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TEJP

**TRAVELLER
EQUALITY AND
JUSTICE PROJECT**



Mapping Irish Frameworks for Non-discrimination of Irish Travellers



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D2.1. Mapping Irish Frameworks for Non-discrimination of Irish Travellers.

1. Introduction.

The Irish Traveller Community face proliferating levels of exclusion from the most basic of services and experience widespread discrimination and racism in their daily lives. Provision of legal services, representation and legal information access more generally are no exception as Travellers report substantial challenges in finding adequate legal representation and in understanding their rights as a minority ethnic group.¹

A core undertaking of the Traveller Equality and Justice Project is awareness-raising and rights-based education, designed to inform and support Travellers in defending and understanding the rights which they have under both domestic and international law. The aim of this report is to provide an overview of domestic legislation and further raise awareness of relevant international instruments, particularly EU frameworks on non-discrimination and equality. It is hoped that in doing so, the report can become a tool for use by Travellers and Traveller Community Groups providing guidance as to the manner in which human rights frameworks operate while promoting these as advocacy tools to challenge the social-exclusion and pervasive discrimination Travellers experience within Irish society.

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1.1. Report Structure.

This report's core aim is to provide oversight of the relevant equality legislation which applies to the Traveller Community it therefore focuses on outlining the relevant domestic and international legal frameworks and instruments from which Irish Travellers derive rights to equality and freedom from discrimination. In consolidating the relevant legislative and human rights frameworks the report contributes to a broader understanding of non-discrimination frameworks and norms, as applicable to Travellers. Considering the scope of these frameworks, the report highlights not only the rights which individuals derive,³ but also the manner in which these instruments hold States accountable. In doing so, this report provides a tool for those advocating for Traveller rights.

¹ Cork Traveller Women's Network, 'Barriers to Access to Justice for Traveller Women' Focus Groups, 2019-2020, cited in the Traveller Equality & Justice Project, 'Barriers to Access to Justice within the Equality Frameworks,' forthcoming Autumn 2021.

² For more on the TEJP activities see <https://www.ucc.ie/en/tejp/>

³ With specific reference and consideration of the rights of Travellers under both the discrimination, ethnic minority and racial ground owed to the Traveller Community as a minority group in Ireland.

The first sections provide an introduction to the topic, defining discrimination and the related terms generally, before considering Travellers and their experiences of discrimination. Subsequent sections outline the relevant domestic and international legislative frameworks for non-discrimination which apply to Travellers. This is divided into four parts:

- Domestic Frameworks of Non-discrimination.
- Relevant European Union Law.
- Council of Europe Frameworks on Non-discrimination.
- Other International Instruments.

Section five starts by mapping the domestic legislative framework for non-discrimination on the grounds of race under the relevant domestic legislation such as the Equal Status Acts 2000-2018 and Employment Equality Acts 1998-2015. In exploring the domestic legal framework, the options for legal recourse for those who have experienced discrimination will be outlined through the District Court and the Workplace Relations Commission.

Sections six to nine map the international discrimination frameworks which Ireland has signed up to under its international law treaty obligations, with the first section providing an overview of this. Section seven considers the human rights and non-discrimination frameworks of the European Union system, including the EU Charter of Fundamental Rights and Racial Equality Directive 2000/43/EC. The findings and recommendations of the Fundamental Rights Agency, although not a binding treaty body, are also considered here given their detailed findings on the experiences of Travellers and Roma in Ireland.

Section eight then maps the relevant Council of Europe treaty obligations, including the European Convention of Human Rights system, the European Social Charter, the Framework Convention on National Minorities and the European Committee on Racism and Intolerance. Such provisions are a part of Irish law and the State must apply these and promote the rights standards therein. Finally, section ten maps other relevant international human rights including consideration of United Nations human rights conventions and monitoring bodies concerned with non-discrimination of minority groups.

2. What is discrimination?

Discrimination occurs when you are treated less favourably than another person, because of who you are. There are different kinds of discrimination outlawed by both domestic and international law, but they all involve comparison with how other people are treated. The frameworks and principles detailed in this report prohibit discrimination on the grounds of equality.

There are two core types of discrimination, direct and indirect discrimination

2.1. Direct discrimination.

Direct discrimination occurs when someone is treated less favourably because of certain attributes. To establish direct discrimination, a direct comparison must be made, for example, in the case of disability discrimination the comparison must be between a person who has a disability and another who has not, or between persons with different disabilities.

Example: A hotel refusing to host a Traveller wedding or refusing to book Travellers into a hotel just because they are Travellers.

E.g., *A Prospective Customer vs. A Hotel/Wedding Venue* ADJ-00026881.

2.2. Indirect discrimination.

Indirect discrimination occurs where a condition of service or sale would put a person at a particular disadvantage and where this is not objectively justified by a legitimate aim and is appropriate and necessary.

Example: Requiring a permanent address which is not a halting site address to hire a sander is indirect discrimination against Travellers.

E.g., *McDonagh v Navan Hire Ltd.* DEC-S2004-017.

Under the domestic equality frameworks, nine grounds are listed under which both direct and indirect discrimination is prohibited. These grounds include characteristics such as age, gender, religion and race and ethnicity as a core ground of discrimination. This domestic framework expressly recognises membership of the Irish Traveller Community as a specific ‘protected ground.’⁴ In their ESRI report ‘A social Portrait of Travellers’ Watson et al., note that: ‘A background and history of extreme prejudice and discrimination against Travellers has necessitated their identification as a group to be protected against discrimination under Irish equality legislation.’⁵

3. Irish Travellers.

Irish Travellers are an indigenous, ethnic minority with a unique and long-established shared history and traditions. The Irish Traveller Movement notes that Travellers have been found by historical sources to have been a part of Irish society for centuries.⁶ Some Travellers prefer to use the term *Mincéir* or *Mincéirí* (pl.) which is the Cant and original word used to describe Travellers.⁷ Travellers are known as ‘*an lucht siúil*’ meaning ‘the walking people’ in Irish.

⁴ *Equal Status Acts* 2000-2018 and *Employment Equality Acts* 2000-2015.

⁵ D. Watson, O. Kenny, and F. McGinnity (2017), *A Social Portrait of Travellers in Ireland* (ESRI). p. 18

⁶ Irish Traveller Movement ‘About Travellers,’ <https://itmtrav.ie/what-is-itm/irish-travellers/>

⁷ The term ‘Traveller’ or ‘Traveller Community’ is used throughout this report.

In March 2017 Taoiseach Enda Kenny TD, made a much overdue formal recognition of Travellers as a distinct ethnic group within the State. Travellers are a distinct ethnic group owing to their culture, shared heritage, history, and values, including language and traditional nomadic way of life. Such cultural values distinguish Travellers from broader Irish settled tradition and are considered entirely unique to Travellers.⁸

4. Discrimination of Irish Travellers.

Although a relatively small group in Ireland, accounting for less than 1 per cent of the population,⁹ Travellers stand out as a group that experiences extreme disadvantage in terms of employment, housing, and health.¹⁰ Surveys highlight the deep-seated prejudice faced by Travellers in Ireland, evidencing the highly static nature of discrimination experienced. This is reflected in the All Ireland Traveller Health Survey which, in 2010, found that 61 per cent of Travellers reported ever having experienced discrimination being served in a pub, restaurant or shop; 56 per cent reported discrimination getting accommodation, and 55 per cent reported discrimination in seeking work.¹¹ Unfortunately, little has changed since 2010, with the ESRI finding in 2017 that Travellers are 22 times more likely than 'White Irish' to experience discrimination in accessing private services.¹² Such inequality is not confined to service provision and instead is widespread and indiscriminate, impacting upon all areas of life for the Community. Drawing on a national survey of attitudes towards different groups, MacGréil reports that 60 per cent of the population in Ireland would not welcome a Traveller as a member of the family; 64 per cent reject Travellers on the basis of their 'way of life' and 18 per cent would deny Irish citizenship to Travellers.¹³

Reflecting on the high levels of social inequality and discrimination faced by Travellers within Irish society, the ESRI report noted the unfavourable situation facing the Traveller community, recognising the multi-faceted issues worsened by racism and discrimination:

It is clear that Travellers are a group disadvantaged in several respects: in terms of educational attainment, employment, housing, and health. They have an unusual age distribution, with a relatively large number of children and a smaller number of older adults. They have experienced exceptionally high levels of discrimination compared to other groups in Ireland.¹⁴

This is evident in the manner which many Travellers both view and access vital services and how they respond to such acts of discrimination. A report conducted by the Traveller Movement (UK) notes that although most Travellers experience discrimination on a daily basis, that 77% of those surveyed stated that

⁸ Statement by An Taoiseach Enda Kenny TD on the recognition of Travellers as an ethnic group, Dáil Éireann, 1st March 2017 <https://www.gov.ie/en/speech/d29014-statement-by-an-taoiseach-enda-kenny-td-on-the-recognition-of-travel/>

⁹ The last population census, carried out in 2016, recognised that there are officially ca. 30,000 Irish Travellers resident in Ireland, although this figure may be higher.

¹⁰ *Supra* n.4

¹¹ All Ireland Traveller Health Study, Summary of Findings, September 2010, available at https://www.ucd.ie/t4cms/ATHS_SUMMARY.pdf

¹² ESRI, 'Who experiences discrimination in Ireland?' Evidence from the QNHS Equality Modules, <https://www.esri.ie/system/files/media/file-uploads/2017-10/BKMNEXT342.pdf> p.9

¹³ M. MacGréil, (2011). Pluralism and Diversity in Ireland. Prejudice and Related Issues in Early 21st Century Ireland, Dublin: Columbia Press.

¹⁴ *Supra* n.5 p.34

they had no sought help when they experienced discrimination, noting that such discrimination is ‘a fact of (Traveller) life’.¹⁵ Although this study took place amongst Irish Travellers based in the UK, these perceptions that discrimination is ‘shameful’, or embarrassing are rife throughout the Traveller Community.¹⁶

This shame and internalised impact of discrimination in employment and in accessing goods and services is compounded by the inability of many Travellers to access legal representation in order to respond and challenge this through the relevant legal avenues. Access to justice is a crucial right upon which vindication of all other human rights depend. This inability to secure legal representation means that for victims of discrimination often experience ‘rediscrimination’ by virtue of their exclusion from basic service provision, and a further inability to secure legal representation to challenge the initial act of discrimination. The impact of this upon the Traveller Community is stark and creates ‘rediscrimination and deepens existing social exclusion.’¹⁷

5. Domestic Frameworks of Non-Discrimination.

Irish equality legislation is drawn from a number of core legislative provisions which ‘impose general prohibitions on discriminatory behaviour which is based upon or linked to any of the different equality grounds’¹⁸ such as gender, race, age and membership of the Traveller community.¹⁹ This legislative framework prohibits direct and indirect discrimination, harassment and victimisation across all the different equality or ‘protected’ grounds, while making allowances for ‘positive action in certain limited circumstances.’

Discrimination against those who have ‘protected characteristics’ is unlawful under these key domestic anti-discrimination measures, *the Prohibition of Incitement to Hatred Act 1989*, *the Unfair Dismissals Acts 1977*, the *Employment Equality Acts* and *the Equal Status Acts*. These Acts, which will now be discussed, specifically identify Travellers by name as a protected group for the purposes of the legislation.

5.1. The Equal Status Act 2000-2018.

The *Equal Status Acts 2000-2018* (The Acts) prohibit certain types of discrimination in provision of goods and services by both public and private actors. The Acts include, the *Equal Status Act, 2000*, *Equality Act*,

¹⁵ ‘The last acceptable form of racism? The pervasive discrimination and prejudice experienced by Gypsy, Roma and Traveller communities,’ a report by The Traveller Movement September 2017, available at: <http://travellermovement.org.uk/wp-content/uploads/TMreport1JFINAL.pdf>

¹⁶ *Supra* n.1 CTWN Workshops.

¹⁷ The experiences and impact of this lived experience of ‘rediscrimination’ will be mapped in the second part of this research, ‘Mapping ‘Rediscrimination’ of Irish Travellers.’

¹⁸ C. O’Cinneide, Multiple Discrimination and the Distinctions between Discrimination Grounds in EU Law, Expanding Equality Protections in Goods and Services: Irish and EU Perspectives, Proceedings of a Conference held in Dublin on 21 May 2010. Available at:

https://www.ihrec.ie/app/uploads/download/pdf/expanding_equality_protections_in_goods_and_services_conference_proceedings.pdf

¹⁹ *Ibid*

2004, *Equal Status (Amendment) Act 2012* and the *Equality (Miscellaneous Provisions) Act 2015*.²⁰ For the purposes of the Acts, the classification ‘Goods’ is recognised under s.2(1) as extending to ‘any moveable property’. For example, goods are items that can be bought or sold. The category of ‘Services’ is defined as a service or facility of any nature which is ‘available to the public generally or a section of the public, and without prejudice to the generality of the foregoing’²¹ and includes banking, banking, insurance, grants, loans, credit or financing, commercial services, entertainment, recreation or refreshment, cultural activities, transport or travel, a service or facility provided by a club and a professional or trade service and housing services including renting from a landlord, local authority or letting agency.²² There are therefore many different types of services covered by the Acts.

Under the Acts, discrimination based on any one of the following distinct ‘protected’ grounds is unlawful. These grounds are gender; civil status; family status; sexual orientation; religion; age (although this does not apply to a person under 16); disability; race and, membership of the Traveller community.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.²⁴

The Acts also prohibit discrimination against a person on the basis of association with another person, for acting as a witness on behalf of that other person, giving evidence on their behalf, legally opposing an act which is unlawful under the Acts, or who has given notice of an intention to take any such actions.

5.1.1. Defences under the Acts.

²⁰ A 'Restated and Revised' (brings together all amendments and changes in a single text) version of the Equal Status Acts is available from the Law Reform Commission or can be accessed [HERE](#). Equal Status Acts 2000 to 2015: This Act is one of a group of Acts included in this collective citation (Equality (Miscellaneous Provisions) Act 2015, s. 16(4)). The Acts in the group are:

- *Equal Status Act 2000* (8/2000)
- *Intoxicating Liquor Act 2003* (31/2003), s. 25
- *Equality Act 2004* (24/2004), Part 3
- *Civil Law (Miscellaneous Provisions) Act 2008* (14/2008), Part 14
- *Civil Law (Miscellaneous Provisions) Act 2011* (23/2011), s. 21 insofar as it refers to s. 21 of the *Equal Status Act 2000* and ss. 27 to 29 (citation only)
- *Equal Status (Amendment) Act 2012* (41/2012)
- Equality (Miscellaneous Provisions) Act 2015 (43/2015), ss. 12 to 15

²¹ *Ibid*

²² *Ibid*

²³ Furthermore, since 1 January 2016, you cannot be discriminated against when renting where you are in receipt of Rent Supplement, other social welfare payment, or a Housing Assistance Payment. This is known as the housing assistance ground.

²⁴ *Equal Status Act 2010*, s.2 (1)

Although discrimination is generally prohibited under the Acts, there are a limited number of defences available to both licensed premises and other service providers, which are often relied upon in cases concerning alleged acts of discrimination against Travellers. These operate as defences or lawful excuse for an instance of discriminatory conduct in limited circumstances as not all differences of treatment in provision of goods and services are seen as discrimination under the Acts. In refusing to provide a service, the service provider may raise a defence of objective justification under the Acts, where it is in pursuit of a legitimate aim and the means of achieving the aim are appropriate and where the means are necessary (i.e., there is no alternative way to advance the aim). In considering whether the conduct in question is considered to be discrimination, falling within the scope of the Acts, the rights of the alleged victim will be weighed against the aforementioned possible justifications. For example, a core defence under Section 15 of the Acts, is that it is not discrimination to refuse to supply goods and services, where to do so would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property. Section 15 can thus be used to refuse service to someone where the service provider believes that to do so would incite disorderly or criminal conduct to occur on the premises. In relying upon s.15, the service provider must prove that there is or was a legitimate risk of criminal and disorderly conduct. Membership of the Traveller Community alone is not sufficient to suggest a risk of criminal or disorderly conduct. Often, in order for the defence to be raised, there must be clear evidence of prior incidences concerning the individuals in question. An example of this arose in *Mongan v Firhouse Inn*²⁵— where two Traveller men were refused service in a pub because of hostile reaction of other patrons to their presence. The Licensed Premises, the Firhouse Inn, asserted the defence under s.15 was available to them, given the substantial risk of disorderly conduct. In particular, the Inn noted that the individuals refused service were known for previous instances of such conduct. The WRC held that this was therefore not discrimination owing to the substantial risk of imminent violence due to ongoing disputes at the time.

While it is reasonable for service providers to refuse service to people who engage in disorderly behaviour on their premises it is discrimination to refuse Travellers service where there is no evidence to indicate that they would behave in an unreasonable manner under s.15 of the Acts. Unfortunately, a large number of Travellers note that this defence is used in an indiscriminate way to refuse service.²⁶

5.1.2. Exclusions under the Act.

In addition to the limited defences provided for under s.15 of the *Equal Status Acts*, there are also a number of exclusions or exemptions permitted. Such exclusions deal with situations where discrimination in relation to goods and services, do not apply, such conduct not considered discriminatory as a result. There are two types of such exclusions under the Acts; ‘specific exemptions’ and ‘general exemptions.’ General exemptions arise in relation to all areas, whereas specific exemptions only arise in relation to particular areas of service provision. For example, a specific exemption arises where an individual is provided different

²⁵ *Mongan v Firhouse Inn* DEC-S2003-034/035

²⁶ *Supra* n.1 ‘They say they don’t want any trouble and they’ve had trouble with us before – but how could they have? This was our first time at that bar.’

treatment on the religion ground in relation to goods and services, when these are provided for a religious purpose. It is not discrimination to treat people differently where it is reasonably necessary within sporting facilities and events, according to age or gender. For example, some sporting competitions may be only open to girls or competitors of a certain ages e.g., U12s soccer teams.²⁷

5.1.3. Establishing a *prima facie* case of Discrimination under the Equal Status Acts.

Under s. 38(a) of the Acts, the onus is placed upon the complainant to provide evidence from which it may be presumed that the discrimination occurred.²⁸ Where a *prima facie* case of discrimination is established by the complainant, the respondent must rebut the inference of discrimination raised, as the burden of proof shifts where a *prima facie* case of discrimination is made.

This requirement was set out by the Court in *Mitchell v Southern Health Board*.²⁹

A claimant must prove, on the balance of probabilities, the primary facts on which they rely seeking to raise a presumption of unlawful discrimination. It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.³⁰

In establishing a *prima facie* case of direct discrimination, the Complainant must establish (a) that they are covered by the relevant discriminatory ground and (b) that treatment by the Respondent gave rise to the presumption that less favourable treatment of the Complainant had occurred by way of their membership of one of the protected groups under the Acts.³¹

Once a *prima facie* case is established, there are two options for legal recourse under the Acts dependent upon where the alleged conduct took place. Section 19 of the *Intoxicating Liquor Act 2003* requires complaints about discrimination that occur ‘on, or at the point of entry to’ a premises to be made to the District Court. Examples of these types of places include bars, pubs, clubs, and hotels.³² Where the discriminatory treatment takes place at any other location providing goods or services covered by the Acts, then claims are heard at the Workplace Relations Commission (WRC). The WRC gained jurisdiction for all equality claims from the former Equality Tribunal in 2015. The WRC is an independent statutory body set up by law to investigate or mediate complaints under the *Employment Equality Acts 1998–2008*, *Equal Status Acts 2000–2008*, and *Pensions Acts 1990–2008*.

²⁷ For more detailed analysis and discussion of how the exclusions operate see ‘Know Your Rights: A Guide to Responding to Discrimination in Accessing Goods and Services,’ TEJP [2019] available from <https://www.ucc.ie/en/media/academic/law/tejp/TEJPGuideFinal2020.pdf>

²⁸ Section 38(a) of the Equal Status Acts (2000 – 2018) sets out, as follows, the burden of proof which applies in a claim of discrimination: ‘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.’

²⁹ *Mitchell v Southern Health Board* [2001] ELR201

³⁰ *Ibid*

³¹ *Ibid*

³² Although some cases regarding hotels are heard at the Workplace Relations Commission, this generally occurs where the conduct occurred in an area of the hotel exempt from the zones covered by a liquor license under *Section 2(2) Licensing (Ireland) Act. 1902*. Refusal of services which occurs outside of such zones, or over the phone or via email may fall within the WRC.

This divide in jurisdiction, has been criticised as being confusing for lay litigants and unnecessarily burdensome. In particular, human rights advocates and activists have called for the removal of cases concerning licensed premises from the District Court, in favour of these being heard by the WRC, as was the case under the previous Equality Tribunal competencies.³³ This is in recognition of the costs associated with litigation in the District Court, whereas the WRC has no associated fees. Further issues at the District Court include a lack of transparency on decisions, where equality cases are often unreported and long wait times for court listings which serve to further delay justice for victims of discrimination in licensed premises.

5.2. The Employment Equality Act 1998-2015.

Although Travellers face widespread discrimination in accessing goods and services, this unfortunately pervades every aspect of Traveller life, including health, education, and access to employment. Discrimination in accessing employment is provided for in the *Employment Equality Act 1998-2015*, which compliments the *Equal Status Acts* as part of Ireland's equality legislation.

In the past, Travellers were often self-employed in traditional skills-based jobs. Such positions were rooted in the unique cultural and ethnic heritage and identity of the Community, such as tin smithing, other metalwork, and scrap collection. However, in the 1960s demand for these skills began to wane with the advent of plastic and shift towards mass-production. This decline in demand coupled with proliferating discrimination and the implications of the 1963 Commission on Itinerancy³⁴ meant that many Travellers were prevented from following the traditional nomadic lifestyle and moved in inner cities. This resulted in mass-unemployment which prevails to the present day at great cost for many Travellers: 'the result is a community in crisis due to poverty and want, a proud and once self-sufficient people now overly dependent on the state, while their skills and talents go unused and wasted.'³⁵

A recent report from the St Stephen's Green Trust recognises these difficulties and reports that in 2021 80% of Travellers surveyed were unemployed.³⁶ This is reflective of previous data from the Census 2016 which indicated that the 80% unemployment rate for Travellers, is six times that of the general population.³⁷ This data further indicates that 11.3% of Travellers identified they were unable to work due to a disability; nearly three times the rate for the general population (at 4.3%).³⁸

The ESRI found that while almost two-thirds of the employment gap between Travellers and non-Travellers is accounted for by educational disadvantage, when the data is adjusted to account for education,

³³ For example, FLAC Submission to the Seanad Public Consultation Committee on Travellers; 'Towards a more equitable Ireland post-recognition' June 2019, available at: <https://www.flac.ie/publications/flac-submission-to-the-seanad-public-consultation/> see also ICCL A Critical Review of Anti-Discrimination Law in Ireland, https://www.flac.ie/assets/files/pdf/090710_antidiscrimination_law_terms_of_reference_july_2010.pdf

³⁴

³⁵ Mincéir Whiden, December 10, 2019. Submission to the Oireachtas Committee on Key Issues, Affecting the Traveller Community. <https://www.oireachtas.ie/en/committees/32/committee-on-key-issues-affecting-the-traveller-community/>

³⁶ Mincéir Misl'ar a Tom Tober: Travellers in the Mainstream Labour Market: Situation, Experience, and Identity January 2021 Research Report, St Stephen's Green Trust, available at https://www.ssgt.ie/wp-content/uploads/2021/04/SSGT_Travellers_in_the_Mainstream_Labour_Market-FINAL-to-print.pdf

³⁷ Census 2016, Profile 8: Irish Travellers, Central Statistics Office.

³⁸ *Ibid.*

age, gender, marital status, and the presence of children, the employment gap still remains significant. They attribute this gap to the pervasive direct and indirect discrimination and prejudice, which creates significant barriers within Irish society, alongside the widespread implications of State-enforced assimilation since 1963.³⁹

This discriminatory reality is reflected both in the recorded experiences of Travellers themselves, but also by international monitoring bodies such as the Fundamental Rights Agency, who found that Irish Travellers had the highest level of reported discrimination in seeking employment in the previous year and previous five years (38% and 70% of respondents respectively) amongst a cohort of five other EU states surveyed.⁴⁰ In addition, a 2017 Behaviour and Attitudes Survey found that only 17% of the general public said they would employ a Traveller,⁴¹ and the 2010 All Ireland Traveller Health Study, reported that 55% of Traveller respondents had experienced discrimination when seeking employment.⁴²

5.2.1. The Employment Equality Acts 1998-2015.

Discrimination against Travellers within employment and recruitment is prohibited by the *Employment Equality Acts* (EEA or ‘The Acts’), the core legislation covering employment equality in Ireland.⁴³ The EEA’s main aim is to promote equality in employment, banning discrimination across nine grounds in both public and private employment (subject to some exemptions). Section 6(3) sets out the core grounds for ensuring equal treatment in relation to employment: civil status, gender, sexual orientation, religion, age, race, membership of the Traveller Community and under the disability ground. In placing specific obligations upon employers, the EEA ensure that those protected under the nine grounds receive equality and freedom from discrimination in the workplace.⁴⁴

In considering how discrimination is defined under the Acts it is important to note that the Acts define discrimination in the same manner as the aforementioned *Equal Status Acts*, considering an act of discrimination to be one where an individual has been treated less favourably in the workplace than another person in a similar situation would be under s.6.

As noted above, discrimination can be direct or indirect in provision of employment and for the purposes of the EEA. Direct discrimination in the workplace occurs when an employee is treated less favourably than another employee (or comparator) in the same situation or circumstances under any of the nine

³⁹ McGinnity et al., *Supra* n.5

⁴⁰ EU Agency for Fundamental Rights (2020). Roma and Travellers in Six Countries. The six countries surveyed were: Ireland, France, Belgium, UK, Netherlands, and Sweden

⁴¹ J. O’Mahony, (2017). Traveller Community National Survey. Behaviours and Attitudes Survey conducted for the National Traveller Data Steering Group

⁴² C. Kelleher et al. (2010). ‘All Ireland Traveller Health Study Our Geels,’ School of Public Health, Physiotherapy and Population Science, University College Dublin available at <https://assets.gov.ie/18859/d5237d611916463189ecc1f9ea83279d.pdf>

⁴³ A consolidated version of the Act is available at lawreform.ie at https://www.lawreform.ie/fileupload/RevisedActs/WithAnnotations/EN_ACT_1998_0021.PDF

⁴⁴ The nine grounds preclude discrimination in the majority of workplace scenarios including in relation to full-time, part-time and temporary employees, public and private sector employment, vocational training bodies, employment agencies and trade unions, professional and trade bodies. The Acts also extend in certain circumstances to self-employed people, partners in partnerships, and State and local authority officeholders.

grounds covered in the Acts. While direct discrimination is often more obvious, indirect discrimination in employment has a similar impact on employees and is just as harmful. Indirect discrimination occurs where a workplace or employer has policies in place which put particular employees at a direct disadvantage by virtue of one of the nine grounds stipulated under the EEA.

- Other types of discriminatory conduct which can occur under the Act includes, discrimination by imputation, discrimination by association and victimisation:
- Discrimination by association occurs when an employee is treated less favourable as a result of their association or connection to an individual who falls under one of the nine grounds. For example, where an individual is discriminated against at work and subject to harassment due to their being married to a Traveller.
- Discrimination by imputation arises where an employee is treated less favourably because they are labelled as belonging to one of the categories covered by the nine grounds. For example, in the above scenario, if the employee is harassed at work due to an assumption that they are a Traveller and are treated less favourably on this basis, this is discrimination by imputation under the EEA.
- Victimisation under the EEA is detailed under s. 14 and occurs where an employer targets or penalises an employee who has raised a complaint under the Acts. Such conduct is against the law. Victimisation occurs where an employee who raises a complaint or informs their employer that they are considering taking a complaint is dismissed or taken a discrimination claim to court under the Acts.
- Victimisation can also occur if an employee is dismissed or penalised where they have helped a colleague to make a claim; or where the employee may have been penalised as a result of an unfair comparison with a colleague known as a ‘comparator’ (see below) or acted as a witness in legal discrimination proceedings.

5.2.2. Obligations of Employers.

The EEA place obligations upon employers to ensure that employees or potential employees do not face discrimination on the basis of any of the applicable nine protected grounds.⁴⁵ The obligations in the Acts extend to vocational training (s.12) and work experience, ensuring equality in terms and conditions of employment and in promotion or re-grading consideration, equal pay, and dismissals (s.8). They also place obligations upon employers in how they advertise posts and create access to employment for prospective employees (s.10).

The EEA also makes an employer liable for acts carried out by a person in the course of employment, whether or not an employer knew or consented (through vicarious liability)⁴⁶ This includes acts by a person acting as agent for another person with express or implied authority. ‘Vicarious liability’ is defined under s.15 of the EEA and concerns the circumstances where an employer becomes legally responsible for

⁴⁵ under s.16 and 17 EEA.

⁴⁶ s.15 EEA.

someone else's actions. Employers are liable for any act of discrimination by an employee in the course of their employment unless the employer can prove that they took reasonable steps to prevent the discrimination. An employer also has a duty under the EEA (s.15.2) to protect their employees in relation to discrimination or harassment coming from third parties such as service users, contractors, and suppliers.

Furthermore, under the s.24 of the EEA, an employer must take 'positive to take steps that are not required under the law to promote equality for all their workers. In doing so, employers can be seen to be going further than that which is required of them by law. An example of such positive action could be where an employer specifically seeks to attract Traveller employees and applicants.

5.2.3. Exemptions under the Act.

The EEA do not cover every difference in treatment, or discrimination in the workplace. For example, the EEA only apply to certain kinds of discrimination in the workplace and only where this arises under one of the nine protected grounds or categories of people detailed in the Act. Furthermore, there are limitations placed upon employers in the discharging of their duties under the Act and as detailed above, some forms of more favourable treatment, also known as positive action, are not against the law as they are designed to promote equal opportunity.

There are also some situations in which the EEA do not apply, which the Act recognises as exemptions such as those arising under the *Equal Status Acts*:

- General exemptions, which apply to all types of employment,
- Specific exemptions which apply to only some kinds of employment,
- Specific exemptions which apply to one, or more than one, of the nine grounds covered by the EEA.

These exemptions are detailed in ss.34 to 37 of the EEA and relate to issues such as educational and professional qualifications and both gender, age, and religious based exemptions.

5.3. The Prohibition of Incitement to Hatred Act 1989.

Hate speech is categorised by the United Nations example the UN Strategy and Plan of Action on Hate Speech as 'any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.'

Similarly, the Council of Europe notes that hate speech can constitute:

the use of one or more particular forms of expression –namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression –that is based on a non-exhaustive list of personal

characteristics or status that includes ‘race’, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.⁴⁷

Responses to address discrimination throughout society must address both civil and criminal legislation options to adequately promote and secure equality for all. A robust mechanism for combatting hate speech is thus a vital component for ongoing attempts to eradicate discrimination within Irish society.

Although a piece of criminal legislation, the *Prohibition of Incitement to Hatred Act 1989* can also be used to combat discriminatory conduct despite being designed to prohibit racist and hateful speech and conduct. The 1989 Act prohibits certain forms of threatening, abusive, or insulting conduct that are intended or likely to stir up hatred against a group of persons on account of certain characteristics. These characteristics are race, colour, nationality, religion, ethnic or national origins, membership of the Travelling community and sexual orientation.

The Act criminalises certain conduct and forms of expression that are ‘likely or intended to provoke hatred against a group of persons.’⁴⁸ Such conduct can occur under s.2(a) through; ‘the publication or distribution of written material; the use of words, behaviour or display of written material; or the distribution, showing, or playing of a recording of visual images or sounds’ under s.2(c).⁴⁹ Individuals involved in broadcasting which is likely to stir up hatred or preparing or possessing material with a view to distributing, displaying or broadcasting the material, may also be guilty of committing an offence under s.3. Furthermore, under s.4 the offence of incitement does not have to involve communication with the intended victims; where it is addressed to other individuals for the purpose of inciting hatred and thus persuading or encouraging them to commit an offence against these victims.⁵⁰

However, the Act has been deemed unfit for purpose in the new digital age, particularly in light of the emergence of social media platforms, by numerous domestic and international human rights organisations.⁵¹ The European Commission against Racism and Intolerance (ECRI) has repeatedly highlighted the discrepancies in the 1989 Act, and the fact that it does not respond fully to the spectrum of hate speech. Specifically noting that the 1989 Act does not recognise the following elements of hate speech: separate offences of public incitement to violence, hatred, or discrimination; public insults; and defamation. The ECRI further noted that ‘there are no provisions penalising the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a group of persons’ or provisions ‘on the public denial, trivialisation, justification or condoning of crimes of genocide, crimes against humanity or war crimes.’⁵²

⁴⁷ ⁴⁷ ‘Hate Speech’ Council of Europe, <https://www.coe.int/en/web/freedom-expression/hate-speech>

⁴⁸ *The Prohibition of Incitement to Hatred Act 1989*.

⁴⁹ *Ibid* s.2(c)

⁵⁰ *Supra* n.27 p.25

⁵¹ *Ibid*

⁵² ECRI (2019) ECRI Report on Ireland (fifth monitoring cycle), para.6

IHREC has also noted gaps in the Act which does not cover direct abuse towards an individual on the grounds of a protected characteristic, ‘in the absence of a wider intention, or likelihood, to stir up hatred.’⁵³ Such actions must be prosecuted accordingly under other domestic criminal law.⁵⁴ However, these offences do not incorporate a hate element and as a result significant gaps in domestic provisions responding to hate speech and hate crime remain despite numerous calls and consultations on the best option for reform.⁵⁵ This creates an unfortunate and unacceptable situation in which the majority of manners in which hate speech can occur are not currently covered by the 1989 Act, meaning that ‘only the most serious cases of hate speech – those concerning incitement to hatred – currently attract criminal sanction in Ireland.’⁵⁶ Therefore, although a piece of criminal legislation and therefore not a core part of the legislative ‘equality’ framework, the 1989 Act is a vital, albeit flawed part of the legislation used to challenge racially motivated conduct within the jurisdiction and specifically protects the Traveller Community.

5.4. The Unfair Dismissals Acts 1977.

Although not directly considered to be part of the equality legislation, the *Unfair Dismissals Act 1977* can protect against acts of discrimination which result in termination of an employment contract. The Act specifically prohibits ‘unfair dismissals’ where the dismissal can be sufficiently linked to the employee’s race, colour, sexual orientation, age or membership of the Traveller community⁵⁷. A dismissal is automatically considered to be unfair if an employee is dismissed for any of the above reasons. Strict time limits apply for conduct concerned to qualify under the Act, which requires 12 months’ continuous service to give rise to a claim for unfair dismissal. Where conduct falls outside of the *Unfair Dismissal Act*, it may fall under discriminatory dismissal under employment equality legislation however as detailed in s. 5.2 of this report.

6. International Law.

⁵³ IHREC Review of the Prohibition of Incitement to Hatred Act 1989 December 2019, p.26 available at <https://www.ihrec.ie/app/uploads/2019/12/Review-of-the-Prohibition-of-Incitement-to-Hatred-Act-1989.pdf>

⁵⁴ *Ibid* and for example section 6 of the Criminal Justice (Public Order) Act 1994 makes it an offence to ‘use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned’ Similarly, harassment is an offence under section 10 of the Non-Fatal Offences Against the Person Act 1997.

⁵⁵ Most recently, the Department of Justice & Equality held a Public Consultation on Review of the Act in 2019. Traveller Equality & Justice Project Submission to Department of Justice & Equality Public Consultation/Review on the Prohibition of the Incitement to Hatred Act 1989, available at <https://www.ucc.ie/en/media/academic/law/tejp/TEJPDofJESubmission.pdf>

⁵⁶ *Supra* n.27 at 26.

⁵⁷ Unfair Dismissals (Amendment) Act, 1993, Amendment of section 6 of Principal Act.

5.—Section 6 of the Principal Act is hereby amended by—

(a) the substitution in subsection (2) of the following paragraphs for paragraph (e):

(e) the race, colour or sexual orientation of the employee,

(ee) the age of the employee,

(eee) the employee’s membership of the travelling community.

Complementary to domestic equality legislation are the relevant international legal treaties and human rights frameworks of which Ireland is a member. Ireland is bound by a number of international law treaties and through its membership of both the Council of Europe and European Union, both of which provide a number of non-discrimination law frameworks and norms. These are drawn from the EU non-discrimination directives, and the European Convention of Human Rights, in particular Article 14 and Protocol 12 which prohibit discrimination and inequality and operate in conjunction with the domestic legislative framework outlined in the previous section.

This section will examine the relevant European non-discrimination law and associated frameworks drawn from both the Council of Europe and European Union, considering how these work as complementary systems to ensure respect for the principle of non-discrimination. Although considered complementary, there are differences in both scope and application, and these will be considered here alongside a discussion of the relevance and operation of these principles within the domestic legal system.

It is important to note here that both the Council of Europe and European Union often use the umbrella term 'Roma' as a collective noun encompassing diverse groups that include Irish Travellers. The Council of Europe notes that:

The term 'Roma and Travellers' is used at the Council of Europe to encompass the wide diversity of the groups covered by the work of the Council of Europe in this field: on the one hand a) Roma, Sinti/Manush, Calé, Kaale, Romanichals, Boyash/Rudari; b) Balkan Egyptians (Egyptians and Ashkali); c) Eastern groups (Dom, Lom and Abdal); and, on the other hand, groups such as Travellers, Yenish, and the populations designated under the administrative term 'Gens du voyage', as well as persons who identify themselves as Gypsies.⁵⁸

Similarly, the European Union recognises the term 'Roma' to encompass:

The umbrella-term 'Roma' encompasses diverse groups, including Roma, Sinti, Kale, Romanichels, Boyash/Rudari, Ashkali, Egyptians, Yenish, Dom, Lom, Rom and Abdal, as well as Traveller populations (gens du voyage, Gypsies, Camminanti, etc.). EU policy documents and discussions commonly employ this terminology.⁵⁹

However, Irish Travellers generally do not agree with the usage of umbrella terminology, which can be considered to both minimise and distort the unique cultural heritage of the groups included in the terminology. Inclusion of such a broad range of traditionally nomadic groups allows for a blanket response which often does not recognise the unique attributes and rich cultural significance and differences between these ethnic groups. While Travellers stand in solidarity with these groups, in light of their common understanding of social exclusion and discrimination on the basis of ethnicity, usage of the umbrella term is not considered best practice for those working with the Irish Traveller Community.

⁵⁸ Council of Europe Roma and Traveller Team <https://www.coe.int/en/web/roma-and-travellers/about-us>

⁵⁹ 'Roma People in the European Union' https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu_en

The TEJP therefore will always adopt the term Traveller even when working with and referencing both Council of Europe and European Union policy and legislative frameworks.

7. Relevant European Union Law.

As a member of the European Union, Ireland is one of 27 Member States and as such is bound by the doctrine of supremacy of EU law over domestic law.⁶⁰ The two sources of EU law are primary and secondary and are governed by the principle of Direct Effect which enables individuals to invoke EU provisions before domestic or European courts, regardless of whether domestic legislation also exists. Direct Effect only applies to certain European acts and is conditional.⁶¹ The Principle of Direct Effect is a core tenet of EU law enshrined by the Court of Justice in the judgment of *Van Gend en Loos*.⁶²

The main primary sources of EU law are the Treaty of the European Union (TEU), the Treaty of the Functioning of the EU (TFEU) and the EU Charter of Fundamental Rights (CFR), which was granted primary status with the introduction of the Lisbon Treaty. Article 288 of the TFEU dictates that there are two main forms of secondary legislation, regulations, and directives. The article also notes that regulations have direct effect and are binding in their entirety applying in all EU member states. Directives, on the other hand, are an act addressed to EU countries and must be transposed into the domestic legal system, meaning that it is up to the member state to decide on the manner of implementation within the domestic system. However, in *Van Duyn* the Court of Justice recognised the direct effect of directives in certain circumstances in order to protect the rights of individuals.⁶³ Specifically, it found that a directive has direct effect ‘when its provisions are unconditional and sufficiently clear and precise and when the EU country has not transposed the directive by the deadline.’⁶⁴

7.1. Supremacy of EU Law.

⁶⁰ *Case C-6/64 Costa v. ENEL* [1964] E.C.R. 585, 593.

⁶¹ ‘The direct effect principle therefore ensures the application and effectiveness of European law in EU countries. However, the CJEU defined several conditions in order for a European legal act to be immediately applicable. In addition, the direct effect may only relate to relations between an individual and an EU country or be extended to relations between individuals.’ The direct effect of European law, <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=LEGISSUM:l14547>

⁶² ‘In *Van Gend en Loos*, the Court states that European law not only engenders obligations for EU countries, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke European acts before national and European courts. However, it is not necessary for the EU country to adopt the European act concerned into its internal legal system.’ *Ibid*.

⁶³ *Van Duyn v Home Office* (1974) C-41/74

⁶⁴ The direct effect of European law <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=LEGISSUM:l14547>

In *Costa v ENEL* the CJEU established the doctrine of supremacy, which states that EU laws have primacy over member state's domestic legislation.⁶⁵ Any domestic legislation which contradicts the EU principles is considered to be non-applicable.⁶⁶

All member states are therefore obliged to interpret national law in a manner which conforms with EU law and must introduce legislation to recognise the supremacy of EU law. The *European Communities Act 1972*,⁶⁷ provided for the supremacy of EU law within the domestic context, stating that EU treaties and both existing and future acts are binding on the State, becoming part of Irish law. This supremacy was further facilitated through a Constitutional amendment, Article 29.3, which recognises EU law as the supreme normative authority specific areas of competency which it transferred authority to.

In the field of non-discrimination law, this means that Courts must interpret the ESA in light of relevant EU legislation. individuals may also now lodge complaints to the effect that the ESA, as implementing EU law⁶⁸, violates the Charter.⁶⁹

7.2. EU Frameworks of Non-Discrimination.

Although the original European Union treaties did not contain any protections for human rights, this was not initially considered problematic as the majority of EU member states had and continue to have domestic human rights provisions. Notwithstanding this, all 27 EU member states are also Council of Europe member states and are thus subject to the jurisdiction of the European Convention on Human Rights and the European Social Charter. This is recognised within Article 6(3) TEU which provides that the Convention rights constitute general principles of EU law and confirms the EU member states' recognition of the importance of social rights, as enshrined in the European Social Charter.⁷⁰ However, as EU law developed and sought to cement its primacy and areas of competence, it became increasingly clear that human rights principles needed to be clearly incorporated in EU legal frameworks.

Non-discrimination is considered a core facet of applicable EU laws and as such has become embedded in the primary legislation under Article 2 TEU and Article 10 TFEU amongst others. Under Article 2 TEU, the non-discrimination principle is noted as being one of the fundamental values of the Union, while Article 10 TFEU requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief,

⁶⁵ *Case C-6/64 Costa v. ENEL* [1964] E.C.R. 585, 593 'The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law. It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.'

⁶⁶ *Ibid* See also R., Arigho, *The Supremacy of European Union Law: An Inevitable Revolution or Federalism in Action?* (2014) *Journal of Postgraduate Research*, Trinity College Dublin, who notes that 'the central rationale of the Court was that in order for EU law to be given the same uniform application across the Member State, it would be incongruous to place the power of interpretation with the Courts of the Member States, which would likely reach different conclusions, thus negating any attempt at one single European law having the same effect in the Member States. If Union law was not superior to national law, then divergent national laws would trump Union law, leaving the State of Union law in a perilous position.'

⁶⁷ <http://www.irishstatutebook.ie/eli/1972/act/27/enacted/en/html>

⁶⁸ Under the Equality Act 2004.

⁶⁹ For more on this see J. Walsh. 'The Equal Status Acts 2000-2011', (Dublin, ICCL, 2011).

⁷⁰ Both of these will be discussed shortly in s.8.

disability, age, or sexual orientation, when defining and implementing its policies and activities. Although initially adopted as a non-binding declaration of human rights in 2000, the European Charter of Fundamental Rights became primary law under the Lisbon Treaty in 2009. The Lisbon Treaty placing the Charter on the same grounds as the TEU and TFEU under Article 6(1) TEU. EU institutions are bound by the rights provisions within the Charter and member states must follow its rights provisions when implementing EU law. In this sense, the Charter is considered less useful for human rights litigation. Yet while the Charter largely mirrors its Council of Europe counterpart, the European Convention on Human Rights, it explicitly protects both civil and political and socio-economic rights and includes broad principles of equality and promotion of non-discrimination. Its scope of protection can therefore be considered more robust than the ECHR.

In 2000 two directives were adopted designed to combat and respond to racism and inequality within the EU, these were the Employment Equality Directive (2000/78/EC) which prohibits discrimination on the basis of sexual orientation, religion or belief, age and disability, in the area of employment; and the Racial Equality Directive (2000/43/EC) which prohibits discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, as well as goods and services.

These core principles of non-discrimination within EU law which bind member states, are therefore drawn from primary legislation such as the Charter of Fundamental Rights, and relevant EU secondary legislation (such as the Racial Equality Directive 2004/EC/43) and the relevant jurisprudence of the CJEU.⁷¹ Such principles have been crucial for guiding member states in their efforts to challenge and respond to non-discrimination. Harvey recognises the important influence and ‘valuable role’⁷² which the European Union has had ‘in stimulating and shaping equality strategies in Ireland over the past three decades.’ He notes, in particular, that this influence is clear within the core domestic framework consisting of the *Equal Status Acts* and *Employment Equality Acts* which were drafted in consideration of the European Union directives, European case law and European Union action programmes focusing on increased equality within European Societies.⁷³

7.3. The Charter of Fundamental Rights.

As aforementioned, the Charter of Fundamental Rights of the European Union enshrines a range of personal, civil, political, economic, and social rights into the primary sources of EU law. Article 51(1) notes the scope and duties conferred on Member States to respect the rights, observe the principles, and promote

⁷² B. Harvey, Guide to Equality and the Policies, Institutions and Programmes of the European Union, [https://www.ihrec.ie/app/uploads/download/pdf/guide to equality and the policies institutions and programmes of the eu.pdf](https://www.ihrec.ie/app/uploads/download/pdf/guide%20to%20equality%20and%20the%20policies%20institutions%20and%20programmes%20of%20the%20eu.pdf) p.3

⁷³ *Ibid*

the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The Charter groups rights into sections known as ‘titles’, the most relevant for the purposes of this report being ‘Title III Equality.’ Title III covers Articles 20 to 26 and emphasises the importance of the principle of equal treatment in the EU legal order. Article 20 of the EU Charter confirms that everyone is equal before the law, while Article 21 provides for a widespread prohibition of discrimination on the basis of any protected grounds such as race, sex, ethnic and social origin, religion, language, age, political or other opinion, disability, sexual orientation or membership of a national minority amongst others.⁷⁴ The Charter also protects the right to respect for private and family life under Article 7, and the right to education under Article 14. Which are rights which are often limited or directly undermined when discriminatory conduct has occurred.

It is important to remember however, that application of the Charter is limited as the terms are addressed to the institutions and bodies of the EU national authorities only when they are implementing EU law. As a result, individuals may only action the provisions of the Charter where an individual feels that EU law or a national act which implements EU law is in breach of the Charter. Where such a complaint arises, an individual may take a complaint under the Charter to the national courts, who can then seek guidance from the CJEU under Article 267 TFEU, the preliminary reference procedure.

In cases where the Charter does not apply, the protection of fundamental rights is guaranteed under the domestic equality frameworks or under complimentary human rights frameworks such as the ECHR or other international conventions which the relevant Member State may have ratified.

7.4. Racial Equality Directive 2004/EC/43.

Article 19 of the TFEU granted the EU competence to combat discrimination based on sex, racial and ethnic origin, religion, belief, disability, age, and sexual orientation. This provision has given rise to three directives, the Framework Directive 2000/78,⁷⁵ the Gender Goods and Services Directive 2004/113, and the Racial Equality Directive 2000/43/EC the latter two of which overlap with the competencies of the *Equal Status Acts 2000-2015*. The Racial Equality Directive creates a framework for combating discrimination on the grounds of racial or ethnic origin throughout the Union. It does so in relation to a number of grounds including, employment, education, social protection, social security and healthcare, social advantages, and access to and the supply of goods and services, including housing.

The purpose of this Directive is noted within its text as being ‘to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member

⁷⁴ The Charter of Fundamental Rights of the European Union, Title III. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

⁷⁵ The Framework Directive is implemented through the EEA 1998-2015.

States the principle of equal treatment.’ In doing so the Directive provides definitions of both direct and indirect discrimination as:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The Directive also signals the importance of combatting inequality within the European Union as discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty:

in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion, and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security, and justice.

In promoting the principle of non-discrimination within the Union, the Race Equality Directive requires Member States to take a number of actions including:

- Article 7(1) requires member states to ensure adequate judicial and administrative procedures are available to those affected under the scope of the Directive, arising from a failure to secure equal treatment.
- Article 7(2) requires member states to ensure that associations, organisations, or other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
- Article 13 requires creation of equality bodies to promote equal treatment of all persons within discrimination as to racial or ethnic origin.
- Article 8(1) reverses the burden of proof, mirroring that of the Equal Status Acts, requiring a complainant to establish facts ‘from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’

The Equality Act 2004 amended the Equal Status Act 2000 to transpose the Directive into Irish law.⁷⁶ However, the European Commission previously questioned the extent to which the *Equal Status Acts*

⁷⁶ The Equality Directives Equality Act 2004 amended the *Equal Status Act 2000* and the *Employment Equality Act 1998* in order to give effect to the: Council Directive 2000/43/EC – The Racial Equality Directive; Council Directive 2000/78/EC – The General Framework Directive; Council Directive 2002/73/EC – The Equal Treatment Directive.

adequately implement the Racial Equality Directive. In 2007 the Commission initiated infringement proceedings through a Reasoned Opinion⁷⁷ noting Ireland's failure to fully implement the provisions of the Directive.⁷⁸ In particular, the Commission raised issue with the definition of indirect discrimination in the *Equal Status Act* highlighting that it does not cover future or possible events.⁷⁹ It also noted that the *Equal Status Act* did not comply with the Directive's Article 7 owing to the limitations of the right of associations to engage in legal procedures to help victims of discrimination.⁸⁰

These infringement proceedings were closed in 2011 when the Commission recognised that Ireland had provided satisfactory clarification on its transposition of the Directive.⁸¹ The legislation however remains unchanged and further issues remain which may also be quantified as raising possible issues with the Directive, by undermining Article 7 and Article 13. For example, the transfer of jurisdiction from the Equality Tribunal to the District Court for cases concerning licensed premises has resulted in fewer complaints owing to the adversarial and public nature of hearings.⁸² This, coupled with the complicated rules and procedures in the District Court, and possibility of costs incurred, engages Article 13 of the Directive as the transfer from the more transparent and accessible Equality Tribunal to the District Court can be considered a wholly regressive shift owing to the significant barriers presented by the District Court.⁸³ Many Travellers may also choose not to proceed with claims because they are afraid of incurring costs where a claim is unsuccessful, whereas both the WRC and former Equality Tribunal did not have costs. This deterrent effect was foreseeable as a consequence of the change made by the Government to the Equality Tribunal's jurisdiction and can thus be considered to be a breach of the non-regression provisions of Article 15 of the Racial Equality Directive.⁸⁴

Similarly, Section 21(1) of the *Equal Status Act* provides that a complainant must instigate proceedings within two months of the alleged discriminatory conduct, by sending a written notification to the alleged discriminator. This system has proved problematic for a number of protected groups such as Travellers, as it presents a formidable barrier to litigation. It also fails to recognise the difficulties which many minorities or socially excluded groups may have in accessing legal advice and representation. These restrictive limitation periods may therefore undermine Article 7. In light of these ongoing issues with the *Equal Status*

⁷⁷ A reasoned opinion is the second stage of infringement proceedings, used for member states considered to be defaulting on EU law transposition and implementation. For more on this process see: https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

⁷⁸ The Commission sent a further Reasoned Opinion on 31 January 2008 for failure to fully implement the provisions of the Framework Employment Directive 2000/78/EC

⁷⁹ MEMO/07/257, Brussels, 27 June 2007, The Race Equality Directive: What is the Race Equality Directive? https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_257

⁸⁰ *Ibid.*

⁸¹ Unusually, there does not appear to be a press release noting this closure, nor a record of this on the usual platforms. As noted in O. O'Farrell, 'Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC', Country Report 2012 Ireland, State of Affairs up to 1st January 2013.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ J Walsh, *Equal Status Acts 2000-2011 Ibid* and see also O'Farrell *Supra*.

Act and equality framework, it is surprising that the Commission accepted the Irish submission regarding effective transposition of the Directive.⁸⁵

7.5. Policy Statements.

While the EU has a number of both primary and secondary acts of legislation within its robust non-discrimination framework, there is also considerable work within policy statements, which warrant examination here. In particular, Council recommendations and other statements can shape legislation and often allow for quick response to proliferating social and rights-based issues.

Owing to their widespread social exclusion and high levels of discrimination and racism, Roma, and Travellers of particular concern for the Council of the EU and rights-implementation bodies of the European Union. To that end, the Council has adopted a number of recommendations focused on promotion of Roma equality, inclusion, and participation.⁸⁶ Such recommendations serve as reminders to member states to reconfirm their commitment to effectively fight discrimination against Roma people and to promote their human rights to inclusion in the key areas of education, employment, health, and housing.⁸⁷

Although not binding in a legislative manner, the findings, and reports of the EU's Fundamental Rights Agency (FRA) are also worthy of inclusion here as they are increasingly persuasive in encouraging States to secure the human rights of vulnerable rights holders across Europe. The FRA was established in 2007 in order to provide research led assistance and expertise on the operation of human rights within Europe to the EU institutions. It has been particularly strong in highlighting and reporting on the proliferating situation faced by Travellers and Roma in Europe.⁸⁸ Of particular interest to discrimination as experienced by Irish Travellers is the 'Roma and Travellers in six countries - Country sheet on Ireland'⁸⁹ and the 'Travellers in Ireland' video which highlights the lived experience of discrimination experienced by Travellers in Ireland.⁹⁰

⁸⁵ More detailed analysis of the effectiveness of the Irish equality framework and barriers which this presents in accessing and securing access will be provided in a subsequent report, entitled 'Barriers to Accessing Justice within the Non-discrimination framework in Ireland,' which will be made available in February 2022.

⁸⁶ Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States, and the

⁸⁷ Council Recommendation on Roma equality, inclusion, and participation (2021/C 93/01) adopted on 12 March 2021 aims to provide a renewed and strengthened commitment from the EU and its Member States to the shared objectives on Roma equality, inclusion, and participation in order to push forward policy measures over the next decade to tackle the enormous inequality gap suffered by the Roma population across Europe. The Recommendation serves to 'confirm a long-term commitment to the shared objectives on Roma equality, inclusion and participation and to provide renewed and strengthened guidance by setting out measures that Member States may adopt towards those objectives. 'Council reaffirms commitment to combat discrimination against Roma, March 2021 <https://www.consilium.europa.eu/en/press/press-releases/2021/03/12/council-reaffirms-commitment-to-combat-discrimination-against-roma/>

⁸⁸ For an overview of the FRA's work on the theme of Roma and thereby Traveller rights see <https://fra.europa.eu/en/themes/roma>

⁸⁹ <https://fra.europa.eu/en/publication/2020/roma-and-travellers-six-countries-country-sheets>

⁹⁰ <https://fra.europa.eu/en/video/2020/travellers-ireland> See also the EU programme's relevant specifically to Traveller rights which will also be considered in this section. The EU Roma Strategic Framework for Equality, Inclusion, and Participation 2020–2030 identifies employment as one of four sectoral objectives to be pursued by the Member States in the period to 2030. This strategy, which is inclusive of Travellers, sets a number of key targets for Member states, to 2030 to:

- cut the employment gap and the gender employment gap, for Roma, by at least half;
- ensure 60% of Roma overall and 40% of Roma women, are in paid employment.

Both EU Roma Strategic Frameworks⁹⁰ require each Member State to develop a national Roma integration strategy: at national level, this is the National Traveller and Roma Inclusion Strategy (NTRIS) 2017–2021.

8. Council of Europe Framework on Non-Discrimination.

The Council of Europe is distinct from EU and has 47 member states. In comparison to the EU, the Council of Europe's exclusive focus is on promotion of the rule of law and promotion of human rights standards. The Council of Europe comprises two statutory bodies, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe. The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote awareness of and respect for human rights in the member states. The Committee of Ministers is the Council of Europe's decision-making body and monitors compliance with decisions made by the European Court of Human Rights. PACE comprises the representatives of national parliaments and has a consultative role. Both PACE and the Committee of Ministers adopt resolutions which act as guidance for implementation of Council of Europe instruments, which include a number of core human rights treaties such as, the European Convention on Human Rights, European Social Charter, the Framework Convention on National Minorities and the European Commission on Racism and Intolerance.

The relevant non-discrimination framework is drawn from the treaties of the Council of Europe including the ECHR and ESRC and from the caselaw of these bodies (ECtHR, ECSR) alongside policy statements made by the PACE, The Commissioner for Human Rights, Committee of Ministers and ECRI.⁹¹

8.1. The European Convention on Human Rights.

The European Convention on Human Rights (ECHR) lists a number of human rights, which are legally binding upon State parties. Traditionally considered to be a 'civil and political' doctrine, the Convention does also confer limited socio-economic rights, including a right to property under Article 1 Protocol 1. Protocols have been adopted which amend the original text, expanded the rights protection therein.

Of particular relevance for Travellers, and in particular for promotion of equality and non-discrimination are Article 6, 8, 14 and Protocol 12.

- Article 6 confers the right to a fair trial and includes a right to legal aid in certain circumstances⁹² and legal representation.⁹³

⁹¹ ECHR, Art. 14 (prohibition of discrimination), Protocol No. 12, Art. 1 (general prohibition of discrimination) ESC, Art. E, Protocol Providing for a System of Collective Complaints (Revised) Framework Convention for the Protection of National Minorities; ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], Nos. 60367/08 and 961/11, 2017 ECtHR, *Pichkur v. Ukraine*, No. 10441/06, 2013 ECtHR, *Savež crkava "Riječ života" and Others v. Croatia*, No. 7798/08, 2010

⁹² *Airey v. Ireland* 6289/73 - Chamber Judgment [1979] ECHR 3 (09 October 1979)

⁹³ For more see European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb) (2020) available at https://www.echr.coe.int/documents/guide_art_6_eng.pdf which notes that 'Article 6 § 1 does not imply that the State must provide free legal aid for every dispute relating to a "civil right" (*Airey v. Ireland*, § 26). There is a clear distinction between Article 6 § 3 (c) – which guarantees the right to free legal aid in criminal proceedings subject to certain conditions – and Article 6 § 1, which makes no reference to legal aid (*Essaadi v. France*, § 30). However, the Convention is intended to safeguard rights which are practical and effective, in particular the right of access to a court. Hence, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court (*Airey v. Ireland*, § 26). The question whether or not Article 6 requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case (*Airey v. Ireland*, § 26. *Steel and Morris v. the United Kingdom*, § 61; *McVicar v. the United Kingdom*, § 48). What has to be ascertained is whether, in the light of all the circumstances, the lack of legal aid would deprive the applicant of a fair hearing (ibid., § 51).'

- Article 8 promotes the Right to Respect for Private and Family Life, Home and Correspondence and has been used to promote respect for the unique needs of the Irish Traveller Community regarding right to culturally appropriate accommodation.⁹⁴
- Article 14 prohibits discrimination through guarantee of equality in ‘the enjoyment of [...] [the] rights and freedoms’ set out in the ECHR, in relation to the exercise of another right guaranteed by the Convention.
- Protocol 12 prohibits discrimination in relation to the ‘enjoyment of any right set forth by law’ and ‘by any public authority.’

The ECHR was transposed into domestic law by the European *Convention on Human Rights Act 2003*, which requires domestic courts ‘interpreting and applying any statutory provision or rule of law, a court shall,’ to ‘in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.’⁹⁵

8.1.1. Scope of Non-discrimination protections under the ECHR.

As noted above, Article 14 prohibits discrimination through guarantee of equality in ‘the enjoyment of [...] [the] rights and freedoms’ set out in the ECHR, however, this is only engaged in relation to the exercise of another right guaranteed by the Convention. The ECHR will therefore not be competent to examine complaints of discrimination unless they fall within the ambit of one of the rights protected by the ECHR.

An applicant will often allege a violation of a substantive right, and in addition, a violation of a substantive right in conjunction with Article 14. That is, that the interference with their rights was, in addition to failing to meet the standards required in the substantive right, also discriminatory, in that those in a comparable situation did not face a similar disadvantage. In order for a claim to arise under Article 14 there must be ‘a difference in the treatment of persons in analogous, or relevantly similar, situations’.⁹⁶ This difference is discriminatory under Article 14 a) if it has no objective and reasonable justification; b) if it does not pursue a legitimate aim and c) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁹⁷ While Article 14 does provide a non-discrimination clause within the Convention text it has ‘no independent existence’⁹⁸ and the discrimination must be attributable to the enjoyment of another Convention norm in order for the principle of non-discrimination included

⁹⁴ See for example: *Winterstein v. France* no. 27013/07 – Chamber Judgment, [2013] ECHR 984; *Connors v. the United Kingdom* judgment (no. 66746/01, 27 May 2004); *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I§ 73; *Buckley v. the United Kingdom*, 25 September 1996, §§ 52-54, *Reports of Judgments and Decisions* 1996-IV; *Orlić v. Croatia*, no. 48833/07, § 54, 21 June 2011§ 55; and *Yordanova and Others v. Bulgaria*, no. 25446/06, § 103, 24 April 2012). and more broadly: *Moreno Gomez v. Spain* no. 4143/02. Judgment of 16 November 2004, at paragraph 53; *Prokopovitch v. Russia*,⁹⁴ no. 58255/00, § 36, ECHR 2004-XI.

⁹⁵ ECHR Act, 2003 s2(1).

⁹⁶ see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008

⁹⁷ *Carson v. UK* (2010) (Application No. 42184/05) §61.

therein to become actionable. The protection conferred by Article 14 is therefore limited to its consideration alongside another Convention right.

However, under Protocol No. 12, the prohibition of discrimination became a free-standing right. Protocol No. 12 prohibits discrimination in relation to the ‘enjoyment of any right set forth by law’ and ‘by any public authority’ and is thus greater in scope than Article 14, which relates only to the rights guaranteed by the Convention. Although Ireland has signed Protocol 12, it has yet to bring this into force through ratification.

Paragraph 22 of the Explanatory Report of Protocol No. 12 states that Article 1 of Protocol No. 12 relates to discrimination in the following:

- (i) in the enjoyment of any right specifically granted to an individual under national law;
- (ii) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- (iii) by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- (iv) by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

The FRA notes that this means that while that Protocol principally protects individuals against discrimination from the state, it will also apply to those relationships between private persons, which should normally be regulated by the state. These may include, ‘for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity’.⁹⁹ Broadly speaking, Protocol No. 12 will prohibit discrimination outside purely personal contexts, where individuals exercise functions placing them in a position to decide on how publicly available goods and services are offered. This may provide considerable scope for challenging discrimination in accessing goods and services experienced by Travellers.

8.1.2. Relevant ECtHR Case Law on Non-Discrimination.

Individuals who feel that their rights under the Convention have been interfered with may take a case to the European Court of Human Rights, where they have exhausted all domestic remedies. The ECtHR has been clear on its intolerance of racial discrimination,¹⁰⁰ particularly relating to Travellers. It has also been very clear on the rights of Travellers and Roma to specific and culturally-appropriate accommodation, beyond that of ‘bricks and mortar’ homes.¹⁰¹ Furthermore, the Court has recognised ‘[A]s a result of their turbulent history and constant uprooting the [Travellers] have become a specific type of disadvantaged and vulnerable minority ... As the [European] Court [of Human Rights] has noted in previous cases, they

⁹⁹ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, para. 22.

¹⁰⁰

¹⁰¹ *Supra* n.68

therefore require special protection¹⁰² The ECtHR has thus been extremely strict regarding discrimination based on race or ethnicity stating: ‘no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.’¹⁰³

In finding a breach of Article 14, the Court has established that only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of Article 14.¹⁰⁴

It is widely recognised within the Court’s case law, that discrimination on the basis of membership of an ethnic minority such as Travellers falls within the scope of Article 14: ‘Article 14 of the Convention, in the light of its objective and the nature of the rights which it seeks to safeguard, also covers instances in which an individual is treated less favourably on the basis of another person’s status or protected characteristics.’¹⁰⁵

Within the scope of Article 14, member states also enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.¹⁰⁶ The scope of this margin will vary according to the circumstances, the subject-matter and the background.¹⁰⁷ A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Due to their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation.’¹⁰⁸

Protocol 12 expanded the right to non-discrimination secured by the Convention, with the insertion of the following protection:

Article 1 of Protocol No. 12 to the Convention provides:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

In comparison with Article 14, it is widely recognised that Protocol 12 may offer more concrete protection to Travellers experiencing discrimination:

[W]hereas Article 14 of the [European] Convention [on Human Rights] prohibits discrimination in the enjoyment of ‘the rights and freedoms set

¹⁰² *D.H. and Others v. the Czech Republic*, application n° 57325/00, Grand Chamber judgment of 13 November 2007, § 182.

¹⁰³ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009 para 44.

¹⁰⁴ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23

¹⁰⁵ *Škorjanec v. Croatia* (Application No. 25536/1455) at §55

¹⁰⁶ *Ibid Burden* at, § 60.

¹⁰⁷ *Supra* n.74 at §61.

¹⁰⁸ *Stec and Others v. the United Kingdom* [GC], no. 65731/01 and 65900/01, § 52.

forth in [the] Convention', Article 1 of Protocol No. 12 [to the Convention] extends the scope of protection to 'any right set forth by law'. It thus introduces a general prohibition of discrimination.¹⁰⁹

In *Pilav v. Bosnia and Herzegovina*¹¹⁰ the Court confirmed however that notions of discrimination prohibited by both Article 14 and Article 1 of Protocol No. 12 were to be interpreted in the same manner:¹¹¹

The Court further reiterates that the same term 'discrimination' from Article 14 was used in Article 1 of Protocol No. 12 as well. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court sees no reason to depart from the settled interpretation of 'discrimination', as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12¹¹²

Notwithstanding this scope, case law arising under Protocol 12 has been limited to date, with the Court only finding a violation of Article 1 Protocol 12 in one instance concerning Roma to date,¹¹³ *Sejdić and Finci v. Bosnia and Herzegovina*.¹¹⁴ Willers and Johnson note that 'while the underlying goal of Protocol 12 (a general ban on discrimination) is potentially radical' that unfortunately, 'it is difficult to predict how effective a tool it will be for the protection of Gypsies, Travellers and Roma.'¹¹⁵

8.2. The European Social Rights Charter.

The European Social Charter (ESC) is another core treaty of the Council of Europe's human rights framework, considered complementary to the ECHR, the ESC protects socio-economic rights. Adopted in 1961, the Charter has been updated by the 'Revised Social Charter' and a number of protocols which reflect the evolution and our understanding of rights protections since 1961. Adopted in 1996, the Revised European Social Charter, codifies in a single instrument all the rights guaranteed by the 1961 Charter and its Additional Protocol of 1988, while up-dating some of them and adding several completely new rights. The Revised Charter is gradually replacing the initial 1961 treaty.¹¹⁶

The rights contained in both the original Charter and revised Charter protect a wide range of socio-economic rights provisions, including the right of the family to social, legal and economic protection, including the provision of family housing (Article 16 of the Charter and revised Charter), the right to protection against poverty and social exclusion (Article 30 Revised Charter) and the right to housing (Article 31 Revised Charter).

¹⁰⁹ *Sejdić and Finci v. Bosnia and Herzegovina*, (Grand Chamber) (Application No(s). 27996/06 34836/06) § 53

¹¹⁰ *Pilav v. Bosnia and Herzegovina* (Application. No. 41939/07)

¹¹¹ *Ibid*

¹¹² *Ibid* §40

¹¹³ It is noteworthy here, that the case was not principally concerned with discrimination attributable solely to the applicant's status as Roma, but rather than he was not identifying as a Bosniak, Croat or Serb for the purposes of the Constitutional provisions governing the relevant elections being contested. The Court recognised that while the rights of both Roma and Jewish applicants under Article 1 Protocol 12 were particularly violated, that the issue in question which barred anyone not identifying as Bosniak, Croat or Serb more broadly was the core issue creating the violation.

¹¹⁴ *Supra* n. 80

¹¹⁵ *Supra* n.73 at 2.185.

¹¹⁶ 'The Charter's Treaty System', <https://www.coe.int/en/web/european-social-charter/overview>

Although the original Charter does not contain an express non-discrimination clause, it does refer to the need for enjoyment of the social rights included therein to be secured without discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction, and social origin. However, this was expanded upon in the Revised Charter which inserted Article E, an explicit provision prohibiting discrimination. Its wording is very similar to that of Article 14 of the ECHR. It provides protection from discrimination through a horizontal clause covering grounds such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or 'other status'.¹¹⁷

The text of Article E prohibits both discrimination where persons or groups in identical situations are treated differently; and secondly, where difference between individuals or groups are not considered. The Committee has recognised that the protections afforded by Article E mirror that of Article 14 ECHR:¹¹⁸

The Committee observes further that the wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14...the principle of equality that is reflected therein means treating equals equally and unequals unequally.... In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.¹¹⁹

The Committee thus considered that Article E not only prohibits direct discrimination but also all forms of indirect discrimination:

Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.¹²⁰

The Committee continued to propose that the 'insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein.'¹²¹ The prohibition of non-discrimination furthered by Article E of the revised ESC does not allow discrimination on any of the grounds listed in the article, however, the Article is considered to be a non-exhaustive list, thus further mirroring Article 14 ECHR.¹²²

The enforcement and monitoring of the Charter and Revised Charter falls to the European Committee of Social Rights. States submit reports on the implementation of the Charter(s) to the Committee whose members supervise and review these. The 15 independent and impartial members of the Committee are elected by Council of Europe's Committee of Ministers for a period of six years, renewable once. The

¹¹⁷ FRA, Handbook on European non-discrimination law – 2018 edition, available at <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition>

¹¹⁸ *International Associated Autism Europe v. France* Complaint No.13/2002, 4 November 2003

¹¹⁹ *Ibid* para. 52

¹²⁰ *Ibid*

¹²¹ *Supra* n. 73.

¹²² *Supra* n.52 (FRA)

Committee is often considered to be less persuasive a tool for ensuring protection of Traveller and Roma rights, however the findings of the Committee are largely more dynamic than those of the ECtHR, as the Committee is not bound as rigidly to norms of judicial practice. Although a non-judicial body, through the collective complaint system and national reporting, the European Committee of Social Rights has two available methods of monitoring compliance with the Charter(s). Notwithstanding this, the findings and conclusions of the Committee are made in reference to binding legal provisions. Therefore, State Parties to the Revised Charter must respect the Decisions and Conclusions of the European Committee of Social Rights, even where these are not considered to be directly enforceable in the domestic legal systems. The Charter and Committee are therefore highly useful tools for furthering the development of social rights within member states.

Although it operates very differently to the ECtHR, the Committee does have a complaints procedure within its mandate, which includes the collective complaints procedure proposed in Additional Protocol of 1995. The collective complaints procedure. Under this recognised trade unions and NGOs can submit complaints on behalf of individuals in States which have adopted the Additional Protocol. Ireland adopted the Additional Protocol in 2000 and thus may be subject to Collective Complaints as occurred in No. 100/2013 *European Roma Rights Centre (ERRC) v. Ireland*.¹²³

In this decision, which largely focused on the right to housing and protection from evictions, the Committee found that special consideration should be given to the needs and different lifestyle of Irish Travellers who are vulnerable minority. The Committee found that Ireland's Traveller Accommodation Programme and failure to secure culturally appropriate accommodation of an adequate standard amounted to a violation of Article 16 of the ESC. In finding this, the ECSR stressed that failure to provide sufficient accommodation for Travellers may also amount to discrimination if the authorities fail to 'take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.¹²⁴ However, despite noting the possibility of this, the ECSR found no violation of Article E in this case. This does indicate however, that a similar challenge more broadly focused on Article E may result in a breach before the Committee.

In *Centre for Housing Evictions v. France*¹²⁵ the Committee found that mass evictions of Roma both violated their right to dignity and freedom from discrimination, as the 'evictions took place against a background of ethnic discrimination, involving the stigmatisation of Roma, and constraint.'¹²⁶ The Committee thus concluded that the mass-evictions perpetrated by the local authority of which the respondent State was

¹²³ *European Roma Rights Centre (ERRC) v. Ireland*, Complaint No. 100/2013, 1 December 2015. Full decision on the merits available at: [https://hudoc.esc.coe.int/eng/#{?%22sort%22:\[%22ESCPublicationDate%20Descending%22\],%22ESCDcIdentifier%22:\[%22c-100-2013-dadmiss-en%22\]}](https://hudoc.esc.coe.int/eng/#{?%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22c-100-2013-dadmiss-en%22]})

¹²⁴ *Ibid* para. 69

¹²⁵ *Centre for Housing Right and Evictions v. France*, Complaint No 63/2010, 28 June 2011.

¹²⁶ *Ibid* para. 47

responsible for amounted to conduct prohibited under Article E and was thus ‘clearly and directly discriminatory treatment based on the ethnic origin of the persons concerned.’¹²⁷

It is clear therefore that the Charter offers considerable protection against discrimination for ethnic minorities and should hold potential for future legal challenges within this jurisdiction.

8.3. The Framework Convention on National Minorities.

The Framework Convention for the Protection of National Minorities (Framework Convention) is Europe’s most comprehensive treaty protecting the rights of persons belonging to national minorities and is the first legally binding multilateral instrument devoted to the protection of national minorities worldwide. It was adopted on 10 November 1994 by the Committee of Ministers, and it entered into force on 1 February 1998. Ireland became a signatory and ratified the Framework in 1999. As a ‘Framework’ Convention, it requires highlights the scope for member states to translate the Convention’s provisions to their specific country situation through national legislation and appropriate governmental policies. It also confers a number of protections onto national minorities. Of particular merit are Articles 1, 3, 4, 5, 10 and 15:

- Article 1 recognises that ‘the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.’ Rights enjoyed by individuals belonging to national minorities include:
- Article 3: Freely expressing ethnic, cultural, linguistic and religious identities.
- Article 4: Right to non-discrimination. In particular, Article 4 notes that ‘Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.’
- Article 5: Enjoying freedom of assembly, association, expression, thought, conscience and religion.
- Article 10: Using minority languages in contact with the authorities in areas inhabited traditionally or in substantial numbers by national minorities.
- Article 15: Right to participate in cultural, social and economic life.

Complementary obligations to be respected by the States include:

¹²⁷ *Ibid* para 51. Note that the Committee found further evidence of discrimination by virtue of the French State’s policies of targeting Roma for expulsion from the jurisdiction (para. 66): ‘The Committee therefore believes that it has been demonstrated that returning Roma of Romanian and Bulgarian origin to their countries of origin was based on discriminatory provisions that directly targeted Roma individuals and families. The Committee reaches this conclusion for the following reasons: Firstly, the discrimination involved in the expulsions is characterised by the same features as those considered earlier in connection with Article 31§2 and forced evictions. Thus, according to the aforementioned ERRC survey “all the cases of removal of illegal immigrants reported in the media concerned Roma and the ERRC has yet to identify a single case of a return to Romania or Bulgaria that did not involve this community”. Similarly, ECRI regretted “[learning] from a number of sources that Roma from the countries of central and eastern Europe suffer from a generally hostile climate of opinion, including racist prejudice, which also targets Travellers. ECRI notes that this prejudice is sometimes conveyed by the media. Roma are also sometimes the victims of racial discrimination, and even racist violence.’

- Article 4: Promoting effective equality.
- Article 6(2): The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.
- Article 9: Preserving and developing minority cultures, religions, and languages.
- Promoting intercultural dialogue and protecting persons belonging to minorities from hostility or violence

Although the Framework Convention does not define ‘National Minority’ it is widely recognised that Roma and Travellers fall within its scope.¹²⁸

Monitoring of State compliance and implementation of the Framework is provided by the Advisory Committee of the Framework and the Council of Europe’s Committee of Ministers. Under Article 25 of the Framework States are required to submit a report containing information on legislative and other measures taken to comply with the principles of the Framework Convention every 5 years. This report is examined by the Advisory Committee. If the states fail to present their reports, the Committee of Ministers can authorise the Advisory Committee to start the monitoring process. In carrying out its work, the Advisory Committee completes country visits and meets with relevant organisations, individuals, civil society actors and Government. The Advisory Committee then adopts an opinion based on its findings during the state visit which contains recommendations for the State to adopt.¹²⁹ Once the opinion is adopted, states have an opportunity to submit comments on this opinion within four months, after which time the comments and the opinion are published.¹³⁰

In its most recent recommendation on Ireland,¹³¹ the Advisory Committee noted that the Irish State needed to adopt actions to respond to and combat ‘discrimination faced by persons belonging to the Traveller and Roma communities by both launching a joint national and local campaign raising general awareness of the level of discrimination they experience.’¹³² The Committee highlighted that this needed to be done through the development of ‘specific awareness-raising programmes’ which included ‘training targeting the owners and staff of licensed premises.’¹³³ The Committee also recognised the barriers facing Travellers in accessing adequate legal supports and representation, requiring the State to ‘improve access to justice for Irish

¹²⁸ ‘The Framework Convention contains no definition of “national minority”. Each state party has a margin of appreciation to define which groups are to be covered by the convention within their territory. This definition must be non-discriminatory, made in good faith and in accordance with general principles of international law, including the principle of free self-identification. The principle of free self-identification means that individuals have the right to decide themselves whether they wish to be treated as belonging to a national minority. However, their decision must be based on objective criteria connected with their identity, such as their religion, language, traditions and cultural heritage.’ <https://rm.coe.int/fcnm-leaflet-2020-en-final/1680a0bacc>

¹²⁹ The Framework Convention at a glance: [https://www.coe.int/en/web/minorities/at-a-glance#}%2279030665%22:\[7\]](https://www.coe.int/en/web/minorities/at-a-glance#}%2279030665%22:[7])

¹³⁰ The implementation of the recommendations is promoted through follow-up activities in the State concerned. These activities allow the Advisory Committee to explain its findings in more detail, exchange examples of good practice, and contribute to a dialogue between minorities and the state.

¹³¹ Fourth Cycle of the Implementation of the Framework Convention for the Protection of National Minorities 2017-2019 (final resolution adopted).

¹³² *Ibid*

¹³³ *Ibid*

Travellers by allowing access to a remedy ensuring that any potential victim of discrimination in ‘places of entertainment’ has the same procedural guarantees as those provided by an anti-discrimination body.¹³⁴ Although largely unactioned within domestic non-discrimination challenges, the Framework Convention is a potential tool for future litigation concerning the rights of Travellers to equal treatment in accessing goods and services.

8.4. The European Commission on Racism and Intolerance.

The European Commission against Racism and Intolerance (ECRI) is a unique human rights monitoring body which specialises in questions relating to the fight against racism, discrimination (on grounds of ‘race,’ ethnic/national origin, colour, citizenship, religion, language, sexual orientation, gender identity and sex characteristics), xenophobia, antisemitism and intolerance in Europe; it prepares reports and issues recommendations to member States.¹³⁵ The ECRI was set up by the Council of Europe on 13 June 2002 and is composed of 47 members drawn from each Council of Europe Member State. The members are appointed on the basis of their ‘independence, impartiality, moral authority and expertise in dealing with issues of racism, racial discrimination, xenophobia, antisemitism and intolerance.’¹³⁶ Michael Farrell is the Irish Member currently serving on the ECRI.

In the framework of its country monitoring work, ECRI examines the situation concerning manifestations of racism and intolerance in each of the Council of Europe member states. ECRI’s findings, along with recommendations as to how each country might deal with the problems identified, are published in country reports within reporting cycles which last for five years. These reports are drawn up after a country site visit and a confidential dialogue with the national authorities and other concerned civil society groups.

The ECRI adopts themes which focus on areas of specific concern, one of which is Member States’ treatment of Roma and Travellers. As part of its mandate, the ECRI has urged States to ensure that national legislation genuinely protects Roma¹³⁷ rights and take urgent action. As part of this work, the ECRI has adopted two regional recommendations for all member states relating to their combatting of racism against Roma, including ECRI General Policy Recommendation N°3¹³⁸ and ECRI General Policy Recommendation N°13 revised on combating anti-gypsyism and discrimination against Roma.¹³⁹

¹³⁴ Resolution CM/ResCMN (2019)14 on the implementation of the Framework Convention for the Protection of National Minorities by Ireland (Adopted by the Committee of Ministers on 16 October 2019 at the 1357th meeting of the Ministers’ Deputies)

¹³⁵ About the European Commission against Racism and Intolerance (ECRI) <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/about>.

¹³⁶ About the European Commission against Racism and Intolerance (ECRI) <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/about>

¹³⁷ As noted above, the Council of Europe and EU both adopt the term Roma, as an umbrella term which covers Travellers amongst other Romanichal, Romani groups.

¹³⁸ ECRI General Policy Recommendation N°3 on combating racism and intolerance against Roma/Gypsies- adopted on 6 March 1998.

¹³⁹ ECRI General Policy Recommendation N°13 revised on combating antigypsyism and discrimination against Roma - adopted on 24 June 2011 and amended on 1 December 2020

- General Policy Recommendation No.3 recognises the ‘the fact that Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of a racism which is deep-rooted in society, are the target of sometimes violent demonstrations of racism and intolerance and that their fundamental rights are regularly violated or threatened.’ The Recommendation encourages States to implement and adopt ‘a series of measures to combat manifestations of racism and intolerance and discriminatory practices against Roma/Gypsies.’¹⁴⁰
- General Policy Recommendation No.13 confirmed the principles of recommendation No.3 and was drafted in response to a ‘worsening of the situation’ facing Roma and associated groups in Europe. In the recommendation, ECRI ‘calls on member States to adopt no less than 90 measures: on the one hand, to ensure the access of Roma to education, employment and other goods and services; and, on the other hand, to combat hate speech, racist crimes and violence against Roma, through both the application of criminal law provisions and preventive and awareness-raising measures.’¹⁴¹ The Recommendation then highlighted that ‘a comprehensive and multidisciplinary approach to Roma issues,’ was required in order to properly respond to the issues involved. Reiteration that solutions involving Roma representatives ‘at all levels of policy-making (conception, development, implementation and evaluation) can enhance mutual trust and contribute to the fight against anti-gypsyism.’¹⁴²

Alongside the generalised recommendations, the ECRI also issues country-specific reports, which monitor and report on efforts needed to alleviate all forms of racism. In its previous concluding report on Ireland in 2016, the ECRI highlighted ongoing issues with discrimination in goods and services and called for reform of the division of case load between the WRC and District Court in light of concerns of suitability of the adversarial nature of the Court. The Commission highlighting with concern the manner in which the system will fail to adequately address the discrimination experienced by Travellers in licensed premises.¹⁴³

The recent ECRI report on Ireland, produced in 2019, was particularly damning and drew widespread domestic media coverage.¹⁴⁴ In particular, it highlighted the dire living conditions of many Travellers as a

¹⁴⁰ *Supra* n.54

¹⁴¹ *Supra* n.55

¹⁴² *Ibid.*

¹⁴³ ‘ECRI notes, however, that the Act does not include any changes to the current legislation with regard to cases of discrimination related to licensed premises, such as pubs, bars, nightclubs and other public venues licensed to sell alcohol. Up to now, cases of discrimination related to the provision of goods and services in such venues could not be heard by the Equality Tribunal, but only by the District Courts. The new Workplace Relations Commission will also not have the right to hear such cases. Hence a substantial number of pertinent cases will remain excluded from the mandate of this new independent authority. ECRI notes that in particular members of the Traveller Community are often affected by discrimination in the provision of goods and services in licensed premises. Hence, the new Workplace Relations Commission cannot be considered as addressing the problem in full.’ ECRI CONCLUSIONS ON THE IMPLEMENTATION OF THE RECOMMENDATIONS IN RESPECT OF IRELAND SUBJECT TO INTERIM FOLLOW-UP Adopted on 11 December 2015/ Published on 1 March 2016 <https://rm.coe.int/interim-follow-up-conclusions-on-ireland-4th-monitoring-cycle/16808b580a>

¹⁴⁴ ‘ECRI calls for new strategy to tackle racism and prejudice,’ RTE News Tuesday, 4 Jun 2019 <https://www.rte.ie/news/2019/0604/1053288-ecri-racism-ireland/> see also ‘Councils should be sanctioned if Traveller budgets not spent, report says,’ Kitty Holland, Irish Times, Tue, Jun 4, 2019 <https://www.irishtimes.com/news/social-affairs/councils-should-be-sanctioned-if-traveller-budgets-not-spent-report-says-1.3913498>

result of the ‘totally avoidable’¹⁴⁵ Traveller accommodation crisis. It also highlighted the lack of implementation of both racism and hate-speech strategy which left Travellers and Roma vulnerable and called upon the State to reform both the relevant Traveller accommodation and hate speech frameworks.¹⁴⁶ The findings of the ECRI have proven a useful advocacy tool for those working within Traveller rights, in highlighting the implementation gap between the Equal Status Acts and their operational framework and international human rights best practice for ethnic minority rights.

8.4. The Commissioner for Human Rights.

The Commissioner for Human Rights is an independent and impartial non-judicial institution established in 1999 by Council of Europe to promote awareness of and respect for human rights in the 47 Council of Europe member states. The current Commissioner is Dunja Mijatović.

The fundamental objectives of the Commissioner for Human Rights are laid out in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights. According to this resolution, the Commissioner is mandated to:

- foster the effective observance of human rights and assist member states in the implementation of Council of Europe human rights standards.
- promote education in and awareness of human rights in Council of Europe member states.
- identify possible shortcomings in the law and practice concerning human rights.
- facilitate the activities of national ombudsperson institutions and other human rights structures, and
- provide advice and information regarding the protection of human rights across the region.¹⁴⁷

The Commissioner's work thus focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. However, unlike the ESRC and ECtHR, the Commissioner's Office cannot act upon individual complaints as it is not a judicial or quasi-judicial body. The Commissioner can draw conclusions and take ‘initiatives’ on ‘the basis of reliable information regarding human rights violations suffered by individuals’.¹⁴⁸ As part of their mandate, the Commissioner thus carries out country visits, which aim at ‘pursuing a direct dialogue with the authorities’ and examining issues with human rights implementation. As part of these official visits, the Commissioner may release a press statement and will then have the opportunity, if necessary, to publish a report focusing on ‘conclusions and relevant recommendations to help redress shortcomings’.¹⁴⁹

¹⁴⁵ ECRI REPORT ON IRELAND (fifth monitoring cycle) Adopted on 2 April 2019 Published on 4 June 2019 ‘Traveller and Roma’ para 68.

¹⁴⁶ ECRI REPORT ON IRELAND (fifth monitoring cycle) Adopted on 2 April 2019 Published on 4 June 2019 ‘Traveller and Roma’ section.

¹⁴⁷ Mandate of the Commissioner <https://www.coe.int/en/web/commissioner/mandate>

¹⁴⁸ Mandate of the Commissioner <https://www.coe.int/en/web/commissioner/mandate>

¹⁴⁹ Activities of the Commissioner <https://www.coe.int/en/web/commissioner/country-monitoring>

During the Commissioner's last visit to Ireland in 2016, then Commissioner for Human Rights, Nils Muižnieks, noted the continued discrimination faced by Travellers in his country report, despite the recent (and welcomed) ethnic recognition:

The Irish government should ensure that the economic upturn benefits the most vulnerable groups and should promote equality of Travellers, women and children by removing the barriers that disproportionately hinder them from fully enjoying their rights.... The Irish authorities, including at local level, should reinvest in the community and improve access of Travellers and Roma to education, health, housing and employment, as well as to legal remedies in cases of discrimination.¹⁵⁰

During the actual site visit, the Commissioner had also urged the State to implement equality norms more robustly to counteract the inequalities faced by Travellers: 'I am deeply concerned at the persisting social exclusion and discrimination Travellers are confronted with in Ireland.'¹⁵¹

Although non-binding, the work of the Commissioner is a useful tool in highlighting ongoing and proliferating issues pertaining to Traveller and Roma rights in Council of Europe member states. The persuasive power of the 'name and shame' approach cannot and should not be underestimated.

9. Interrelatedness of the 'European' Non-Discrimination Frameworks.

It is important to note that although the Council of Europe and European Union are two separate legal entities and should not be confused. Notwithstanding this, there is a high degree of complementarity between the two systems and judges at both the CJEU and ECtHR have become increasingly interconnected. In particular, the CJEU has often noted the influence of the ECHR¹⁵² and the ESC¹⁵³ in providing guidance for the Court as to human rights focused interpretations of the EU frameworks. As noted above, the TEU makes express reference to the influence of the ECHR upon the developing EU fundamental rights norms under Article 6(1). This is furthered by Article 52 (3) of EU Charter of Fundamental Rights which outlines that relevant Charter rights shall be the same as those laid down by the ECHR where there is an overlap of protections. Equally, the ECtHR has expressed its focus on the importance of the EU fundamental rights having referred both the CJEU jurisprudence¹⁵⁴ and EU rights frameworks in its judgments.

This complementarity is reflected in the drive for the European Union to accede to the ECHR which was included in the Lisbon Treaty.¹⁵⁵ EU accession to the ECHR was also provided for in light of this proposal

¹⁵⁰ 'Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Ireland' from 22 to 25 November 2016. <https://rm.coe.int/report-on-the-visit-to-ireland-from-22-to-25-november-2016-by-nils-mui/16807bcf0e>

¹⁵¹ 'Country Visit: Ireland: advance equality of Travellers and women,' 29 November 2016, <https://www.coe.int/en/web/commissioner/-/ireland-advance-equality-of-travellers-and-women>

¹⁵² CJEU C-510/11 P, *Kone Oyj and Others v. European Commission*, 24 October 2013, paras. 20-22.

¹⁵³ CJEU, Joined cases C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v. Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, 10 June 2010, paras. 31-32.

¹⁵⁴ *Biao v. Denmark*, No. 38590/10 [GC], 24 May 2016.

¹⁵⁵ Art 6(2) TEU inserted by the Lisbon Treaty, 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

under Protocol 14 to the ECHR. Although currently on pause,¹⁵⁶ this move to codify the relationship between the two bodies reflects the widespread European commitment to securing and furtherance of fundamental rights within both the EU and Council of Europe.

10. Other International Instruments.

Although both the European Union and Council of Europe provide vital regional protection for Travellers, through their human rights treaties and non-discrimination focused policy priorities. There are other international human rights organisation and treaties which also afford Travellers protection. In particular, Ireland has signed and ratified a number of United Nations treaties which enforce international obligations upon the Irish state to protect Travellers from discrimination. Such treaties and State implementation of these is assessed by UN bodies known as monitoring committees. The relevant Committees send periodic reports which assess the States fulfilment of the treaty terms and rights therein. The Committees also make concluding observations which consider the State reporting submitted and make recommendations for specific points of action under which a State should take steps towards achieving the relevant treaty norms. The relevant treaties and committees which Ireland has signed up to include the ICCPR which is monitored by the Human Rights Committee¹⁵⁷; the ICESCR which is monitored by CESCR¹⁵⁸; and the International Convention on the Elimination of All Forms of Racial Discrimination, which is monitored by CERD¹⁵⁹.

Most recently, CERD issued a concluding observation to Ireland to respond to the issues facing Travellers as part of its consideration of the Irish State's approach to promoting the principle of non-discrimination since 2008. In particular, the Committee asked the State to focus on ethnic data collection to highlight areas where outcomes are poorer for ethnic minorities. The Committee also noted the unsuitability of the current equality framework, within which Travellers must take cases lodged against licensed premises to the District Court, recommending that all cases arising under the ESA be heard by the WRC. It also urged the State to

¹⁵⁶ On 29 September 2020 the Secretary General of the Council of Europe, Marija Pejčinović Burić, and the EU Commission's Vice President for Values and Transparency, Věra Jourová, issued the following statement concerning the resumption of negotiations on the European Union's accession to the European Convention on Human Rights on Tuesday 29 September:

'The European Union's accession to the European Convention on Human Rights will be an important milestone in the protection of human rights and fundamental freedoms across Europe. For 70 years, the Convention has been a unique and invaluable tool protecting millions of Europeans and supporting our shared values of human rights, democracy and the rule of law. The EU's accession to the Convention, which is a legal requirement under the Lisbon Treaty, will further strengthen human rights protection in Europe.... Accession will help to guarantee coherence and consistency between EU law and the Convention system. It will also ensure that the EU is subjected to the same international oversight on human rights as its 27 member states and 20 other Council of Europe countries which are not members of the EU. It means that citizens will be able to challenge the EU's actions before the European Court of Human Rights. The EU will also be able to join its member states in proceedings at the European Court of Human Rights concerning alleged violations resulting from EU law. The European Convention on Human Rights represents everything that the Council of Europe and the European Union stand for. In these difficult times, the resumption of these crucial negotiations sends a strong signal about the commitment of our two organisations, and our member states, to the fundamental values that we cherish. We very much hope that the negotiations can be brought to a speedy and successful conclusion for the benefit of Europe as a whole.' Full statement available at: <https://www.coe.int/en/web/portal/-/the-eu-s-accession-to-the-european-convention-on-human-rights>

¹⁵⁷ Ireland signed in 1973 and ratified in 1989.

¹⁵⁸ Ireland signed in 1973 and ratified in 1989.

¹⁵⁹ Ireland signed in 1968 and ratified in 2000.

take steps towards incorporating the UN Convention on the Elimination of Racial Discrimination into the domestic legal order.¹⁶⁰

The Committees may also provide comments to States on general themes for consideration, which are known as General Comments. An example of this is the CERD General Recommendation XXVII on Discrimination Against Roma, which called upon States to ‘take urgent action to review and enact or amend legislation, as appropriate, in order to eliminate all forms of racial discrimination against Roma’¹⁶¹ and ‘to adopt and implement national strategies and programmes and express determined political will and moral leadership, with a view to improving the situation of Roma and their protection against discrimination.’¹⁶² The General Comments are therefore issued to highlight areas within which a State needs to take steps to better secure the treaty norms.

The ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the human rights treaties. International treaties of note before which individuals can bring complaints include the aforementioned Convention on Elimination of Racial Discrimination, Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

CEDAW is an international treaty which defines discrimination against women and lists the actions states need to take to respect the rights of women and girls to freedom from discrimination. State signatories commit to having their record under the Convention reviewed periodically by the UN’s CEDAW Committee. Once the Committee has examined the state’s record, it will then publish ‘Concluding Observations.’ The Committee can also receive complaints directly from individuals concerned alleging violations of the where the by States party in question has signed the Optional Protocol to the Convention on the Elimination of Discrimination against Women. Ireland signed the Optional Protocol in 2000.

The Convention on the Rights of the Child CRC, which Ireland became a State party to in 1990, protects the human rights of children. The Committee on the Rights of the Child may consider individual communications alleging violations of the Convention on the Rights of the Child. The principle of non-discrimination underpins the CRC. Article 2 notes that all the rights guaranteed by the Convention must be available to all children without discrimination of any kind).

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

¹⁶⁰ Committee on the Elimination of Racial Discrimination Concluding observations on the combined fifth to ninth reports of Ireland https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf

¹⁶¹ CERD General Recommendation XXVII on Discrimination Against Roma Adopted at the Fifty-seventh session of the Committee on the Elimination of Racial Discrimination, on 16 August 2000 (Contained in document A/55/18, annex V) at 1.

¹⁶² *Ibid* at 2.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.¹⁶³

As part of these mechanisms, Travellers themselves may make submissions to the Committee bodies, known as communications. This can occur only where Ireland has recognised the competence of the committee to receive communications as noted above.

11. Conclusion.

The report has outlined the relevant legal frameworks and instruments from which Irish Travellers derive rights to equality and freedom from discrimination. In doing so, it explored the relevant domestic framework provided for under the equality legislation before mapping the applicable international human rights norms promoting the principle of non-discrimination drawn from EU law, the Council of Europe framework and the UN treaties and reporting bodies.

In consolidating the relevant legislative and human rights frameworks the report is intended to contribute to broader understanding of non-discrimination frameworks and norms, as applicable to Travellers.

¹⁶³ Article 2, Convention on the Rights of the Child.

the Traveller Equality & Justice Project is a partnership between the Centre for Criminal Justice & Human Rights, School of Law, University College Cork and the Free Legal Advice Centre.

