses. Public education campaigns need to be developed by the IHREC to highlight and stimulate debate about the protections available. Specific targeted initiatives need to be developed by the IHREC within communities that evidence high levels of under-reporting, to build their awareness about, and confidence to exercise, their rights.

8. Accommodation of diversity of complainants

A broad and diverse range of constituents come within the remit of the IHREC and the related institutional infrastructure. This diversity has practical implications. The failure to make adjustments for diversity and to take account of the practical implications that flow from it, results in significant barriers to individuals that seek access to justice. The IHREC needs to develop procedures to take account of diversity in its materials, events, policies, procedures and practices. It needs to champion such an approach across all elements of the institutional infrastructure concerned with equality and human rights.

Beyond the individual:

9. Legal certainty

There is a need for further litigation to secure an interpretation of all elements of the protections available and to build a deeper body of casework that should then be effectively communicated to those at risk of discrimination and human rights abuses. The IHREC needs to identify the gaps in this regard and to work to bring forward the necessary cases to secure such legal certainty where it is required.

There is also need for a more robust approach to enhancing domestic accountability to international human rights treaties to which Ireland is a party. FLAC, for example, recommends the establishment of a domestic forum to monitor and report on whether the state is observing any legally binding treaty. Such a forum would enhance the current situation, where the only mechanism of accountability regarding the state's compliance with human rights treaties, is every five years or more, before a UN committee. The IHREC should develop and pursue proposals in this area.

10. Favourable context

Creating a favourable context for reporting discrimination and human rights abuses is essential. This will require the further evolution of a societal value base that values equality, diversity, and human rights, values those who champion equality, diversity and human rights, and values those who would challenge their experience of discrimination or abuse of human rights. The IHREC has the potential to impact on, and inform the value base of, Irish society. It will need to invest expertise, resources, and collaborative initiatives with civil society to do so.

57. European Union Fundamental Rights Agency (2012) "Access to Justice in Cases of Discrimination in the EU: Steps to further equality",
58. In addition, some people, such as people with intellectual disabilities, will require the support of an expert advocate to access justice on an equal basis as others.
59. Work done by Traveller organisations, trade unions, and the Public Interest Law Alliance could provide useful learning for the community and voluntary sector in this regard.

7. Conclusion

Under-reporting poses a significant threat to any aspiration for an effective equality and human rights infrastructure. It is a key challenge to statutory agencies working to address inequality, discrimination and human rights abuses. It is also a challenge to policy makers in this field and to all in civil society concerned with these issues.

Under-reporting will only be addressed where there is an adequately resourced equality and human rights infrastructure, where this infrastructure is committed to taking a critical mass of cases and where it invests in contributing to the cultural change required to enable people to report discrimination and human rights abuses.

The IHREC can champion a response to under-reporting, and in doing so, secure a new and valuable effectiveness for the equality legislation and human rights standards in place.

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