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Barriers to Justice for Irish Travellers Seeking to Challenge Discrimination

Mapping Traveller 'Rediscrimination' within the Equality System in Ireland.

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IRISH RESEARCH COUNCIL
An Chomhairle um Thaighde in Éirinn

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Traveller Equality and Justice Project – 'Barriers to Justice for Irish Travellers seeking to challenge discrimination.'

Introduction.

There are significant barriers for Travellers seeking to challenge discrimination experienced in accessing goods and services. 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."[1] Despite this protected status Travellers report increasing instances of discrimination and internalise this as 'just the way it is.'[2] Ongoing social exclusion and rising instances of discrimination indicate that the equality system and associated legislative framework is not an effective tool through which to address discrimination for Travellers. Furthermore, the manner in which Travellers (and other) victims of discrimination must seek to challenge such acts is discriminatory in and of itself. Although the majority of Travellers experience discrimination in day-to-day life[3] due to the inequal structures of the legal system and ability to access legal services, many are excluded from legal service provision and as a result feel unable to challenge discriminatory acts. The barriers currently presented for Travellers result in a proliferating cycle of 'rediscrimination' which further entrenches the social exclusion of Travellers within Ireland. The resulting situation is one within which Travellers are marginalised and excluded from all aspects of society including access to services especially legal services. This is problematic as access to justice is a crucial enabling right, which when inaccessible, further deepens social exclusions.

Recent data collected by the Cork Traveller Women's Network and the Traveller Equality and Justice Project highlight the manner in which Travellers seeking to challenge discrimination are excluded from the legal system.[4] A group of Traveller women were asked a number of questions about the current equality framework in Ireland and options for redress.

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

[2] '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

[3] Travellers in Ireland —Key Results From The Roma and Travellers Survey 2019, Fundamental Rights Agency (2019) available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-ireland_en.pdf

[4] Cork Traveller Women's Network 'Barriers to Justice and Taking Action to Challenge Discrimination' Focus Groups, 2019.

The majority surveyed reported a deep-distrust and perceived 'exclusion' from the legal system. In identifying the barriers preventing access to justice, the women noted that core issues involved access to legal representation, costs, and prohibitive barriers in taking cases, alongside unclear avenues to redress. In presenting the findings of these workshops, this research paper maps the weaknesses of the current equality system and its inaccessibility for socially marginalised groups using the testimony of the Traveller women surveyed. It is argued throughout, that these failings and the testimony of those surveyed clearly indicate that the current system is blocking Travellers from accessing justice. In detailing the manner in which the system not only fails to provide redress for Travellers, but actually creates the barriers preventing Travellers from challenging inequality, this report draws attention to the need for significant reform within both the equality and legal aid systems. Further speaking to a need for increased representation in the areas of equality and racial issues more broadly.

The report is divided into two sections: Part I & Part II. Part I includes Sections 2, 3 and 4 outlining the operations and legislative basis of the current equality system in Ireland and the foundations of access to justice rights within both domestic and international law. An overview of the Equal Status Acts and equality system is provided before a comprehensive consideration of the meaning of access to justice and its corresponding rights-basis is discussed. This section providing a grounding for consideration of Traveller experiences of the equality system. This analysis of the relevant legislative framework is used to frame the survey findings as explored in Part II. Part II presents the women's testimony, and lived experiences, highlighting the weaknesses and failures of the current system.

Part I 'An Overview of the Relevant Legislative Frameworks and Rights Conferred.'

1. The Irish Equality Framework.

The Traveller Community face proliferating levels of exclusion from the most basic of services and experience widespread discrimination and racism in their daily lives. The domestic equality frameworks[5] prohibit discrimination, both direct and indirect, on nine grounds. These nine grounds expressly recognise ethnicity as a possible ground for discrimination and explicitly identify membership of the Traveller Community as one of these specific 'protected ground.'[6]

Despite this protected status Travellers stand out as a group that experiences extreme disadvantage in terms of employment, housing and health.[7] Provision of legal services, and legal access are no exception, with Travellers reporting substantial challenges in finding adequate legal representation and in understanding their rights as a minority ethnic group.[8] The All Ireland Traveller Health Survey (2010), found that 61 per cent of Travellers reported 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.[9] 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.[10] A strong, robust and accessible equality framework is therefore acutely needed to allow Travellers to respond the discrimination while also creating a deterrent for those who actively discriminate.

1.1. The Legislative Framework.

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[5] *Equal Status Acts* 2000-2018 and *Employment Equality Acts* 2000-2015. Note that 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 2018: 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; *Equal Status (Amendment) Act 2012* (41/2012); Equality (Miscellaneous Provisions) Act 2015 (43/2015), ss. 12 to 15

[6] Equal Status Acts 2000-2018 and Employment Equality Acts 2000-2015.

[7] *Supra* n.2

[8] See s.4 of this report for the findings of the TEJP and CTWN Focus Groups on Access to Justice.

[9] All Ireland Traveller Health Study, Summary of Findings, September 2010, available at https://www.ucd.ie/t4cms/AITHS_SUMMARY.pdf

[10] 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

Irish equality legislation is drawn from a number of core legislative provisions which 'impose general prohibitions on discriminatory or racist behaviour based upon or linked to any of the different equality grounds' such as gender, race, age and membership of the Traveller community.[11] The legislative framework includes *the Prohibition of Incitement to Hatred Act 1989, the Unfair Dismissals Acts 1977,* the *Employment Equality Acts* and *the Equal Status Acts 2000-2018*. 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.'

1.2. The Equal Status Acts 2000-2018.

The *Equal Status Acts 2000-2018* prohibit certain types of discrimination in provision of 'goods' and 'services' by both public and private actors. The Acts protect nine categories of people generally, and ten groups of people in relation to accommodation, one of these protected grounds is that of membership of the Irish Traveller Community. Under the Acts, discrimination based on any one of the 'protected' grounds is unlawful.

S 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.*[12]

S.5(1) notes that. — (1) A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service. This 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. Goods are defined as any articles of movable property. This includes all retail environments, utilities and service providers including accommodation and hotels and licensed premises.

How an act of discrimination in accessing goods and services is challenged depends in which of these contexts it took place. The law provides for two different routes to justice. Under s.19 of the *Intoxicating Liquor Act 2003,* complaints about discrimination that occur "on, or at the point of entry to", a premises that sells alcohol must be made to the District Court. If the alleged discriminatory treatment occurred somewhere other than "on or at the point of entry

[11] 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

[12] Equal Status Act, s.2 (1)

to" the premises that sells alcohol, then the complaint is heard at the Workplace Relations Commission (WRC). The WRC has officially taken over the functions of the Equality Tribunal since 2015.

This division in jurisdiction was actioned during the winding down of the former Equality Authority and Equality Tribunal and the introduction of *the Intoxicating Liquor Act 2003.* Understanding the reform of the equality framework is essential to understanding the current barriers which exist for Travellers and other social excluded and minority groups. A brief consideration of this follows.

1.3. Former Equality Framework.

The Equality Tribunal was established in 1999. It was designed so that hearings were quicker and more affordable than the Court's service. Although often confused, The Equality Authority was a separate body tasked with monitoring compliance with equality law. It was replaced by IHREC in 2012.

The Equality Tribunal was considered by Travellers to be an appropriate and accessible forum, and this was reflected in the number of claims which arose before the Tribunal in its early years.[13] Notwithstanding this, reform was tabled in July 2008 via a radical rationalisation and merging of 35 state agencies. It was announced by the Department of Justice, Equality and Law Reform that the Equality Authority and Human Rights Commission were to be merged with the Equality Tribunal, Data Protection Commissioner, and the National Disability Authority. The bodies were then given three months to respond to this proposed merger. It has been noted however that such mergers were an inevitable consequence of austerity; "there's no point in fighting it, it's going to happen".[14]

The proposed merger aimed to unite bodies working in similar competencies under a general approach to human rights and equality. It was largely unpopular however and considered to be a retroactive step within domestic human rights oversight, protection and monitoring.[15] Reporting in 2008, the Irish Times noted that while 'suggested that the merger would be a "natural fit"[16] few others agreed' owing to the 'genuine incompatibilities in the functions of the different bodies'[17].This backlash resulted in a change of direction with the proposed merger being dropped. Instead, a number of cuts were implemented in Budget 2009. These cuts were

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[13] Sunday Tribune, Travellers' pub claims fall to nine by Michael Clifford 19th June 2005.
[14] Irish Times, 'State plans merger of five bodies instead of just three', 20 August 2008. 70 Irish Times, 'Equality, data protection and human rights bodies to merge', 24 July 2008.
[15] *Ibid*
[16] *Ibid*
[17] *Ibid*

severe, resulting in a 43% and 32% cut to the Equality Authority and Human Rights Commission (IHRC) annual budget respectively. In practice, this resulted in reduction from €5.89 million to €3.33 million for the Equality Authority. While the IHRC was subjected to a budget reduction of €2.3 to €1.6 million. Pegram notes that 'no convincing rationale or explanation was provided for the severity of the cuts,'[18] yet the effects were crippling for the arguably already underfunded bodies. The Equality Authority noted that the cuts had left it unable to adequately complete its mandate, while the IHRC indicated that the budget cuts, although required within the economic climate were in effect 'disproportionate and excessive'.[19]

The dangerous and far-reaching consequence of cuts to human rights bodies during periods of economic crisis is well documented.[20] In times of crisis, hate speech, racism, and general acts of xenophobia increase. It is therefore arguable that human rights and equality bodies are especially important during times of austerity. Unfortunately, however, it is often such rights-based oversight bodies which are first on the chopping block:

> *[W]e need to stop viewing equality as a cost and begin to understand it as an investment. Economic recession should trigger an increased focus on equality rather than being used as a cover to dismantle our capacity to promote and advance equality.*[21]

While the reforms and justifications for these is often linked to the implications of the impending recession, Pegram notes that 'the original proposal to integrate the two bodies in July 2008 actually preceded the official announcement of recession by two months.'[22] Notwithstanding this, he does concede that 'it is impossible to ignore the prolonged and severe impact of fiscal austerity on the public sector in Ireland.'[23] It remains clear however that human rights and equality bodies have never received the full budget line required to complete all actions within their mandate to full potential, and as result, such equality bodies continue to wrestle with 'low-intensity institutional crisis.'[24]

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[18] T. Pegram, 'Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission,' 2013 https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web2September.pdf

[19] Irish Times, 'Cuts will impair core functions – equality body', 12 November 2008 Irish Times, 'Human rights body says 24% cut makes it unworkable', 5 November 2008.

[20] CESR, 'Assessing Austerity: Monitoring the Human Rights Impacts of Fiscal Consolidation,' 2018 https://www.cesr.org/assessing-austerity-monitoring-human-rights-impacts-fiscal-consolidation CDDH Feasibility Study, 'The Impact of the Economic- Crisis and Austerity Measures on Human Rights in Europe,' 2015, https://rm.coe.int/the-impact-of-the-economic-crisis-and-austerity-measures-on-human-righ/16806f2030; A, Babic, COVID-19 And Inequality: The Human Rights Impact Of Economic Austerity Measures In The UK, August 5, 2020,

[21] N. Crowley, *Empty Promises: Bringing the Equality Authority to Heel,* (Dublin; AA Farmer, 2010).

[22] *Supra* n. 18

[23] *Supra* n.18 at 28

[24] *Ibid*

Beyond Ireland's borders, the experience of both bodies has provoked growing concern among international stakeholders. In anticipation of the 2009 budget announcement, then Council of Europe Commissioner on Human Rights, Thomas Hammarburg, urged the Irish government to protect the Commission's funding.[25] Colm O'Cinneide, a member of the European Committee of Social Rights, speaking in November 2009, noted a perception abroad that Ireland has "fallen from grace" because of the sweeping cuts to the two bodies.[26] In October 2010, an EU report on equality bodies singled Ireland out for criticism.

In response, the Government announced reforms to the equality framework in 2011 which revisited the idea of merging related bodies with complimentary jurisdiction. Announcing the reforms, Alan Shatter noted that the changes would respond to international scrutiny of Ireland's defective equality structures, creating a "more streamlined body will be able more effectively, efficiently and cohesively to champion human rights."[27] The core result of this merger saw the dissolution of the Equality Authority and associated Tribunal. It was replaced by the newly established Workplace Relations Commission which would have competency for all cases arising under the *Employment Equality Acts*. At the time it was not clear how the former Equality Tribunal's powers under the *Equal Status Acts* would be transferred – although submissions to the consultation on the merger recommended inclusion of all equality matters within the new Workplace Relations Commission Jurisdiction,[28] Walsh notes that discussion of this was largely absent from policy proposal and discussion docs at the time.[29] It would appear that the core focus of this reform and establishment focused predominantly on creation of 'a world-class workplace relations service and employment rights framework'[30] at the expense of equality in accessing goods and services:

> *There are, however, a number of worrying proposals set out where, it would seem, insufficient consideration has been given to the unique nature of equality complaints and to the need for an accessible infrastructure for people seeking redress under the Employment Equality Act 1998-2008 and the Equal Status Act 2000- 2008*[31]

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[25] Irish Times, 'Cutbacks warning on human rights commission', 17 September 2008.
[26] Irish Times, 'Human rights cuts harm image', 25 November 2009.
[27] Irish Times, 'Minister announces details of merged human rights body', 10 September 2011
[28] J. Walsh,, *Equal Status Acts 2000-2011* , (2000) ICCL Press, Dublin, at 297.
[29] "Unfortunately, the fate of complaints under the ESA was not specifically addressed in the discussion papers issued by the Department of Jobs, Enterprise and Innovation…A number of submissions to the initial consultation including that by the Equality Tribunal recommended that the WRC also hear ESA Cases.' J Walsh, *Ibid* at 297.
[30] R Bruton, 'Introduction by the Minister for Jobs, Enterprise and Innovation p.1 in Consultation on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures (2011) available at https://www.workplacerelations.ie/en/publications_forms/consultation_paper_on_reform.pdf
[31] ERA Response to the "Blueprint to Deliver A World-Class Workplace Relations Service" April 2012 https://www.workplacerelations.ie/en/publications_forms/blueprint_consultation_responses_-_may_2012.pdf

It is notable that, a core aim of the merger was to increase reporting of discrimination instances in light of low level of reporting.[32] The merger was also noted to respond directly to issues raised re accessibility to remedies:

> *From an equality perspective, the starting point for any consideration of the proposals for the Workplace Relations Service should be the issues of under-reporting and accessibility. There are remarkably high levels of under-reporting of incidents of discrimination. Research data from the CSO, analysed by the ESRI and the Equality Authority, indicates high levels of perceived discrimination and low levels of reporting discrimination. The groups most likely to experience discrimination are the least likely to report it.*[33]

It is interesting however that despite this being a central aim of reform, that the measures in fact further entrenched issues with access for the most vulnerable in society.

> *Accessibility is central to ensuring the new body does not further aggravate the current situation of under-reporting. The Equality Tribunal has a valuable and strong commitment to accessibility, and it is important that this should be mainstreamed into the new structures.*[34]

> *ERA strongly recommend that equal status cases would not be transferred to the District Court. In 2003, cases under the Equal Status Act 200-2008 involving licensed premises were moved to the District Court under the Intoxicating Liquor Act 2003. Research on the impact of this transfer found that "the changes in Jurisdiction has resulted in an almost complete reduction in complaints taken under the law in relation to prohibited acts of discrimination".*[35]

In particular, critics of the merger highlighted the worrisome impact of previous reform to the equality frameworks, whereby equality cases wherein the discriminatory act occurred in a licensed premises were transferred to the jurisdiction of the District Court through s.19 of *the Intoxicating Liquor Act, 2003*. The impacts of which were clearly detrimental to increased reporting and taking of cases, as evidenced by the significant drop in Travellers taking claims once this jurisdictional move to the adversarial district court occurred in 2003: 'Between September 2004 and February 2005 only nine claims of such discrimination were lodged

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

[33] ERA Response to the "Blueprint to Deliver A World-Class Workplace Relations Service" April 2012 https://www.workplacerelations.ie/en/publications_forms/blueprint_consultation_responses_-_may_2012.pdf

[34] *Ibid* at 59

[35] Gogan, S (2005) "From the Equality Tribunal to the District Court" research for the Clondalkin Travellers development group. Pg. 5. Cited in *Ibid* at 62

compared to an average of 514 claims annually taken with the Equality Tribunal between 2000 to 2003'.[36]

This speaks to the importance of equality cases being heard by specialist equality oversight bodies, which are victim-centred and more accessible than a Court. For example, the WRC, in line with the former Equality Tribunal practice, holds hearings in hotels, does not require outlays or costs to take a claim and generally the adjudicator will be more accessible and engaged with hearings and evidence consideration than a member of the judiciary. It has been suggested that specialist bodies are essential to fair hearing of equality issues in light of the myriad of accessibility issues presented by a Court. These were highlighted by the ERA within their Blueprint submission. Their submission raised significant concerns from civil society and relevant stake holders regarding the adversarial nature of the District Court, which they considered wholly unsuitable as a venue for equality claims:

> *The adversarial nature of the District Court is in direct contrast to the more informal investigative model applied in the Equality Tribunal. This will act as a significant barrier to claimants seeking redress under the Equal Status Acts. In the Tribunal, unlike the District Court, neither the complainant nor the respondent has to mobilize or present legal arguments. They merely have to present the facts of the case and the equality officer then investigates these facts, applies the relevant law, and makes a finding. This is key to the accessibility of the Equality Tribunal.*[37]

Most jarring, however, is that to date, equality cases under s.19 are still heard in the District Court, despite general backlash against the suitability of the Court as an equality adjudication forum. In particular, concerns can be noted not only regarding the adversarial nature of the Court, but also with the need for legal representation to ensure equality of arms before the Court. While the District Court permits lay litigants, this is generally a difficult undertaking owing to procedural and administrative requirements and may result in disadvantage where a victim of discrimination is challenging an alleged act committed by an established entity who will certainly have legal representation.

> *The adversarial nature of the District Court lends itself to both respondents and claimants requiring legal representation. There is no broad right of representation before the District Court as there is before the Equality Tribunal.*[38]

Another factor which may be a deterrent for victims of discrimination is the possible awarding of costs against the claimant: 'Claimants and respondents before the District Court

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[36] Sunday Tribune, Travellers' pub claims fall to nine by Michael Clifford 19th June 2005.
[37] *Supra* n.32 at 62
[38] *Ibid*

may be liable for the costs incurred by the other party. This is not the case for parties seeking redress to the Equality Tribunal.'[39]

Issues further arise with the manner in which District Court cases are unreported, thus a significant body of potential case law data remains inaccessible to both counsel seeking to interrogate precedent and for those seeking to analyse the development of equality cases. The inaccessibility of this, creates a desert for those seeking to inform reform policy, practice, and legislative development in the area of equality and anti-discrimination.

> *The lack of data on cases taken to the District Court would have a significant impact on building a body of case law in regard to equal status cases. The body of case law produced by the Equality Tribunal is extremely important in informing policy, practice, and legislative development in the area of equality and anti-discrimination.* [40]

Ultimately, the detrimental impacts of jurisdictional transfer for cases concerning s.19 of the *Intoxicating Liquor Act* are clear, given the sharp decline in cases taken. These reductions in cases taken and accessibility issues created through the procedural rules of the Court and lack of a mediation service (unlike that offered by the Equality Tribunal) make the District Court wholly unsuitable for hearing equality claims:

> *Research has shown that the change in jurisdiction of complaints under the Intoxicating Liquor Acts in 2003 from the Equality Tribunal to the District Court resulted in a very significant reduction in the number of complaints referred. The procedures and rules of the District Court are a barrier to access for vulnerable people who experience discrimination. The standard of proof applied is different and the rules of evidence and procedures more formal than in the Equality Tribunal. Legal representation is effectively necessary and there is exposure to costs awards against unsuccessful litigants. The District Court does not provide a mediation service, which would often be the most effective and efficient method of resolving disputes, nor does the District Court furnish detailed reasons for its decisions which can be recorded and published.*[41]

Notwithstanding these ongoing issues, competency for cases concerning discrimination which occurred in a licensed premises remain within the jurisdiction of the District Court.

In 2011 a further review of Ireland's human rights infrastructure was announced following on from significant debate[42] to "ensure that resources are used efficiently". A core focus of this

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[39] *Ibid*
[40] *Ibid*
[41] Mercy Law submission to Blueprint *Ibid* at 125
[42] Pegram notes that "the idea of merging the two bodies was first proposed in 2008. The government had announced a radical programme of public service rationalisation, earmarking 41 mergers or dissolutions of state agencies. However, in response to vocal opposition from politicians, civil society, the bodies concerned, and the international community, this initial attempt at merger was shelved. Instead, the government imposed very severe

was to create an enhanced human rights commission in line with the Paris Principles (UN)[43] which provide a set of standards for the operation of equality and human rights commissions. Reforms were thus tabled "to facilitate the Commission playing an enhanced role."[44] The general scheme of the proposed legislation to replace the Equality Authority and Irish Human Rights Commission was revealed on 29 May 2012.[45] These reforms dissolved the bodies and transferred their functions to the Irish Human Rights and Equality Commission which was set up under the Irish Human Rights and Equality Commission Act 2014 on 1 November 2014.

Nonetheless, despite significant reform in the past three decades there remain ongoing concerns about the accessibility of Irish equality frameworks. While these will be considered in greater detail shortly, it is worth noting at this instance the ongoing and past clashes between the *Equal Status Acts* and the Racial Equality Directive 2000/43/EC (RED). Most notably this was raised by academics and lawyers in 2012[46] regarding possible clashes with Article 13 RED which remains ongoing – 'The EU equality directives require member states to establish and maintain bodies to provide "independent assistance to victims of discrimination in pursuing their complaints about discrimination". *(see e.g., Article 13 Directive 2000/43EC)'.* In particular, it would appear that the current jurisdictional division between the WRC and DC may fall foul of the requirements of RED to guarantee easy access to redress and 'to provide independent assistance to victims of discrimination in pursuing their complaints about discrimination.'[47] In 2007 the Commission initiated infringement proceedings through a Reasoned Opinion[48] noting Ireland's failure to fully implement the provisions of the Directive and noting the need for the State to comply with the Directive.[49] In particular, the Commission raised issue with the definition of indirect discrimination in the *Equal Status Act* noting that the scope of this does not cover future or possible events.[50] It

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budget cuts on both bodies" Executive Summary, Bridging the Divide: The Merger of the Irish Equality Authority and Human Rights Commission, https://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_29_web2September.pdf

[43] Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly Resolution 48/134 of 20 December 1993

[44]1 Irish Times, 'Legislation on way to boost human rights commission', 29 July 2011

[45] "Unlike draft legislation, a general scheme or 'Heads of Bill' provides for an opportunity for consultation with each proposed clause or head accompanied by an explanatory note. The Heads of Bill (HOB) followed the report and recommendations of the Working Group published in April 2012 which the Minister announced he had accepted in full." For more on this process see p 21. N. 14.

[46] 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.

[47] RED 2000/43/EC Art 7

[48] 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

[49] 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

[50] 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

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.[51] Perhaps confusingly, these infringement proceedings were closed in 2011 with the Commission recognising that the State had provided satisfactory clarification on its transposition of the Directive.[52] Yet it is not clear how this was executed given that the legislation remains unchanged.

Furthermore, issues may also arise in relation to Articles 7 & 13 RED. In particular, the aforementioned jurisdiction transfer 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.[53] 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 more challenging environment of the District Court can be considered a wholly regressive shift.[54] 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.[55]

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 Act* and equality framework, it is surprising that the Commission accepted the Irish submission regarding effective transposition of the Directive.[56]

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[51] *Ibid.*
[52] 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.
[53] *Ibid.*
[54] *Ibid.*
[55] *Supra* J. Walsh n.28 and see also O'Farrell *Supra* n.52
[56] *Supra* n.52

There are therefore ongoing questions as to how the current system is in line with RED 2000/43/EC. Particularly in light of the continued clash between the Directive and the protection provided for by the Equal Status Acts. This thus gives rise to questions of both compatibility and issues with possible access to justice rights for victims of discrimination.

2. Access to the Justice.

> *Access to justice is not just a right in itself but also an enabling and empowering right in so far as it allows individuals to enforce their rights and obtain redress.*[57]

Access to justice encompasses a variety of different areas which rights holders may rely on, such as the right to fair trial, effective remedy, access to court, judicial protection and to due process. Dame Hazel Genn has defined access to justice as:

- An awareness of rights, entitlements, obligations, and responsibilities.
- An awareness of procedures for resolution.
- The ability effectively to access resolution systems/procedures; and
- The ability to effectively participate in the resolution process to achieve just outcomes.[58]

A definition of access to justice, should not be considered a definition of a human right in itself but more a concatenation of rights which create an 'access to justice.' The scope of which is most simply provided by referencing which terms can be considered under the scope of access to justice. These terms are presented below in Figure 1:

Figure 1: Access to justice and related terminology:

[57] Francoise Tulkens speaking at the European Court of Human Rights, Dialogue between Judges 2013 transcript available at: http://www.echr.coe.int/Documents/Dialogue_2013_ENG.pdf

[58] Dame Hazel Genn, speaking to the English Law Society 2009, cited in A Colley, Chairperson of the Legal Aid Board in her address, 'Access to Justice and the role of the Legal Aid Board,' at the Legal Aid Board 30th Anniversary Conference, 15th September, 2010 *"Access to Justice and Legal Aid – Learning from the Past, Looking to the Future".*

Source: FRA Report on Access to Justice in Europe: an overview of challenges and opportunities.

Access to justice rights are arguably the workhorse of most human rights treaties and documents. The enforceability and justiciability of other rights rely solely on a right-holder having access to justice to allege violations and make such complaints, allowing individuals 'to enforce their rights and obtain redress…[transforming] fundamental rights from theory into practise.'[59] This transformative power was recognised by the CEDAW Committee within the context of promoting and providing context for rights, which can only be done though the availability of redress and effective remedies domestically. The Committee notes 'legal rights are only meaningful if they can be asserted. Access to Justice is therefore also an essential component of rule of law and a means…to actively claim the entire range of rights.'[60]

Access to justice therefore relies on the existence of functioning, independent institutions and 'effective implementation of rules of procedure governing them in order to ensure that laws are implemented though a functioning justice chain.'[61] The 'functioning and independent judicial institutions,' which the rights operate within are generally at the different tiers of a legal system;[62] the national domestic level and the regional or international level. At national level, access to justice relates to access to internal courts and non-judicial procedures, and such rights will be codified within the domestic law of the State concerned. Within the European level, there are a number of both regional and supra-national levels which must be considered, the EU and the Council of Europe.

At the EU level, 'access to justice' can relate directly to access to dispute resolution before the European Court of Justice. Complimentary to this is the Council of Europe, within which access to justice relates to the right to petition the ECtHR once all domestic remedies have been exhausted.

The United Nations also offers various means of exercising the collective of rights known as access to justice rights, through the UN monitoring bodies, which are responsible for the implementation of human rights treaties (e.g., Committee on Elimination of Racial Discrimination since 1969 – CERD; Human Rights Committee since 1966 - UNHRC). The UN also frequently highlights that access to justice is a key pillar and intrinsic to affording human rights to the most vulnerable: 'In the absence of access to justice, people are unable to have

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[59] 'Access to Justice' UN, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/

[60] The UN CEDAW Committee, 'Access to Justice: Concept note for general discussion,' 2012 available at: http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/ConceptNoteAccessToJustice.pdf

[61] *Ibid.*

[62] Although arguable mediation and alternative dispute resolution that takes place outside of Courts can also be considered part of access to justice.

their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Rule of law is the foundation for both justice and security.'[63]

Although there is not a right to access to justice enshrined in the Constitution, Ireland is subject to both the ECHR and EUCFR both of which outline how States must ensure both access to justice and effective remedy within domestic proceedings. Within the European union legal order, access to Justice, was first explicitly codified internationally by the Treaty of Lisbon, whereby Article 67(4) of the TFEU states that "the Union shall facilitate access to justice in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters." Under the aforementioned Treaty of Lisbon, the Charter of Fundamental Rights of the European Union became binding upon EU Member States in areas where EU law breached the fundamental rights encapsulated in the Charter.

Article 47 of the Charter, access to justice, guarantees the following:

> *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*
>
> *Everyone shall have the possibility of being advised, defended, and represented.*
>
> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

Article 47 therefore guarantees the right to an effective remedy before a tribunal; right to a fair and public hearing within a reasonable time; by an independent and impartial tribunal established by law; the right to be advised, defended, and represented; and the right to legal aid for those who lack the resources; in so far as such aid is necessary to ensure effective access to justice.

The ECHR, while not explicitly guaranteeing 'access to justice,' enshrines and protects the right to a fair trial under Article 6:

> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...*

[63] United Nations Development Programme, Key Goals and Focus Areas in "Access to Justice: Rule of Law," available: http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law.htm

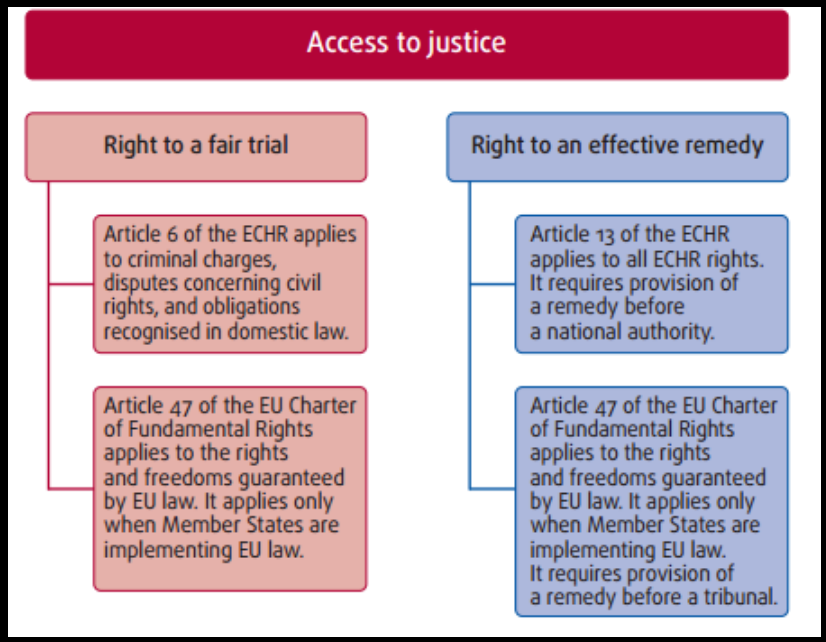
> *3. Everyone charged with a criminal offence has the following minimum rights: …*
>
> *b) to have adequate time and facilities for the preparation of his defence.*
>
> *c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; …*
>
> *e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

The Convention therefore affords a tripartite or three-tiered protection under Art 6 whereby an individual has the right to accessing justice through access to a legal system, the right to legal aid where required and necessitated and the right to seek and obtain redress.

Complimentary to this is Article 13, the right to an effective remedy:

> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

The scope of protection of access to justice rights, as protected by both Art 47 CFR and Art 6 & 13 ECHR is rather succinctly captured in Figure 2: Access to Justice in Europe, a comparison of ECHR and CFR protections:



Source: Handbook of European Case Law on Access to Justice.

The comparisons and differences between 'access to justice' as protected by the ECHR vs the Charter are well explained in the above figure 2, albeit rather succinctly and it is

interesting to note the variances in scope between the two. As Figure 2 indicates, Article 6 of the ECHR has somewhat limited scope and only applies to cases concerning criminal charges, civil rights and obligations recognised in domestic legal cases. Whereas Article 47 of the EU Charter of Fundamental Rights is not as confined and applies to all rights and freedoms recognised by EU law, which include certain additional economic, social, and cultural rights.

Within the EU, the aforementioned Racial Equality Directive 2000/43/EC is instructive on access to justice for minority and ethnic groups. The purpose of the Racial Equality Directive is "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 States the principle of equal treatment" (Article 1).

Article 7 provides for the Defence of rights with and requires member states to ensure that judicial and/ or administrative procedures are available to victims to enforce their right to equal treatment. Article 7(1) noting that:

> 1. *Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.*

Article 7(2) indicates the importance of amicus curiae motions in promoting and protecting the rights of ethnic minorities:

> 2. *Member States shall ensure that associations, organisations, or other legal entities, which have, in accordance with the criteria laid down by their national law, 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.*

The FRA has noted the importance of Article 7:

> *Article 7 of the Racial Equality Directive obliges EU Member States to ensure, in accordance with national law, that associations, organisations or*

> *other legal entities may engage in judicial or administrative proceedings on behalf of or in support of victims, with the victim's permission.*[64]

The FRA also indicating the scope of minimum standards enshrined in Article 7, which States can move beyond where they see fit:

> *The CJEU clarified in the Feryn*[65] *case that Member States may also adopt more generous rules of legal standing, allowing claims to be brought without the permission of the victim, or even where no identifiable victim exists.*[34] *The role of such civil society organisations, which may include NGOs, trade unions or equality bodies themselves, is particularly valuable in facilitating the enforcement of discrimination law.*[66]

More broadly, many EU legislative instruments are intended to give effects to the right to access to justice explicitly mentioning the term within their provisions. These include the Free Movement Directive" 2004/38; the Mediation directive (2008/52); and the Legal aid Directive 2003/8 which governs cross-border disputes but has the same incentive to adequate internal legislation as the Mediation Directive. Access to justice is also explicitly used elsewhere through the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, where the term is defined as; "access to a review procedure before a court of law or another independent and impartial body established by law."[67]

Within the Council of Europe mechanisms, there are arguably less references to 'access to justice' notwithstanding Art 6 and 13 ECHR. However, some notable exceptions include a 2007 report on *European Judicial Systems – Edition 2008: Efficiency and Quality of Justice,* the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ). In its reporting, the CEPEJ refers directly to access to justice and notes, rather broadly, that access to justice encapsulates "all the legal and organisational factors affecting the availability and effectiveness of judicial services."[68] Interestingly, the CEPEJ often considers the ECHR and CFR protections as intertwined or intrinsically connected and considers both provisions in its work.

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[64] The Fundamental Rights Agency, 'The Racial Equality Directive: application and challenges,' (2011) available at: https://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf p14 at 1.3.3.
[65] CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn VN,* [2008] ECR I-5187
[66] The Fundamental Rights Agency, 'The Racial Equality Directive: application and challenges,' (2011) available at: https://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf p14 at 1.3.3.
[67] *Ibid*
[68] *European Judicial Systems – Edition 2008: Efficiency and Quality of Justice,* the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) European Commission for the Efficiency of Justice (CEPEJ) - Access to justice in Europe / CEPEJ studies No. 9 p12 glossary of terms, accessed on 2nd June 2016 at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1702042&SecMode=1&DocId=1657228&Usage=2

> *Access to justice is a key human right due to its transformative and enabling nature and can be sought through a range of mechanisms…In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination, or hold decision-makers accountable.*[69]

Resolution 2054 'Equality and Non-discrimination in access to justice' which was adopted unanimously in 2015 speaks to the importance of ensuring the core principles of equality and non-discrimination are centralised within access to justice initiatives:

> *Access to justice is an inherent aspect of the rule of law and a fundamental requirement of any democratic society…. despite the essential role of access to justice for the effective enjoyment of rights by individuals, it is too often hampered by both practical and legal obstacles. The lack of legal information, the lack of trust in the authorities, the impact of the economic crisis on legal aid and the incomplete legal framework applicable to specific situations significantly contribute to the persistence of barriers to access to justice.*[70]

In particular, it notes the importance of measures for minority and socially excluded groups:

> *barriers are harder to overcome for some groups of people who are particularly subject to discrimination and also less likely to know their rights and existing remedies. The need to achieve equal access to justice for all by removing obstacles preventing individuals from understanding and exercising their rights and seeking redress in the event of a violation.* [71]

The importance of access to justice and the associated scope of rights, including access to a legal remedy and representation are clearly transformative and enabling for those seeking to vindicate alleged breaches of human rights. It is important to note, that without access to justice, many rights remain elusive and illusory. In particular, the crucial need for access to justice to be secured for the most marginalised and excluded within our society is clear.

2.1. Access to Justice & Legal Aid.

Notwithstanding these substantive guarantees, access to justice for many is reliant upon ability to afford legal representation and is thus impossible without legal aid. For marginalised groups such as the Traveller Community, the issue of access to justice becomes intersectional, as many are excluded by virtue of their membership of the Traveller Community, which in turn is further compounded by socio-economic barriers to sourcing legal advice. The importance of legal aid for ensuring access to justice and legal

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[69] United Nations Development Programme, Key Goals and Focus Areas in "Access to Justice: Rule of Law," available http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law.htm

[70] Resolution 2054 'Equality and Non-discrimination in access to justice (2015)

[71] *Ibid*

representation for socio-economic disadvantaged groups cannot be downplayed. Minority groups often face considerable barriers to finding employment and therefore may be reliant on social welfare supports or reduced incomes. For many, it may be simply untenable to employ a legal practitioner. Notwithstanding this, however even if the financial burden of legal representation was not an issue, many marginalised groups may still face difficulties in finding a practitioner experienced in equality cases. For Travellers this issue is compounded further by a possible unwillingness to take on Traveller clients. Clear and accessible legal aid systems are therefore crucial to ensure access to justice.

In Ireland, the legal aid system has yet to recover from the revanchist cuts implemented during the economic crash: 'this current overburdened, under-resourced and limited service is a direct and foreseeable consequence of the lack of state priority in promoting, or even protecting, the fundamental human right of access to justice.'[72] The result of the cuts in 2006-2009 are still being felt, with the system generally hugely overburdened and largely unable to respond to applications in a timely manner. Reform must focus on greater consideration of the legal needs of vulnerable and marginalised groups such as ethnic minorities including Travellers, as at present, the legal aid system offers little supports to the justiciable problems of these groups which often include accommodation, social welfare, and equality issues (before the WRC) for which legal aid is not available. A victim-centred approach is needed to ensure a better-equipped and more inclusive system:

> *The current structure of civil legal aid is not inclusive. It does not place the needs of the client at the heart of its decision and policymaking. It does not engage with communities in relation to their priority needs, nor does it undertake public or community legal education.*[73]

An injection of much needed funding and significant reform to the current scope of legal aid is needed in order for the system to adequately respond to the legal needs of those seeking legal aid support. In particular, legal aid is not provided for hearings before tribunals or issues concerning accommodation or disputes as to land, which means that the majority of accommodation and eviction cases fall outside of its remit, effectively removing legal aid as an option for securing representation for Travellers:

> *At the moment there is no legal aid for employment/equality claims before the Workplace Relations Commission, no matter how complex the issue is or how vulnerable the claimant may be. We also have been advocating to*

[72] FLAC, Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland (2005) available at: https://www.flac.ie/publications/access-to-justice-a-right-or-a-privilege/ p.4
[73] *Ibid*

> *ensure that legal aid is available for people facing evictions from their family homes.*[74]

A core result of the inability of the current system to respond to demand for its services, is an overreliance on organisations which provide legal advice services, such as FLAC, Community Law and Mediation, Mercy Law, and other law centres. In this sense, the State, by failing to reinstate and adequately fund legal aid while further entrenching societal divides within its equality system, has itself further degraded access to justice within the State. Its inability to proactively take the required measures to ensure access to the legal system for the most vulnerable reflects its general failure to play its role resulting in a denial of access to justice rights.

Eilis Barry, CEO of FLAC has noted the impact of which is a denial of access to justice rights within the jurisdiction:

> *The denial of the right of access to justice is the denial of a core and fundamental human right. It is the duty of the State, and agencies such as the Legal Aid Board which carry a statutory mandate, to ensure that the right is respected, protected, and promoted. The existence of a civil legal aid scheme demonstrates that the State recognises it has a key role to play. However, the restrictions, inadequacies, and delays in the current scheme, together with the lack of any proper facility for addressing client or community need, show that only grudging steps have been taken to ensure to every person the right to equality before the law; a right guaranteed by Irish constitutional law and international human rights law.*[75]

There is a crucial need for reform of the system to ensure that it becomes inclusive and places the needs of vulnerable rights-holders at the fore. Reform must also be guided by minorities and communities with justiciable issues to ensure that any reform of the system holds space for 'priority needs.' At present however the current system serves to further entrench exclusion as it proactively prohibits many from taking legal action within areas outside of the current legal aid scope, without which, many cannot afford to vindicate their rights.

2.2. Travellers as Legal Aid Recipients.

Although, the justiciable problems affecting Travellers may mirror those of general population, Travellers experience far greater barriers in accessing services generally and may need legal advice arising from urgent legal problems which are highly time sensitive

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[74] Eilis Barry, CEO of FLAC speaking at the official opening of the new FLAC HQ, cited in https://www.irishlegal.com/articles/president-higgins-barriers-to-access-to-justice-damaging-very-fabric-of-irish-society

[75] FLAC, https://www.flac.ie/news/2021/05/12/status-check-20-years-of-the-equal-status-acts-fla/

e.g., evictions. Legal aid is no exception, and while the domestic and international legal framework for free legal assistance does not distinguish among defendants based on their ethnicity, the fact is that Travellers are largely excluded from legal representation despite having equality in accessing justice. Legal representation in Ireland is expensive and many Traveller do not qualify for legal aid yet remain unable to afford to retain the services of a lawyer owing to high cost of legal services. Even where a Traveller may successfully apply for legal aid, this is not without cost as the current legal aid system requires contributions from the complainant. Furthermore, the current delays and long waiting periods characteristic of the legal aid board services mean that representation may not be secured as quickly as required by the legal issue at stake.

Unfortunately, while this is not a Traveller-specific issue and these barriers to justice caused by ineffective legal aid systems have indiscriminate effect, these become more significant for Travellers owing to their high level of social-exclusion and overall lower economic and social status within Irish society. Traveller exclusion from legal services is therefore often intersectional, stemming not only from ethnic minority status but often too from socio-economic disadvantage. This added disadvantage has been recognised at a regional level by both the Council of Europe and European Union and has resulted in numerous policies and programmes designed to provide equitable access to justice for Travellers (and Roma).[76]

In particular, programmes dedicated to ensuring access to justice such as the JUSTROM and CAHROM initiatives focus on unmet legal need as caused by social exclusion of Traveller and Roma. These programmes recognised how difficult it may be to ensure that discrimination is adequately responded to, when victims are excluded from access to justice.[77]

Within the Irish context, the general inaccessible nature of the legal system for Travellers is compounded by systemic barriers, including the high costs associated with legal action. As Justice Kelly has noted:

> *Ireland is a high-cost jurisdiction in which to conduct litigation. That fact may amount to a denial of justice for individuals and businesses who are deterred from having recourse to the courts for fear of financial ruin.*[78]

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[76] JUSTROM, JUSTROM2, JUSTROM3, CAHROM. See also specific grounds under RED 2000/43/EC, ECRI etc which promote equal access to justice for victims of discrimination.

[77] The Committee of Ministers of the Council of Europe adopts a new recommendation to member States, namely CM/Rec(2017)10 on improving access to justice for Roma and Travellers in Europe, http://www.roma-alliance.org/fr/page/223-the-committee-of-ministers-of-the-council-of-europe-adopts-a-new-recommendation-to-member-states--namely-cm-rec-2017-10-on-improving-access-to-justice-for-roma-and-travellers-in-europe.html

[78] Mr Justice Peter Kelly, 'Fear of financial ruin deters recourse to the courts,' Law Society Gazette, https://www.lawsociety.ie/gazette/top-stories/fear-of-financial-ruin-deters-recourse-to-courts--kelly

Particular issues with costs and the current scope of legal aid are laid bare within equality litigation. Where a Traveller seeks to challenge discrimination before the WRC, they will not be able to access legal aid, as tribunals are excluded from the scope of the legal aid board. Notwithstanding this, legal aid is in theory available for s.19 *Intoxicating Liquor Act* cases before the District Court, however both advocates and Travellers appear to be unaware of this and how to action and apply for legal aid. As a result, it would appear that few Travellers avail of the Legal Aid Board services. This is difficult to map precisely however, as the Legal Aid Board does not use an ethnic identifier, so does not hold data in relation to the number of Travellers availing of legal aid. This lack of awareness of legal aid provision was made clear in the focus group responses, with none of those taking part aware that legal aid was available for s.19 cases. Furthermore, none of those participants had heard of a Traveller applying for legal aid. This lack of Travellers applying can shape how legal aid is provided. If no demonstrable demand, then no need to ensure accessibility for Travellers.

Notwithstanding these issues, it is worth noting that the Legal Aid Board appears committed despite its ongoing budgetary restraints to increase the number of Travellers accessing its services and applying for legal aid. In particular, the Board has appointed Susan Fay, former solicitor with the ITM Legal Unit and board member of Offaly Traveller Movement, to work in a dedicated capacity. This will increase consideration of Traveller specific issues within Board policy and it is hoped will result in enhanced provision of legal services to members of the Traveller community in relation to Traveller specific legal issues, in particular discrimination issues. The role will further entail:

- Working with Law Centre staff and other Board colleagues to develop the capability within the organisation to provide legal services to Travellers,
- Working with government and non-government agencies to explore how the Board can better support Travellers
- Contribute to general policy development and participate in cross departmental working groups
- Identify barriers to our existing services and make recommendations to improve accessibility

The possibility for much-needed reform of the system may also arise shortly, as a review of Legal Aid provision in Ireland has been undertaken in 2021. It is hoped that this will result in an external "root-and-branch" review of the legal aid system, which will ensure greater supports for marginalised groups such as the Irish Traveller Community.

3. Conclusion.

Despite the aforementioned legislative basis and the importance of access to justice as an enabling and transformative right, minorities and ethnic groups experience increased hardship in accessing legal representation and redress. Exclusion from access to justice is an ongoing concern for all ethnic minority groups. Reform of these is needed to ensure equal treatment and access to adequate remedies. Equality legislation and access to justice frameworks needs to be strengthened and specific actions taken to support Traveller and Roma to take cases. Improved access to justice is needed to ensure a critical mass of cases are brought forward by Roma and Travellers which would result in a greater consideration of inaccessibility of goods and services for Travellers as a result of discriminatory conduct. As Equinet has noted, 'Equal treatment legislation needs to be strengthened with the introduction of positive duties on public bodies to be proactive in promoting equality for Roma and Travellers and combating systemic discrimination against them."[79]

At an international level, specific policies which recognise this burden and proliferating barriers for Travellers have been introduced by both the Council of Europe and European Union.[80] The Irish Traveller Community are no exception and are largely recognised as one of the most socially excluded groups in Irish society. Access to justice is a crucial enabling right used to vindicate all other rights, without access to legal representation or to a court, there is little option for those seeking to challenge discrimination. Unfortunately, this is compounded by a lack of accessible legal aid. The exclusion of Travellers from the legal system through lack of access to legal representation and the significant barriers faced, amounts to a breach of access to justice rights, as protected under both domestic and international law.

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[79] Equinet 'Equality for Roma and Travellers: Time to Deliver.' https://equineteurope.org/equality-for-roma-and-travellers-time-to-deliver/

[80] Recommendation CM/Rec(2017)10 of the Committee of Ministers to member States on improving access to justice for Roma and Travellers in Europe (Adopted by the Committee of Ministers on 17 October 2017 at the 1297th meeting of the Ministers' Deputies) Council of Europe High Level Meeting on Roma, Strasbourg, 20 October 2010 "The Strasbourg Declaration on Roma" CM(2010)133-final 20 October 2010 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ce1de

Part II. 'Traveller "Rediscrimination" within the Equality System and Inability to Access Justice.'

4. Traveller Access to Justice.

Part I of this report mapped the legislative basis of the equality system in Ireland and the foundations of access to justice rights within both domestic and international law. In detailing the manner in which the current system not only fails to provide redress for Travellers, but actually creates the barriers preventing Travellers from challenging inequality, Part II of this report provides testimony which speaks to lived-experiences of these systematic barriers, and draws attention to the need for significant reform within the legal aid system and need for increased representation in the areas of equality and racial issues more broadly. The analysis of the relevant legislative framework explored in Part I will now be used to frame the survey findings, which use the women's testimony and lived experiences to highlight weaknesses and failures of the current system. Consideration of this testimony within the context of the rights provided for within both the equality and access to justice frameworks, indicates a substantial and proliferating 'implementation gap.' This implementation gap is highlighted by the experiences of those surveyed, who speak to both a 'rediscrimination' within the equality framework and an inability to access justice. This double-edged sword highlighting both the toothlessness of the equality system, but also indicating that this has created significant barriers their rights to access justice.

The implication of this is stark. Proliferation and further entrenchment of these barriers serves to further remove Travellers from both access to justice and the ability to vindicate their right to equal status in accessing goods and services. Since the dissolution of the Equality Authority and its Tribunal there has been a large decrease in the amount of caselaw arising from the Equal Status Acts relating to Travellers.[81] Between September 2004 and February 2005 only nine claims of such discrimination were lodged compared to an average of 514 claims annually taken with the Equality Tribunal between 2000 to 2003.[82]

This has been attributed to the difficulties created by a number of factors, including the division of cases between the WRC and District Court.[83] This is detrimental to understanding of who is excluded from goods and services on the basis of discrimination, as it prevents a large number of Travellers from taking cases. Challenges brought by Travellers before the

[81] *Supra* n. 28 at 297
[82] Sunday Tribune, Travellers pub claims fall to nine by Michael Clifford 19th June 2005.
[83] For more on the impact of the 2004 reforms see s.1.3

Courts and WRC are important in highlighting that discrimination is both an offence and one which will incur penalties. The inability of Travellers to respond to discrimination through the relevant legal channels undermines both the effectiveness of the Acts and our understanding of how the Acts apply, case-law being a vital part of recognising and responding to implementation gaps. This dearth of caselaw is especially detrimental for Traveller equality, given they are 22 times more likely than 'settled Irish' to experience discrimination in accessing goods and services.[84] Despite data recognising the social exclusion of Travellers, data which specifically maps Traveller experience of civil access to justice and barriers to justice particularly within equality cases does not exist. The following testimony and broader work of the Traveller Equality & Justice Project is therefore crucial to understanding the implementation gap and extent to which Travellers are barred from legal redress.

Notwithstanding this inability to secure justice and access to legal representation, the Irish Traveller Community are indicated as being more knowledgeable about their rights when surveyed against Traveller and Roma minorities in other European States. The FRA found that 49% of the Irish Traveller Community are aware of at least one Irish equality body (Equality Tribunal, Irish Human Rights and Equality Commission or Office of the Ombudsman). Similarly, in Ireland awareness of laws against discrimination based on skin colour, ethnic origin or religion is among the highest of those surveyed (58%). Notwithstanding this, the survey found that of those that did experience discrimination, the majority did not report or file a complaint yet, the proportion of Traveller respondents who reported or filed a complaint in Ireland (28%) is among the highest from all survey groups. However, Traveller trust in the legal system remains the second lowest of all countries.[85]

5. Travellers Experiences of Accessing Justice within the Equality Frameworks.

While it is clear that the current equality system is not protecting or vindicating the rights of all of those who are victims of discrimination, reform of the system must take account of the lived experiences of minority groups, particularly those who experience disproportionate levels of discrimination. The lived-experience both of discrimination in accessing goods and services and in trying to secure justice and access to justice must inform discussion of best-practice options for reform. A system which requires legal representation serves as a

[84] McGinnerty et al., '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
[85] FRA Country Survey – Roma and Travellers 2020 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-ireland_en.pdf p.3

further barrier for those unable to access legal services. Where victims of discrimination are unable to access justice and take cases, significant data on who experiences discrimination and why is missing.

The following testimony is taken from focus groups with Traveller women to map their experiences both of discrimination and the current equality framework in Ireland and options for redress. Respondents noted issues at every step of the system including recording experiences of discrimination and attempting to report these to the service providers in question. For many, their lived-experiences and identity were denied or excluded from these occurrences, with the majority being told that the staff member in question had not realised they were a Traveller, therefore how could they have experienced discrimination as an ethnic minority? This was considered to be a central first hurdle to taking a case. This was compounded by a clear, yet justified, deep-distrust and perceived 'exclusion' from the legal system. This mistrust growing from adverse experiences in seeking to vindicate their rights.

In identifying the barriers preventing access to justice, the women noted that core issues involved access to legal representation, costs, and prohibitive barriers in taking cases alongside unclear avenues to redress. In presenting the findings of these workshops, the following sections set out the women's testimony and lived experiences, using these to map the weaknesses of the current equality system and its inaccessibility for many Travellers.

The testimony is presented in sections reflecting the core issues the women outlined:

i. Proving Discrimination
ii. Issues arising from District Court Hearings
    a. Costs
    b. Trust in the system
    c. Administrative barriers
iii. Standards of Legal Services
iv. Affordability of legal services & lack of Legal Aid
v. Repeat acts of discrimination

Other issues which were revealed within the focus groups include lack of legal knowledge (timeframes, how to prove, who to approach) lack of trust in Court system and issues with proving cases, possible issues with racism or discrimination within the Judiciary.

5.1. Proving discrimination.

Within the focus groups, the majority of women surveyed noted that an initial hurdle to challenging discrimination was proving that the conduct in question satisfied the current test. Many noted that venues and business are aware of the law and may deploy "sneaky ways" to refuse Travellers:

"We were booking a wedding venue. We had the date booked and we left the deposit, and the bride and groom went to test the food and when they did, and the venue saw them they were told "sorry that date was not available anymore". It was discrimination. but how can we prove it?"

"Even if they have prebooked tickets, and they turn up to a door with tickets they are often still refused. The bouncers give excuses that it is double booked or claim they have drink taken."

"When we go to the door we are told "only locals tonight". Even though we are born and bred in the area ourselves. Even though other people living in other areas have no problem gaining entry, but we as Travellers cannot."

"When you walk in, they look at you as if you have 2 heads and say, "oh sorry there was a double booking" or "we are short staffed". Or they say, "just managers orders". Or "sorry lads not tonight". They don't say "No Travellers", they find other ways of turning you away."

"First, they said we needed credit cards on us and not everyone has a credit card, but a couple of us had them and when I produced my credit card, they told me that there were renovations going on in the hotel and there was no room. So, they kept changing their excuse, even though they had already taken my booking."

"When you go to the door, they are not saying I am refusing you because you are a Traveller, they'll ask you for a college ID, when you give them a college ID, they ask you for a garda ID, or tell you that you have had too much to drink so, you can't prove that they are refusing you because you are a Traveller."

"The minute he saw him, they just said no, he had ID, he had a passport but that wasn't acceptable, they asked for a second ID which he didn't have so they turned us away."

The women found that many service providers will attempt to justify the act of discrimination by asserting that they were not aware that the individual(s) in question were members of the Traveller Community:

"I know Travellers who have taken cases against bars and pubs and what they get is the venue saying that they didn't know that the person is a Traveller."

"You can book it on the phone pay your money, but when you walk into that venue, they have all different kinds of excuses for you, they will say they don't have that date that they are double booked, or if you offer to change the date, they might also say there is a mistake, that they have no record of your booking."

"They think it's acceptable not to give you an excuse, because they say no that's it. they say they have the right to do that."

"We booked the hotel, paid it through my card. i had all my details back, when we went there with everything paid in advance through the phone, with confirmation "we have got your money, we want wait to see ye". we arrived at the door, they looked at us and said, "I don't think ye are the people who booked" We showed them the confirmation on my phone and they still said no. we called the guards and they said there is nothing they can do for us. We had to turn around and head back home. what proof did we have that they were turning us away because we are Travellers?"

Ancillary to this is the s.15 defence, often raised by respondents in cases before the District Court. Under s.15 -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.[86]

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. Notwithstanding this, the defence is often raised regardless of whether the individuals in question have or may have engaged in criminal behaviour in the past:

[86] E.g., *Mongan v Firhouse Inn* DEC-S2003-034/035 –A rare case which failed where two Travellers were refused service in a pub because of hostile reaction of other patrons to their presence. It was held that there was a substantial risk of imminent violence due to ongoing disputes at the time

"it's not just pubs, its picture halls too, our local cinema won't let any Traveller children in. If any of them did something wrong, the whole lot of them are barred for life."

Many Travellers speak of feeling 'tarred with one brush' and being refused service in light of another individual or family's conduct. This can be exceptionally damaging as the individual or group in question may have no connection to the victim of discrimination apart from membership of the Traveller Community. Unfortunately, however, the defence is often used regardless of this and it is clear that s.15 defences are open to manipulation by businesses seeking to discriminate against Travellers.

5.2. Weakness of the current legislative framework.

Many of those surveyed noted that the law was not a deterrent to discrimination. Research conducted by the Traveller Movement in the UK recognised that Travellers feel that discrimination is 'just the way it is'.

Leading counsel Marc Willers QC has noted that it would appear that discrimination against Travellers is 'the last acceptable form of racism.' Unfortunately, while no racism or discrimination can be considered acceptable, the social exclusion of Travellers appears to be woven deep into the fabric of Irish society. Notwithstanding the aforementioned examples of service providers manipulating facts to conceal discrimination, there are many other businesses who do not even try to conceal discrimination against members of the Traveller Community. These businesses clearly do not see possible legal action as a sufficient deterrent.

However, perhaps more insidious are the businesses who do provide services to members of the Traveller Community, only to then make the experience so unbearable or intolerable that the individual(s) in question leave or chose to go somewhere else:

"It's so embarrassing to be watched or put out all the time from shops, restaurants, pubs, supermarkets, clothes shops. I am going to one local shop nearly 35 years and I still feel the shiver that i am being watched, no matter how much i spend in a shop, i still am not wanted, they still don't want you in there"

"It's the same if you are parking a car in a shopping centre and the security are staring at you, like you are an alien to them. that's how i feel. that settled people class me as a different species."

"Even if you do get in, you can tell the minute you walk into a place if you are welcome or not, from the staff's body language, they are clinking the glasses around and walk away to the other end of the counter, they don't know whether

to serve you or not and make funny excuses to make you feel uncomfortable. they just make you feel so unwelcome."

"The place know that they can just say no outright, but they are trying to put other

barriers in place to make you feel unwelcome. it's like you are paying for the service, but you feel under pressure to make them like you."

"When I got in shopping into town, I have no doubt that I will be followed in every shop and made feel so small"

"We have a local pub, to get in, even though we have gone there for years, we have to walk in separately, not as a group, (or we won't be left in) and sit up the back. this is going on for years. My husband saying to my son, sit down, don't be talking to people. If we wanted to have a family gathering, we can't go in as a group, only walk in as ones or two trying not to be noticed, it's very stressful but the same standard doesn't apply for settled people

The Traveller women surveyed noted how this culture of exclusion and racism prevalent in Ireland creates repeated adverse experiences for them in their daily lives, but also when they are at their most vulnerable. The women spoke about the manner in which towns respond to Traveller funerals:

"If the pubs know that there is a Traveller funeral happening in the area, they lock the doors of the bars. It's very hurtful to do this to people after a funeral to be honest. And it's everywhere"

"You know the way people say after the funeral though the microphone, 'the family would like to bring you for tea and coffee or a drink to the nearest hotel or pub,' we can't do that, no way."

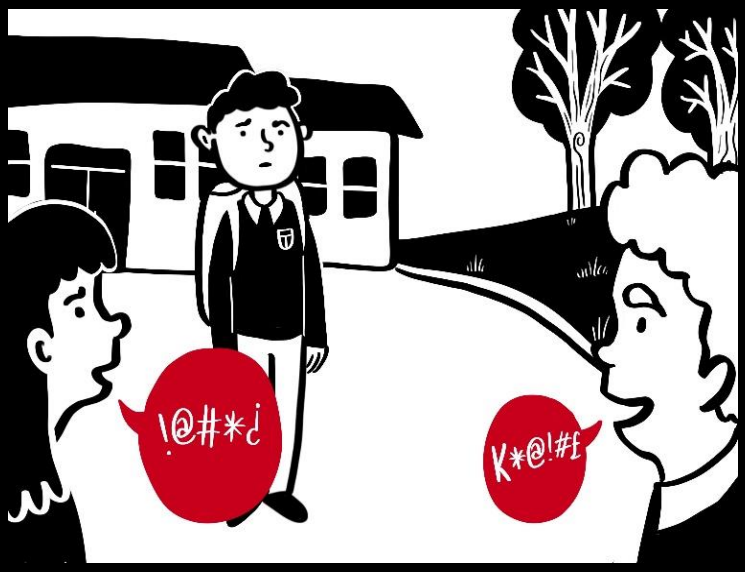
"If there is a Traveller funeral, the rumours will start "it's a Traveller funeral" and each publican is made aware that it's a Traveller funeral. What happens is so distressing because you are in a time of mourning, you haven't the will to fight because you are in mourning and you are passing through with your loved on in a casket through the town and every door in that town where you were reared and went to school is closed in your face. It is awful."

The women surveyed also spoke to the intergenerational nature of this lifelong discrimination, in particular noting the variances in how the older generations respond to this pervasive discrimination, and noted the manner in which the discrimination experienced was also impacting upon their children

> *"There are play places for children X & Y; they let you in but make you feel so unwelcome. no one is smiling. when the children are playing, they are patrolling around watching them in a way they don't do for other groups of kids.*
>
> *"*

> *"They let you in but it's a bit like they are doing you a favour even though you have paid your money the same as anyone else. you feel like you have to be extra nice to them even though they are making you feel unwelcome for fear they would just put you out. we feel like we have to coax them to let us in. It's like don't complain or make a full or you might never be left in again because you are only just barely tolerated. we feel like we have to be on the absolute best behaviour at all times because they are only looking for an excuse to put you out. they should be thanking us to use their service."*

Unfortunately, these experiences speak to the endemic and entrenched social exclusion faced by Travellers. Most worryingly, this appears to be handed down from parents to children and used against Traveller children in school settings:



*"It's in the schools as well. My lad going to school when he was very small, made a new friend. I was collecting him in the yard his parents saw me. The kids were small coming out in a line with their little partner and they had to hold hands. I heard the mother tell her son not to hold my son's hand because he was a kn***** from the site."*

*"A kn***** is a very offensive word to call a Traveller. Children are called it in school. - he was only 6. It's happening all the time."*

*"My child came home saying mam my friend called me a kn*****. She told the teacher about it, but nothing was done. It's coming from the parents, and they are telling their children not to mix with our kids."*

The impunity with which such acts of racism are committed reflects both the toothlessness of both hate speech and equality laws in Ireland while also reflecting the ingrained societal exclusion of the Traveller Community and their persistent othering and treatment as 'less than.'

This othering pervades within popular culture and has led to entrenchment of negative stereotypes which have shaped settled perception and responses to the Traveller Community. An effective equality framework which enables victim participation and increased taking of cases would be a first step towards creation of the required societal shift to end blatant and systemic discrimination as experienced by the Irish Traveller Community.

5.3. Issues arising from District Court Hearings.

Unfortunately, the current system divided between the District Court and the WRC has, as detailed in section 1, effectively implemented as opposed to alleviated barriers to justice for Travellers. Of those surveyed, the majority indicated that the current system, whereby cases concerning licensed premises are heard under s.19 of *the Intoxicating Liquor Act 2003* before the District Court to be problematic on many fronts.

The following testimonies highlight the manner in which those surveyed found taking a case to the District Court to be untenable including barriers such as costs, delays, difficulty understanding administrative procedures before the Court and a lack of trust in the ability of the District Court to secure 'justice.'

5.3.1. Costs as a deterrent factor.

Those surveyed noted that the possible awarding of costs was a deterrent to taking a case concerning a licensed premises:

"The costs of the court are a barrier. I decided to make a complaint about being refused into a hotel, decided to take it to court, but the solicitors advised me that if we lost the at the court, I could be liable for court costs of up to €5000. There and then, I decided to drop the case, because I just don't have that kind of money and couldn't take the chance. The threat of big court costs is a big barrier"

"Bringing cases to court would cost too much, solicitors are costly. Some are no win no fee, but most would charge you a lot"

5.3.2. Delays as a deterrent factor.

They also cited delays within the Court system as a factor which may preclude them from taking cases:

"[The] system is too slow to bring cases to court. it took a full 2 years for the case to go to the court."

"You could put in your complaint and be waiting years for it to get to court."

"Travellers would never appeal to the judge if the court case goes against them, because do you realise how long it takes - 2 and a half years or maybe 3 and then the case goes to court and it could be postponed or thrown out. and the cost. it would cost too much solicitors are costly. Some are no win no fee, but most would charge you a lot."

5.3.3. Administrative barriers.

Issues were also raised in light of the complicated processes connected to bringing a case before the District Court, noting that many find this prohibitive:

"You're torn left right and centre fighting to get your evidence, make your statements, write your letters, and still at the end of it you don't even get an apology."

"The paperwork is a barrier for Travellers, keeping records so it can stand up in court it wasn't easy for people to know how to do it. The other thing is that you could be discriminated against by 10 people daily and the system is so slow."

5.3.4. Inability of the District Court to provide 'justice'.

Survey responses also spoke to a general lack of trust in the ability of the system to provide justice or to act fairly in response to cases concerning Travellers:

"We can't trust gardai, solicitors, or judges. Most of them are not interested in Travellers."

"We never brought a case because you don't hear of Travellers getting any justice and its draining to have to fight every day of your life when the system that is supposed to be there to help you doesn't work. You could be years fighting and never get anywhere."

Many noted that this lack of trust in the ability of the system to secure justice has resulted in feelings of resignation:

"The system doesn't care about Travellers rights."

"I think a lot of Travellers, just leave it go when it happens.... After they were refused, I drove out to challenge the owner, and he said it's his premises and he can do what he likes. But that put every one of us in the whole extended family in bad form for the whole day. he wouldn't even give me an explanation, just they are not coming in. so then we thought we might bring it to court, but we thought what the point is, the court is not going to do anything for us."

Those surveyed were asked whether they felt the current system (split between WRC/DC) was fit for purpose or whether the previous system of the Equality Tribunal was more accessible:

"Yes, that was a better system, quicker and more straightforward. better environment, in a hotel. easier to do the forms. and you could get support from a Traveller project, you didn't have to go to a solicitor. there was loads of cases at that time."

"[after the system changed from Equality Tribunal to District Court] the solicitors saw that there were more cases being thrown out and dismissed and they lost interest."

"Without a doubt there was more cases being won by Travellers in the Equality Tribunal and Travellers saw it. There was fire in our bellies, and we were standing up for ourselves going to the Equality Tribunals But then suddenly that was all taken away."

5.3.5. Affordability of legal services and legal aid.

Although legal aid is available for s.19 *Intoxicating Liquor Act 2003* cases, it would appear that awareness of this is non-existent within the women surveyed, when asked if they had applied for legal aid or knew anyone who had been successful in a legal aid application with the entire group answering 'no.'

Furthermore, the women noted concerns about the cost of both legal representation and costs awarded – highlighting this as a barrier to bringing a case to the District Court. This indicates a clear lack of awareness of the legal aid scheme's availability in District Court cases.

This is compounded by the perceived need for representation before the Court. Although the District Court holds space for lay litigants, the reality is that many would not feel comfortable doing so. A practitioner however brings associated costs:

> *"The costs of the court are a barrier. I decided to make a complaint about being refused into a hotel, decided to take it to court, but the solicitors advised me that if we lost the at the court, I could be liable for court costs of up to €5000. There and then, I decided to drop the case, because I just don't have that kind of money and couldn't take the chance. The threat of big court costs is a big barrier"*
>
> *"Bringing cases to court would cost too much, solicitors are costly. Some are no win no fee, but most would charge you a lot"*

The deterrent nature of costs, delays, issues with accessibility and access to legal representation, as identified by the women, raises ongoing concerns about the viability of the District Court as an acceptable and accessible avenue for victims of discrimination.

5.4. Standards of Representation.

A central issue to responding to discrimination amongst those surveyed was their inability to access legal advice as to their rights and how/who to approach to take a case. Many of the women had previously had adverse experiences with members of the legal profession and this shaped their willingness to take a case moving forward.

Women who had attempted to take cases noted that practitioners often indicated a conflict of inflict:

> *"It's like this, if you look for a local solicitor, they are not going to go against a local venue, to because they use those same shops and restaurants, bars. You are better off getting a solicitor from out of town that knows nothing about Cork city."*
>
> *"I think the solicitors could be getting more business from the hotel owners and vintners and don't want to go against them."*

Furthermore, where those surveyed wanted to take a case and approached a solicitor, they were often dissuaded from doing so owing to costs:

> *"The solicitors are only interested in cases that they think they can make money out of. they are mostly only interested in big cases."*
>
> *"I went into my solicitor to report it and ask her to take a case, she accepted the case there and then, she said she was hoping that they would settle out of court, but they didn't, but she told me that really these cases are not making what they used to make; so, it's all about money for the solicitor, so the pay is not big enough for them. And now she is telling us that the cost of the court could go against us. Also, she said the onus is on us to prove that we were discriminated against and on top of that if we lose, we will have to pay the costs of the court."*

This highlights the difficulties the respondents faced in accessing legal representation initially. Where an individual had secured legal representation, further issues arose in maintaining a professional client/practitioner relationship which reflected proper professional standards.

> *"So even though a solicitor might take the cases from us, they don't stay in touch with is about the case, we are chasing them for information and there is no progress, it's like they are trying to put us down gently"*
>
> *"The reason why Travellers don't take cases anymore, is because they are wondering where they go. They feel like cases are sitting in a shelf somewhere. Solicitors don't get back to you. You must chase them. And it's so slow with no feedback"*
>
> *"I have brought at least 3 cases to one solicitor and they have all just faded away, never made it away and I was always the person doing the chasing the solicitor for news. I will never go to that law firm again; I have not faith in it. But I have no doubt in my mind that I will be discriminated against. <u>But I don't know any other solicitor to go to who would push things and take us seriously</u>. And what I do know is that the system that is in place right now to challenge discrimination is not working"*

For many, adverse experiences were shaped by a perceived lack of interest from the practitioner in taking on an equality case:

> *"I don't trust solicitors, ever since the time I was on my way for an appointment with [a solicitor], on the way my small young fella, needed the toilet so i brought him in to the pub across the road to use the toilet, this was the middle of the day and when the pub saw us, they said " ye kind of people shouldn't come in here, because i don't want ye in here". so, when we went to out solicitor who has his office a few doors away, he said, he could do nothing about it, he wouldn't take it seriously, maybe the fella in the pub was his friend or else it was his local."*
>
> *"We reported a case of discrimination to the same solicitor, after being turned away from a different pub, and he said he could do nothing for us."*

"The solicitors are only in it for money, not because they are interest in human rights. What I am hearing a lot from solicitors is "these cases are not going the way they used" to tell Travellers that it's not worth taking discrimination cases"

Their responses and testimony speak to broader issues within how practitioners engage with vulnerable victims of discrimination and the negative light in which many view equality cases. Furthermore, dialogue between the interviewer and the participants reflect the broader advice desert of good quality and accessible equality and human rights practitioners in Munster:

Interviewer: Is there any solicitor in [your area] that Travellers feel that they can trust to take discrimination cases and follow them up properly?

All the group: NO

5.5. 'Rediscrimination.'

Unfortunately, the above factors and the context within which they arise highlight that the equality system is not suitable for vulnerable, socially excluded victims of discrimination.

The importance of an accessible and functioning equality complaints framework is central to the promoting of equality and the principles of non-discrimination. The Racial Equality Directive 2000/43/EC which informed *the Equal Status Acts 2000* reflects this in Articles 19 & 20 which note that

> *Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on*

behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

(20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

Unfortunately, the current system with its divide between the District Court and WRC does not do such. This raises questions as to the general effectiveness of the framework as a prohibition to discrimination, as was reflected by the women in their survey responses:

"Travellers are a small community. When we hear of other Travellers going through the stress of bringing a place to court for discrimination and it changes nothing, that means we feel it's not worth taking cases."

"Even if you win your case and get compensation money, it's no good because when you go back to that venue, they will still discriminate against you again. And just because you won for that one pub doesn't mean the pub next to them is going to let Travellers in."

"My brother brought a pub to court for discrimination and won the case. They got an apology and compensation. So, 2 weeks after, they decided to go back to the place because it was their local bar. When they went back in, the staff and the owner watched them all night long, stared at them, they felt unwelcome and uncomfortable"

"I brought venue x to court, won, didn't get money, got an apology, and got a family weekend break to stay in the hotel again with breakfast dinner and supper and spas as compensation, so we confirmed it, booked the date, and went down and were told no. straight blank no. we have no record of the booking. but I had my reference number and my booking in my phone. so, the staff said they had no records and me and the family there. I ended up doing nothing then, I was tired. I had travelled to do the courts; I was the one who was out of pocket."

"If a Traveller wins a case against a pub, and then goes back there again and they make you feel so unwelcome and uncomfortable, they barely talk to you, you say to yourself why am I here? I am getting out of here."

This lived experience reflects the toothlessness of the current acts to ensure justice and to prevent recurrence of discrimination. The aforementioned experiences of being unable to find representation and access the Courts indicate that the equality system is itself a discriminatory forum, whereby the most vulnerable are excluded from seeking both assistance and retribution. This has been recognised as 'rediscrimination'. However, it would appear that for many, being taken to Court is not a deterrent. The act must therefore be strengthened to combat this lack of impunity and repeated acts of discriminatory conduct, creating a just outcome for victims of discrimination.

6. Recommendations for Reform.

A core outcome of the workshops was not only identifying the core barriers which Travellers themselves see within the current system, but also the changes necessary to ensure that Travellers can access their rights and challenge inequality. These changes can be considered as the reforms necessary within both equality and access to the equality systems to ensure increased perceptions of fairness and access to legal recourse for those discriminated against.

The Traveller women involved felt that options for reform which would impact most clearly upon Traveller barriers to justice focused on unmet legal need and solutions needed to address this. In particular, their comments noted:

- The lack of available equality law and human rights practitioners available to represent Travellers in Cork and Kerry:

"We would love to know what solicitors are interested in human rights and to know if legal aid is available for discrimination cases."

"We would like to know some solicitors who we can trust and who have an interest in human rights."

- A lack of information and education on how to take a case and apply for legal aid and how to record discrimination properly:

"We need information, education and allies Travellers need guidance on how to do it. We need allies."

"We would like to know who you can object to and how to write a statement. A lot of Travelers wouldn't know how to write a statement. And to know where you can object."

- Need for reform of DC/WRC divide to reinstate a body fit for purpose.

"The system needs to be taken back out of the District Courts. This system does not work for Travellers."

- Issues with standards of legal representation.

- Need for state responses to highlight how unacceptable racism and discrimination are e.g., toothlessness of system.

"Services need to know that discrimination is a serious matter."

It is clear from the testimony gathered within the CTWN/TEJP workshops that the current equality system is unfortunately unfit for purpose. While the WRC and District Court can achieve justice for those who are excluded from legal service provision, issues with inequality of arms and the highly intimidatory option to become a litigant in person means that for many, responding to equality through the appropriate avenue is unattainable. As a result, there is a distinct gap between recording acts of discrimination and correlating cases being actioned. This has wider issues beyond providing victims of discrimination with clear options for recourse. More damaging perhaps is the fact that the equality system has failed to act as a deterrent to influence the behaviour of public venues in terms of challenging widespread discrimination. This toothlessness of the system leads to 'repeat offending' while the inability of Travellers to access legal redress results in further 'rediscrimination.

While the TEJP seeks to respond to a number of this issues, including targeted training, education and information, a systemic overhaul and complete reform of the equality framework is needed.

7. Conclusion.

This report mapped the legislative and procedural barriers to justice which the Traveller Community experience. In outlining the cause and consequences of these, the report highlights the manner in which reform in vitally needed to ensure adequate access to both legal advice and representation for Traveller victims of discrimination. The barriers detailed and the lived experiences provided for in Part II made clear that the current system services to not only undermine access to justice for marginalised groups, but effectively rediscriminates vulnerable victims.

Cappelletti and Garth define 'access to justice' as:

> *"to focus on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just".*

It is clear from the above critical review of equality frameworks and the testimony above that the current system in rediscriminating against Traveller victims is not as Capelletti and Garth note either 'individually or socially just'. Instead, the system itself further perpetuates inequalities and further entrenches societal exclusion. The Chief Justice has recognised these barriers faced for minorities seeking access to justice: "Minorities, marginalised groups or the vulnerable obviously run a real risk of having less effective access to justice than others. "[87] Our data illustrates that this 'less effective access to justice' is the painful reality for Travellers. Although the majority of Travellers experience discrimination in day-to-day life[88] due to the inequal structures of the legal system and ability to access legal services, many are excluded from legal service provision and as a result feel unable to challenge discriminatory acts. The barriers currently presented for Travellers result in a proliferating cycle of 'rediscrimination' which further entrenches the social exclusion of Travellers within Ireland. The resulting situation is one within which Travellers are marginalised and excluded from all aspects of society including access to services especially legal services. This is problematic as access to justice is a crucial enabling right, which when inaccessible, further deepens social exclusions. This evidently represent the need for urgent

[87] Chief Justice Frank Clarke, speaking in his introductory remarks to the Access to Justice 2021 Conference https://www.lawlibrary.ie/accesstojustice2021/

[88] Travellers in Ireland —Key Results From The Roma and Travellers Survey 2019, Fundamental Rights Agency (2019) available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-ireland_en.pdf

reform to create a system within which Travellers can challenge the high levels of discrimination to which they are subject.

The recent attention paid to the need to improve access to justice, including the commitment to a review of legal aid[89] and a significant review into the functioning of the Equality Acts[90] are welcome. However, the state needs to recognise that access to justice and accessible equality frameworks are an investment; one which is essential to ensuring Ireland is a better place for all citizens regardless of ethnic status. Any reforms that follow current reviews must prioritise the eradication of prejudice and racism against minority ethnic groups such as Travellers. In doing so, all options for reform must take into account victim perspectives in order to ensure that they serve those most affected. Reforms such as those detailed in s.6 and proposed by the Traveller women are therefore crucial to create a system which is both responsive to discrimination and which places the voices of those victimised first.

As President Higgins has noted, an equality system which fails to provide for and protect societies' most vulnerable is one which cannot be considered effective:

> *We know that a right to justice is fundamental to human rights protection, a primary element of an individual's entitlement as an equal citizen of any state. It is simply not acceptable, in a state that claims to be a democracy, that the most vulnerable section of our society is unable to access our legal system or is prevented from doing so in a timely manner. That is a situation which damages the very fabric of our society, entrenching and exacerbating inequality. At the very roots of democracy lies a respect for all citizens and a refusal to foster a culture of privilege and advantage for those who can afford it.* [91]

It is crucial therefore that the Irish State take responsibility and action to further reform of the equality framework in line with its duties under both domestic and international law, ensuring that vulnerable groups are adequately provided for and protected within the State.

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[89] https://www.irishlegal.com/articles/flac-welcomes-plans-for-civil-legal-aid-review-by-september

[90] https://www.gov.ie/en/consultation/066b6-review-of-the-equalityacts/#:~:text=Purpose%20of%20the%20Consultation&text=The%20review%20will%20examine%20the,including%20in%20relation%20to%20disability.

[91] President Michael D. Higgins, speech marking FLAC's 50th Anniversary and Official Opening of their New Office https://president.ie/en/media-library/speeches/speech-marking-flacs-50th-anniversary-and-official-openingof-their-new-office