

**Analytical Study on Legislation  
EUMC RAXEN3**

**Report on Ireland**

**National Focal Point:  
Equality Authority  
National Consultative Committee on Racism and  
Interculturalism**

**December 2002**

DISCLAIMER: This study has been compiled by the National Focal Point of the European Monitoring Centre on Racism and Xenophobia (EUMC). The opinions expressed by the author/s do not necessarily reflect the opinion or position of the EUMC. No mention of any authority, organisation, company or individual shall imply any approval as to their standing and capability on the part of the EUMC. This study is provided by the National Focal Point as information guide only, and in particular does not constitute legal advice.

## **I. Executive Summary**

This analytical study is part of the third phase of RAXEN and has been undertaken by the Equality Authority and the National Consultative Committee on Racism (NCCRI) and completed in December 2002. The focus of the study is on legislation. Legislation in the context of this study is understood to mean the main legislation that seeks to provide protection against racism and to promote equality and integration in Ireland. The study seeks to complement the other analytical studies, which have also in part included a particular focus on legislation, (i.e. the studies on education, employment and racial violence).

The introduction includes a summary of the aims, the purpose and the structure of the study. The key aims, as set out in the EUMC guidelines for the study, are to give a descriptive summary report of the current situation, major activities and recent developments 2000-2002, and to present an analysis of the situation, their causes and consequences.

Part One of this study provides the contextual background to the study under the following headings: Cultural diversity in Ireland; recent socio-economic and demographic changes in Ireland; racism in Ireland and a brief description of the legislature in Ireland.

Cultural diversity has significantly increased in recent years, building on the diversity that previously existed in Ireland. The Traveller community, an indigenous Irish group with an estimated population of 22,000 people, remains the largest minority ethnic group in Ireland. There has been a long established Jewish community and growing Islamic, Asian and Chinese communities in Ireland. There are now refugees and asylum seekers from over 100 countries in Ireland. There are now more visible communities of black Irish and other EU and non-EU citizens who are living in Ireland.

Ireland has become a country of net inward migration for only the second intercensal period since the foundation of the State in 1921. There has been a dramatic fall in unemployment in recent years from over 20% in the 1980's to less than 5% in 2002.

In the period up to 2001 Ireland's economic growth rate was more than double any other member state in the EU. This has resulted in significant labour and skills shortages across the whole of the labour market. As a consequence there has been active recruitment of workers from both EEA<sup>1</sup> and non-EEA countries. .

The different forms and manifestations of racism in Ireland are briefly outlined in Part One of this study, including racism at an individual level and racism at a systemic/institutional level. This part of the study concludes with a brief outline of the legislature in Ireland and the dualist system under which international agreements are incorporated into Irish law.

Part Two outlines the methodology used for this study, which is defined by the EUMC guidelines for analytical studies.

---

<sup>1</sup> The European Economic Area (EEA) consists of the EU, Norway, Iceland and Liechtenstein.

Part Three outlines the sources and gaps in available data and concludes that there is a small but increasing body of reports and submissions on legislation relevant to the focus of this study, including for example a recent survey and analysis of the jurisprudence generated by the equality legislation.

Part Four provides an overview and analysis of the main legislation relevant to this study. These are:

1. The Equality Legislation
2. The Transposition EU Directives into Irish Law
3. The International Convention on the Elimination of all Forms of Racial Discrimination
4. Other International Conventions
5. The Prohibition of Incitement to Hatred Act, 1989

The principal legislation protecting against racism and promoting equality are the Employment Equality Act, 1998 and the Equal Status Act, 2000. Bodies established under this legislation are the Equality Authority and the Office of Director of Equality Investigations-the Equality Tribunal (ODEI).

As a consequence of three EU Directives: The Race Directive (RD); the Framework Employment Directive and the forthcoming Gender Equal Treatment Directive (GETD), the Irish government must transpose important equality commitments into legislation beginning with the RD in July 2003.

This requirement has important consequences for the equality legislation in Ireland, both across all nine grounds and also specifically to the 'race' and Traveller community grounds that are most relevant to the focus of this study. A key issue in transposition of the Directives is the consolidation of the present test of 'burden of proof' and the extension of the equality legislation to cover public activities not already covered by the present equality legislation. The most substantive changes are likely to be in respect of the Equal Status Act, which provides protection against discrimination in the provision goods and services.

Following the enactment of the equality legislation, Ireland ratified the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) in January 2001. This is the most important international convention on racism and sends an important signal within Ireland and to the international community about Ireland's commitments to address racism. The first report from Ireland will be drawn up in the near future.

The Prohibition of Incitement to Hatred Act, 1989 is an important part of Ireland's commitments to ICERD and was enacted over ten years before ICERD's ratification in Ireland. Because of perceived weaknesses in the legislation, including lack of successful convictions (until recently), a review of the Act was announced in 2001. This review has been delayed in recent months to enable the government to assess the impact of the recent EU Directives on possible amendments to this legislation. Other important international instruments that Ireland has recently ratified include the European Convention on Human Rights (ECHR), which will be incorporated into Irish

legislation, although the extent of incorporation is still to be clarified.

A brief outline of the national specialised and expert bodies and Tribunals completes Part Four of this study.

Part Five of the study concludes the study.

Annex One provides a select bibliography and list of websites.

Annex Two is a summary of equality cases referred to the ODEI in 2001 and the first 6 months of 2002.

Annex Three is a summary of important international jurisprudence related to incitement to hatred.

## **II Introduction**

As part of the third phase of RAXEN<sup>2</sup>, the European Monitoring Centre on Racism and Xenophobia (EUMC) has decided to undertake analytical studies in four data collection areas across the fifteen member states of the European Union. The National Focal Point in each member state has undertaken these studies. In Ireland the National Focal Point is the Equality Authority (EA) and the National Consultative Committee on Racism and Interculturalism (NCCRI). The four data collection areas of RAXEN3 are: Employment; racial violence; education and legislation.

The analytical studies are primarily aimed at policy makers at both European Union level and member state level and the expected outcomes in relation to the legislation study are:

- Background information on minorities, immigration, foreign labour, asylum seekers
- New integration policy (specified for different sectors/ministries in society)
- New immigration legislation
- New anti-discrimination legislation
- New articles of penal codes on racial motives
- Newly ratified conventions,
- Newly established specialised bodies (responsibilities)
- Description of acts of discrimination on ethnic, racial, cultural and religious grounds; jurisprudence and court cases; victims, perpetrators, type of punishments
- Theoretically based explanations to legislative effects, causes and consequences

### **Definitions**

Legislation in the context of this study is understood to mean the main legislation, which seeks to provide protection against racism, incitement to racism and the promotion of equality. This includes the establishment of expert and specialised bodies and Ireland's ratification of international instruments, including conventions and the transposition into Irish law of relevant EU Directives.

---

<sup>2</sup> RAXEN is the EU wide network developed and coordinated by the EUMC to collect data and information on racism and xenophobia and to promote good practice in addressing racism and supporting cultural diversity.

### **III Report Structure**

The report structure is as follows:

	Page
I. Executive summary	2
II. Introduction	5
III. Report Structure	6
<b>Part</b>	
1. Context	7
2. Methodology	15
3. Description of existing data and sources and gaps	16
4. Emerging knowledge/good practice	17
<b>Annex</b>	
1. Select Bibliography and Websites	36
2. Cases referred to the ODEI-the Equality Tribunal	38
3. Summary of ECHR case law relevant to Incitement	39

## **Part One: Context**

This part of the study is divided into the following sections:

1. Cultural diversity in Ireland
2. Recent socio-economic and demographic changes in Ireland
3. Racism in Ireland
4. The legislature in Ireland

### **1. Cultural diversity in Ireland**

There has always been cultural diversity in Ireland, despite the widely believed myth that Ireland has always been and still is a homogeneous and a mono-cultural society or the defining of diversity solely along religious grounds (Protestant and Roman Catholic).

The Traveller community, an indigenous Irish group, with an estimated population of 22,000 people and remains the largest minority ethnic group in Ireland. There has been a long established Jewish community and growing Islamic, Asian and Chinese communities in Ireland.

However, there has been a significant broadening of cultural diversity in recent years, both in terms of numbers of people and national or ethnic origin. There are now refugees and asylum seekers from over 100 countries in Ireland including Vietnam, Bosnia, Kosovo, Nigeria, Romania, Algeria, Congo, and Somalia and from ethnic groups that transcend geographical boundaries, such as the Roma and the Kurds.

There has been a significant increase in the numbers of migrant workers coming to Ireland from outside the European Economic Area. This is a direct consequence of skill and labour force shortages in recent years. The number and diverse national and ethnic backgrounds of third level and language students has also contributed to increasing cultural diversity in Ireland.

In Ireland there are now more visible populations of black Irish and other EU and non-EU citizens living in Ireland who experience racism on the basis of skin colour and ethnic origin.

### **2. Recent Socio-Economic and Demographic changes in Ireland.**

The following is a summary of key features in the dramatic socio-economic and demographic changes that have taken place in Ireland in recent years:

- In the period up to 2001 Ireland's economic growth rate was more than double any other member state in the EU. This has resulted in significant labour and skills shortages across the whole of the labour market.
- There has been a dramatic fall in unemployment in recent years from over 20% in the 1980's to less than 5% in 2002. As a consequence there has been active recruitment of workers from both EEA<sup>3</sup> and non-EEA countries.

---

<sup>3</sup> The European Economic Area (EEA) consists of the EU, Norway, Iceland and Liechtenstein.

- Ireland has been traditionally seen as a country of mass emigration. Largely as a consequence of almost continuous, though fluctuating levels of emigration, Ireland's population actually declined from 3m in 1926 to 2.8m in 1961. Between 1996 and 2002 the population of Ireland rose from 3.6m to 3.9m<sup>4</sup>, the most rapid increase in population since the foundation of the State.
- Nearly half of all inward migration into Ireland over the past two inter-censal periods has been returning Irish nationals. The proportion of Irish nationals returning to Ireland as a total share of all inward migration peaked in 1999 and the current trend is that their share of the total will fall over the next few years in favour of an increase of people from outside the European Economic Area.

### **Inward Migration**

Since the establishment of the State in 1921, the Republic of Ireland has consistently been a country where emigration has exceeded immigration, with the exceptions of the periods 1971-1979 and 1991-2002. The highest levels of net outward migration occurred between 1951 and 1961, at a level, which is twice that of the highest level of net inward migration. The highest level of net inward migration to Ireland since the foundation of the State occurred in the most recent period, 1996 and 2002 (see Table One). On an annual basis net inward migration of 25,500 for the most recent period, was almost twice the average recorded during the 1970's<sup>5</sup>.

**Table One:**  
**Average Annual Estimated Net Migration (Inward Less Outward)**  
**Per 1,000 Population 1926-2002 (CSO)<sup>6</sup>**

Intercensal Period	Per 1,000 Population
1926-1936	-5.6
1936-1946	-6.3
1946-1951	-8.2
1951-1956	-13.4
1956-1961	-14.4
1961-1966	-5.7
1966-1971	-3.7
1971-1979	4.3
1979-1981	-0.7
1981-1986	-4.1
1986-1991	-7.6
1991-1996	-0.5
1996-2002	6.8

<sup>4</sup> Central Statistics Office, (September 2002). Preliminary Report 2002 Census.

<sup>5</sup> Central Statistics Office (September 2002). Preliminary Report 2002 Census. P11

<sup>6</sup>ibid

The pattern of inward migration into Ireland in relation to the origin of migrants has changed dramatically in recent years. Between the period 1996 and 2002, returned Irish nationals accounted for 46% of immigration into Ireland, however this share has been declining since 1999, when it peaked at 55% share of total inward migration.

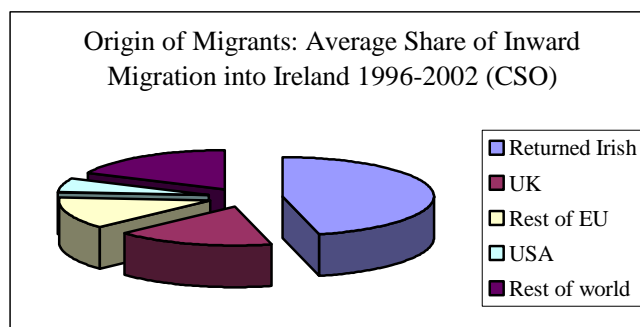
The most significant trend emerging in the most recent intercensal period, 1996 to 2002 has been the increase in the share of migrants coming to Ireland from the rest of the world<sup>7</sup>. Immigration from the rest of the world accounted for 35% of immigration in 2002, compared with 11% in 1996. Averaged out over the period 1996-2002, the proportion of people from the rest of the world was roughly the same as immigrants from the UK to Ireland.

Concomitant with this increase of migrants from the rest of the world, there has been a parallel decrease in the share and number of UK and USA migrants over the same period. The actual number of US immigrants to Ireland fell by half between 1996 and 2002 and their share of the total declined from 10% to 6%. The number of immigrants from the UK to Ireland declined by 39% between 1996 and 2002 as well as their share falling from 21% to 11% over the same period. The rest of the European Union's share of immigration into Ireland has remained almost static at 13% between 1996 and 2002.

**Table Two:**  
**Inward Migration into Ireland**  
**Origin (% of Total) Inward**  
**Migration into Ireland in 1996, 1999 and 2002 (CSO)<sup>8</sup>**

Origin	1996	1999	2002	Average 1996-2002 (Chart One)
Returned Irish	45%	55%	38%	46%
UK	21%	17%	11%	17%
Rest of EU	13%	14%	13%	13%
USA	10%	5%	3%	6%
Rest of world	11%	9%	35%	18%

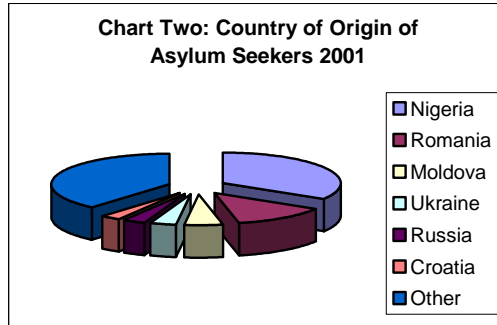
**Chart One<sup>9</sup>**



<sup>7</sup> This category defined in the census as all countries in the world, excluding the US and the EU.

<sup>8</sup> Central Statistics Office (5 September 2002). Population and migration Estimates. April 2002.

<sup>9</sup> Ibid Table 8



**Table Three:  
Inward Migration into Ireland  
Number of Immigrants (000) in 1996, 1999 and 2002 (CSO)<sup>10</sup>**

Year	1996	1999	2002
Number (000)	39.2	47.5	47.5

**Table Four:  
Usually resident population in Ireland classified by Place of Birth in 1996  
(CSO)<sup>11</sup>**

Place of Birth	Numbers	% of Total Population
Outside the Republic of Ireland	251,624	6.9

Table five shows usually resident population in Ireland classified by place of birth in 1996 (figures for 2002 are not yet available). However it is of very limited value to this study as it includes people born in Northern Ireland, Britain and other EU countries and it excludes migrants. The 2002 Census will provide information on nationality for the first time. There are no figures available on absolute numbers of foreigners in Ireland or members of minority ethnic groups.

### **Refugees and Asylum Seekers**

The number of asylum seekers to Ireland has increased significantly in recent years but appears to have levelled out at approximately 10,500 per year in recent years (table five). This is higher than the EU average per head of population.

However it is also the case that the total number of asylum seekers and refugees in Ireland is much less than many other EU countries per head of population as there was virtually no asylum seekers coming to Ireland before 1996. The main countries of origin for asylum seekers in Ireland in 2001 was Nigeria (33.5%) Romania (13.15%), Moldova (5.3%), Ukraine (3.6%), Russia (3.0%), Croatia (2.8%) Other (38.7%)<sup>12</sup> (See Chart Two).

<sup>10</sup> ibid

<sup>11</sup> Central Statistics Office

<sup>12</sup> Office of the Refugee Applications Commissioner, (2002) Annual Report 2001 and figure for 2002 added.

**Table Five**  
**Asylum Applications to Ireland 1992-2002 (Dept of Justice, Equality and Law Reform)<sup>13</sup>**

<b>Year</b>	<b>Numbers Seeking Asylum</b>
2002	11660
2001	10325
2000	10938
1999	7724
1998	4626
1997	3883
1996	1179
1995	424
1994	362
1993	91
1992	39

### **Migrant Workers**

Because of skills and labour shortages, Irish businesses and employers and State agencies have been actively recruiting out of the European Economic Area in recent years. In 1999 there were 6000 work permits issued, in 2000 there were 20,000 issued and in 2001 this figure had increased to over 36,000 and 2002 to over 40,000.<sup>14</sup>

The main countries of origin are Latvia, USA, Philippines, Czech Republic and Poland. Almost 40% of migrant workers coming to Ireland in 2001 were from EU accession countries, such as Poland, Latvia and the Czech Republic. Most migrant workers in 2002 were employed in the service sector(37%), catering (25%) agriculture and fisheries (15.4%) industrial (7.6%) and the medical and nursing sector (7.1%)<sup>15</sup>.

### **Integration Policy**

There has been comparatively little focus on integration policy in Ireland, and even less that is set down in legislation. However this is beginning to change. One of the key outcomes of the United Nations World Conference Against Racism, held in Durban, South Africa in September 2001, was the commitment by participating countries to develop National Action Plans against Racism.

The development of a National Action Plan Against Racism in Ireland (NPAR) represents a significant opportunity to both build upon and enhance existing policies and strategies to address racism in Ireland and to identify new priorities, aspirations and arenas of work that can be drawn together into an overall, cohesive plan. A key focus of the NPAR will be to develop policies that promote an intercultural approach to integration policy. The NPAR will be completed by December 2003.

<sup>13</sup> www.justice.ie

<sup>14</sup> A significant proportion of the 36,000 permits in 2001 were from migrants renewing their work permits.

<sup>15</sup> ibid

### 3. Racism in Ireland

In recent years there has been a commencement of a public debate and dialogue about racism in Ireland. To date, this debate has often been robust, and at times conflictual, but has generally been constructive and reflective of the widely held concern by representatives of Government and broader civil society that racism deprives people of their basic human rights, dignity and respect and is a threat to social and economic cohesion within Ireland<sup>16</sup>.

The public debate about racism has sometimes been limited in scope, with racism sometimes reduced to, or equated with a discourse concerning issues around immigration, refugee and asylum policy. These issues have a centrality to the present debate, but a narrow focus on these policy issues on their own only provides us with an incomplete picture and understates other forms of racism in Ireland.

Reducing the discourse on racism to a discussion on migration and asylum policy can also have the, albeit often unintentional, outcome of reinforcing the perception that racism is only experienced by recent migrants and that ethnic and cultural diversity in Ireland is solely as a consequence of recent migration or that inward migration is the cause of racism.

There are different forms of racism in Ireland, which are identified as:

- Racism experienced by Travellers on the basis of their distinct identity and nomadic tradition.
- Racism experienced by recent migrants, which includes migrant workers, refugees, asylum seekers and students studying in Ireland.
- Racism experienced by ‘people of colour’ and minority ethnic groups, including black people on the basis of their skin colour and ethnic and/or national identity, irrespective of their legal status.
- The intersection between racism and other grounds of discrimination, including gender, disability and sexual orientation.<sup>17</sup>

The blaming of minority ethnic groups for creating racism in Ireland and the adoption of racist slogans such as ‘Ireland for the Irish’ and the use of emotive language that refers to ‘invasions’ and ‘colonisation’ has been adopted by a small number of groups and individuals in Ireland. This language has a resonance with the language adopted by extreme organisations in other European countries. To date, there has been little evidence of such groups being widely supported, electorally or otherwise.

It is to be welcomed that there is a broad consensus within political parties in Ireland to address racism. All the parties in the Oireachtas have signed and reaffirmed an anti racism protocol governing the conduct of elections, which gives a commitment to sending a clear and positive message to their constituents that they reject racism. There have been occasions when a small number of politicians have sought to extract political capital through alarmist and offensive statements, although these incidents

---

<sup>16</sup> Farrell, F; Watt, P, (Eds.) (2001) Responding to Racism in Ireland. Veritas, p12

<sup>17</sup> These intersections were recognised as an important issue in the World Conference Against Racism Programme of Action.

remain relatively isolated in Ireland, organisations such as the NCCRI have cautioned against complacency.

The potential for racism to be perpetuated through the systems or structures of institutions is an issue that is also beginning to receive attention in Ireland. A number of statutory bodies are aware of this potential and are actively developing awareness raising programmes and training for staff and bringing in anti racism commitments as part of a broader approach to equality.

### **Manifestations of Racism in Ireland**

There are at least two overall manifestations of racism in Ireland, which can be summarised as follows:

#### **Racism at an Individual Level**

Examples of racism at an individual level include assault and abuse directed at people from minority ethnic groups. A number of high profile cases highlighted by the media in recent months, reports of harassment and the distribution of racist literature indicate that individuals are experiencing this form of racism.

#### **Racism at an Institutional/Systemic Level**

There is increasing recognition of the need to address racism at an institutional/systemic level. This form of racism, often unintentional, can be caused through ignorance and lack of thought or adequate planning. The outcome of these processes can contribute to failure in or weaker service provision to minority ethnic groups. The potential for institutional /systemic racism to impact on service provision was highlighted by the MacPherson Report into the Metropolitan Police in Britain.

#### **Attitudinal Surveys**

A recent review of all existing surveys<sup>18</sup> of attitudes toward minority ethnic, surveys of minority experiences of discrimination made a number of conclusions, including:

- The degree of hostility expressed toward minority ethnic groups, has increased measurably and is particularly strong in relation to particular groups, including black people, Roma and Travellers and refugees and asylum seekers.
- Profiles of respondents show that levels of hostility are evident at all levels of society of and in both a rural and urban context.
- Negative attitudes experienced by minority ethnic groups now appears to be an everyday feature of many people's lives.

## **4. The Legislature in Ireland**

The Irish Constitution (1937) provides that the Oireachtas (Irish legislature, with sole powers of making law) shall consist of a President and two houses Dáil Éireann (Dáil) and Seanad Éireann. The Government is accountable to the Dáil only, which is the main legislative body with the Seanad serving as an upper house and empowered only

---

<sup>18</sup> Garner, S and White, A. Racist Attitudes in Ireland: Baseline Research for the Anti Racism Public Awareness Programme. Know Racism. 2002

to make recommendations. The President (Uachtarán na hÉireann) who signs legislation but can also refer legislation to the Supreme Court, normally acts on the advice of the Government<sup>19</sup>.

In respect of the Executive, The Taoiseach or Prime Minister is appointed by the Dáil, by the party (ies) that secure the most seats in a general election which are due to be held no later than every five years. S/he appoints a cabinet of between 7 and 15 Ministers. Ministers of State assist Ministers in carrying out parliamentary and departmental work.

The Judiciary is the system of courts in Ireland, which includes District Courts, Circuit Courts, High Courts and the Supreme Court. The President on the advice of the Government appoints judges.

### **Dualist System**

Like other common law countries, Ireland has a so-called “dualist” system under which international agreements to which Ireland becomes a party are not automatically incorporated into domestic law. Article 29.6 of the Constitution provides that “No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas”. When Ireland wishes to adhere to an international agreement it must, therefore, ensure that its domestic law is in conformity with the agreement in question.

---

<sup>19</sup> Institute of Public Administration, (2003) Yearbook and Diary.

## **Part Two: Methodology**

This part of the study is seeks to outline the methodology for undertaking this analytical study

### **Methodology**

The methodology used for undertaking this study on legislation can be summarised as follows:

- The guidelines for undertaking RAXEN 3, which have been developed by the EUMC in consultation with the 15 NFP's<sup>20</sup>.
- A review of the data sources on legislation referenced and summarised in RAXEN 2.
- The identification of data sources on legislation, which have been updated since RAXEN 2 as part of RAXEN 3.
- A desktop review and analysis of existing publications, research, websites and other data sources.

---

<sup>20</sup> *ibid*

### Part Three: Sources and Gaps in the Data.

The main sources for this study are a range of reports and submissions that have been undertaken by the Equality Authority (EA), the Office of the Director of Equality Investigations-the Equality Tribunal (ODEI) and the National Consultative Committee on Racism and Interculturalism (NCCRI).

These are summarised as follows:

Source of Data	Report/Submission	Date of Publication
National Consultative Committee on Racism and Interculturalism	The Review of the Prohibition of Incitement to Hatred Act.	2001
	The Equal Status Act	1999
	The ICERD	2001
Equality Authority	The Transposition of EU Directives into Irish law	2002
The Office of the Director of Equality Investigations- the Equality Tribunal	Annual Report 2001. Legal Review and Case Summaries	2002

Given the relatively recent enactment of the equality legislation (1998 and 2000) and the establishment of specialised and expert bodies, these reports and submissions provide a useful overview of the equality legislation and the prohibition of incitement to hatred legislation.

Lawyers commissioned by or employed by the national bodies indicated have undertaken many of these reports.

There is much less analysis from an equality or anti racism perspective of other legislation that has the potential to impact on racism, in particular legislation that has the potential to impact on racist violence (these issues are considered further in the Analytical Study on Racial Violence).

## **Part Four: Emerging Knowledge and Good Practice**

This Section describes and provides analysis of the main legislation and bodies that exist in Ireland to address racism and includes a discussion of possible developments arising from the need to transpose recent EU Directives on equality into Irish law. This part of the study is divided as follows

1. The Equality Legislation
2. The Transposition of EU Directives into Irish law
3. The International Convention on the Elimination of all Forms of Racial Discrimination
4. Other International Conventions
5. The Prohibition of Incitement to Hatred Act, 1989
6. National Bodies (Specialised, Expert Bodies and Tribunals)

### **1. Equality Legislation<sup>21</sup>**

The recent equality Acts, the Employment Equality Act (1998) and the Equal Status Act (2000) protect against discrimination based on nine grounds. These are:

- Gender
- Marital Status
- Family Status
- Age
- Disability
- Religion
- Race (including nationality)
- Sexual Orientation
- Membership of the Traveller Community

The two most relevant grounds in respect of this study are 'Race' and membership of the Traveller community. The Employment Equality Act covers employment and related areas such as vocational training or membership of trade and professional bodies. The Equal Status Act covers the provision of goods and services, and of a wide range of services available to the public or to a section of the public including access to places, transport, banking, insurance, cultural activities, refreshment, and many aspects of education. Some disposals of property and the provision of accommodation are also covered. There are a number of exceptions and exclusions to both Acts. Earlier equality legislation covered only the gender and marital status grounds.

---

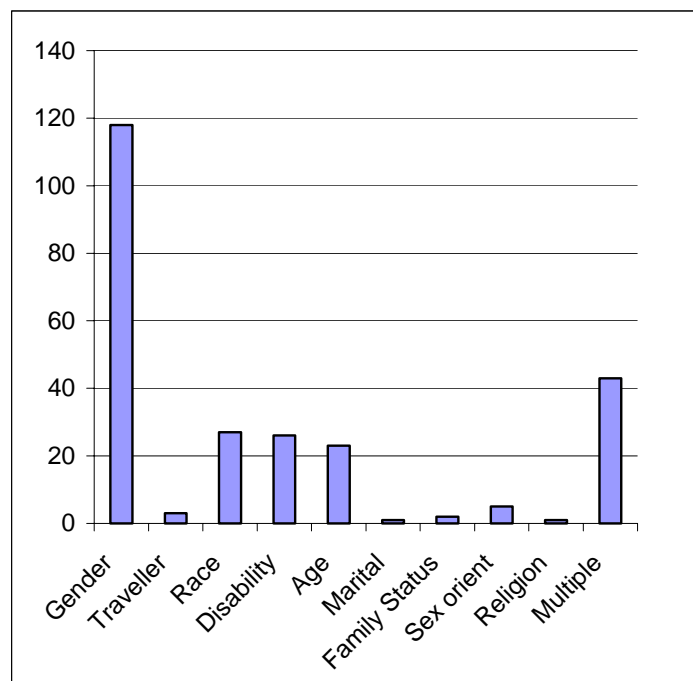
<sup>21</sup> Much of the information for this section is drawn from ODEI-The Equality Tribunal. Annual Report 2001. Legal Review and Case Summaries.

### **Employment Equality Act, 1998.**

The legislation in Ireland is relatively recent in respect of protection from discrimination on grounds related to racism. The first full year of operations for the Employment Equality Act was 2000 and the first full year of operations for the Equal Status Act was 2001.

The Employment Equality Act, 1998 prohibits discrimination in relation to employment on nine distinct grounds -gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. With the exception of gender and marital status, complaints of discrimination under any of the other grounds can only be brought in relation to incidents, which occurred after 18 October 1999. Where a person considers that s/he has been discriminated against on the gender ground, the Act allows the complainant the option of applying directly to the Circuit Court for redress.

**Chart Two. Cases referred to the ODEI (Equality Tribunal) in 2001 under the Employment Equality Act<sup>22</sup>.**



The Employment Equality Act, 1998 covers employees in the public and private sectors as well as applicants for employment and training. The scope of the Act is comprehensive and deals with discrimination in work related areas, from vocational training to access to employment and employment conditions generally, including training, work experience and advancement within employment. The publication of discriminatory advertisements and discrimination by employment agencies, vocational training bodies and certain vocational bodies i.e. trades unions and

<sup>22</sup> OEDI-The Equality Tribunal. Press Statement, July 19, 2002.

employer, professional and trade associations are also outlawed. (Annex 2 of this study provides a summary of cases referred to the Office of Director of Equality Investigations-The Equality Tribunal<sup>23</sup> in 2001 and the first six months of 2002.)

The number of complaints in 2001 under the Employment Equality Act, 1998 rose to 260, which was an 87% increase on the previous year. Of the total number of complaints referred to the ODEI under the Equality legislation, 260 were referred under the Employment Equality Act and the remaining 854 under the Equal Status Act<sup>24</sup>. While gender continued to be the most frequent ground there were significant numbers of complaints under the other grounds relevant to racism, which are ‘race’ and the Traveller community. Race, Disability and Age were the most significant grounds cited after gender in respect of employment cases.

The ‘race’ ground covers race, colour, nationality, ethnic or national origin. There were 27(10.4%) in 2001 and 17 (12%) in the first six months of 2002 cases referred to the ODEI. This compares with only 1 case in the year 2000.

Under the Traveller community ground, there were only 3 cases in 2001 and 2 cases in the first six months of 2002. Under the religion ground there was 1 case in 2001 and 1 in the first six months of 2002. This ground along with family status and marital status were the least invoked ground under the Employment Equality Act.

Multiple ground refers to complaints that were received were more than one ground was referred. In 2001 there were 43 (17%) and in the first six months of 2002 there were 38 (27%) referred cases under this category (see Annex 1 for summary of the cases referred under the Employment Equality Act and the Equal Status Act)

The case files of the Equality Authority provide a further insight into the scale and nature of discrimination experienced in employment. Their Annual Report for 2001 indicated that 18% of their case files related to discrimination on the grounds of Race (15.5%) and membership of the Traveller community (2.5%). The issues raised in these case files are outline in Table One.

**Table Five: Discrimination Experienced in Employment on Grounds of Race and Membership of the Traveller Community Based on Case files<sup>25</sup>.**

Nature of Discrimination	Percentage of Relevant <sup>26</sup> Case files
Dismissal	34%
Access to employment	20%
Equal pay	16%
Working conditions	13.5%
Harassment	9.5%
Access to promotion	4%
Access to training	3%

<sup>23</sup> Hereafter referred to as the ODEI

<sup>24</sup> ODEI-the Equality Tribunal, (2002) Part One Annual Report 2001, p 29.

<sup>25</sup> Equality Authority. (2002) Annual Report for 2001.

<sup>26</sup> Race and Traveller Grounds related to employment.

## **Jurisprudence**

In terms of decisions, the ODEI published 67 Equality Officer findings in 2001 for all Employment and Equal Status cases across the nine grounds<sup>27</sup>. A large number of other claims were withdrawn, settled, mediated or found to be inadmissible. Of the 67 cases decided, 42 were employment discrimination cases. During 2001, two thirds of these were decided in favour of the respondents. Conversely under the Equal Status Act, two thirds of cases favoured the complainants. The ODEI has stated that

‘The fact that the Equal Status Act has only recently come into force, and the possibility that many service providers have not yet adapted to the practice of the Act’s requirements, may explain this differential.’<sup>28</sup>

There were four decisions in 2001 under the race ground, all based on nationality and regarding employment. Two were decided to be inadmissible for jurisdictional reasons (discussed below) and a third failed to prove discrimination. In the fourth case an award was made<sup>29</sup>. Under the case, related to equal pay, a hospital was ordered to pay a doctor who was a Malaysian national occupying an unpaid intern post, the same basic pay, overtime rates and living out allowance as an Irish national doing like work.<sup>30</sup> The hospital argued that that work permit rules or alternatively European Community law, obliged it to give Irish and EEA nationals preference when allocating paid intern positions. The ODEI Equality Officer after a detailed examination of Irish and European case law held that Community law obliged employers to treat other EEA nationals equally favourably with Irish nationals, but did not oblige them to treat non-EEA nationals less favourably, and accordingly did not supersede their obligations under the 1998 Employment Equality Act. She also held that work permit rules required employers to give preference to Irish and EEA nationals in employment opportunities, but did not oblige them to offer posts to the former and unpaid posts to non-EEA nationals. The Equality Officer made an award of equal pay.<sup>31</sup> The case was subsequently appealed to the Labour Court, which upheld the decision of the Equality Officer but ruled that the hospital management acted at all times without discriminatory intent.<sup>32</sup>

Welcoming the original decision, the Irish Medical Organisation stated ‘The decision highlights the unique existence of supernumerary posts, which the IMO has continuously campaigned against’<sup>33</sup>.

An important ruling was made by the Labour Court (see Part Four for Labour Court’s role) in respect of unfair dismissal under the Employment Equality Act<sup>34</sup>. The claimant complained that she had been discriminated against on grounds of her Gender by being sexually harassed and this contributed to her dismissal. The complainant further claimed she was discriminated against on grounds of nationality, contributing to her dismissal.

---

<sup>27</sup> ODEI-The Equality Tribunal (2002) Part Two Annual Report, 2001. Legal Review and Case Summaries. P53. Also available on website [www.odei.ie](http://www.odei.ie)

<sup>28</sup> *ibid* p53.

<sup>29</sup> *ENG v St James Hospital*

<sup>30</sup> *ibid* p54

<sup>31</sup> *ibid* p6

<sup>32</sup> The Labour Court, Determination EDA023. May 29, 2002.

<sup>33</sup> Irish Medical Organisation. Press release, January 14, 2002.

<sup>34</sup> The Labour Court, Determination ED/01/27

The claimant came to Ireland from Russia to take up a position in a nursing home; instead she was offered a position as an assembly line worker, leading her to believe that she was not being employed legally because of the work permit regulations. She was given no written contract of employment. The woman subsequently worked successfully in an Irish nursing home for one year prior to the case.

The Court determined that the worker had been dismissed in circumstances amounting to discrimination on the grounds of her nationality and awarded the complainant €15,000. Of further significance, the Labour Court finding stated:

‘Strongly recommends the companies employing non-nationals recognise difficulties that may arise, provide proper induction courses and that they make resources available to enable them to deal with any social and cultural differences which arise in these situations’<sup>35</sup>

There was only one decision on the Traveller ground in 2001 concerning employment. A young Traveller woman who was not offered further employment following a trial day working as a cleaner in a hotel. The hotel claimed she was unable to do the work satisfactorily, but the complainant produced references from her subsequent employer supporting her ability to do hotel cleaning to a high standard.

The ODEI Equality Officer found that the hotel’s assessment of performance and treatment of the complainant had been inadequate and inconsistent, but held that an unreasonable or unfair sequence of events did not in itself prove discrimination. However the ODEI Equality Officer accepted evidence by the complainant’s supervisor that she ‘did not have the same concept of cleaning as other people, but then how could she be expected to, given the way that they lived,’ and that this was discriminatory reference to the complainants membership of the Traveller community. The comment established that, on the balance of probabilities, the overall adverse treatment had been due to discrimination<sup>36</sup>.

The ODEI equality officer awarded €6,349 compensation and ordered the respondent to draw up an equal opportunities code of practice and to instruct all staff in regard to it’s content.<sup>37</sup>

### **The Equal Status Act**

The Equal Status Act prohibits discrimination (with some exceptions) in the disposal of goods to the public, the provision of services or of accommodation to the public, in certain disposals of property and in education. Services are defined more broadly under Section Two of the Act.

The decisions of the Equality Tribunal in 2001 related to claims of discrimination in a wide range of areas, including service in hotels and pubs, admission to nightclubs, treatment in a supermarket, access to sporting events, policing functions and the provision of car insurance.

---

<sup>35</sup> *ibid* p7

<sup>36</sup> This case was appealed to the Labour Court, which upheld the original judgement.

<sup>37</sup> ODEI-the equality Tribunal (2002) Part Two Annual Report, 2001. Legal Review and Case Summaries. P8

In respect of the focus of this study the most relevant grounds under the equality legislation are 'Race' and 'the Traveller community'. Annex two of this study provides a summary of cases referred to the Equality Tribunal in 2001 and the first six months of 2002. These show that Equal Status cases are dominated by actions taken under the Traveller ground (See Chart Two). In 2001 75% of all cases referred under the Equal Status Act were Traveller related and in the first six months of 2002 this had increased to 80%.

By contrast only 2.5% and 2% of Equal Status cases were referred under the 'Race' ground for 2001 and the first six months of 2002 respectively. This picture also contrasts with the cases taken under the Employment Equality Act in respect of the Race and Traveller grounds, which are documented above.

There were 22 decisions on the Traveller ground made in 2001 under the equality legislation, 21 of which were referred under the Equal Status Act. These concerned access to pubs and restaurants, a supermarket, a community centre, and the exercise of policing functions

### **Jurisprudence**

An issue that was raised in several early cases as whether 'settled' Travellers came within the definition of the Act. The decisions followed the approach taken in an early case, which stated that this definition can include 'settled' Travellers:

'It is clear that for someone to be considered as a member of the Traveller community, they do not have to be actively leading a nomadic way of life. This is because the definition states that Travellers are people with a shared history, culture and traditions, "including, historically, a nomadic way of life"<sup>38</sup>.

It was further clarified in other cases that a Traveller must identify themselves as a Traveller and be identified by others as a Traveller and that 'speech and appearance' were ways in which Travellers were identified.

A further issue identified through cases referred to the ODEI-Equality Tribunal was the limitations in the definition of what constitutes a 'service' under the Equal Status Act. In *Donovan v Garda Donnellan*, a Traveller contended that he was discriminated against because a police officer (Garda) prosecuted a Traveller but not other people whose horses also strayed onto the road. The ODEI ruled that the definition of 'services' in section 2 of the Act, did not cover services provided by the State to the public

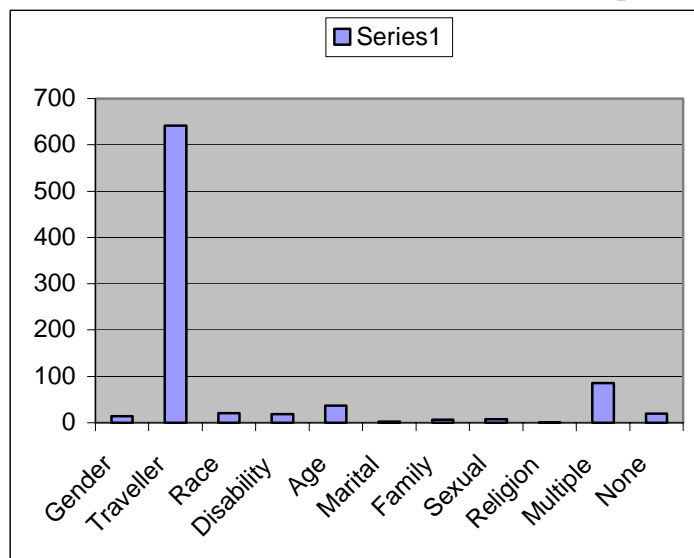
'The investigation and prosecution of crime are not services which are available to the public, or a section of it, within the meaning of service defined in section 2. It is my belief that these are State functions, which are carried out by the Gardai (and the Director of Public Prosecutions) on behalf of and for the benefit of the public and society as a whole. They are clearly not services to which the public has access, such as access to facilities for banking, leisure and travel.<sup>39</sup>.

---

<sup>38</sup> Connors vs Molly Heffernan's Public House in ODEI op cit. P9.

<sup>39</sup> *ibid.* P26

**Chart Three: Cases Referred to the ODEI under the Equal Status Act in 2001**



## **General Equality Issues**

### **The nature of discrimination**

A number of rulings referred to the classic statement by the European Court of Justice 'It is well settled that discrimination involves the application of different rules to comparable situations, or the application of the same rule for different situations'<sup>40</sup>,

### **Relevance of European Community Law**

The provisions of Article 141 of the European Community Treaty, the Equal Pay, Equal Treatments and Burden of Proof Directives and the ECJ case law on gender equality were widely applied in the ODEI rulings on employment. The argument that provisions in the 'Race' Directive (Council Directive 2000/43) should apply before it comes into force in 2003, were rejected by the ODEI.

### **Burden of Proof**

In a number of employment cases the rulings at EU level<sup>41</sup> on the burden of proof became relevant. The burden of proof shifts to the defendant when a prima facie case of discrimination is established. The case law under the Equal Status Act has applied the same approach regarding the need to establish a prima facie case and the possibility of shifting the burden of proof. In one case the elements of a prima facie case were identified as:

- That the claimants are covered by one of the discriminatory grounds outlined in the Equal Status Act
- That specific instances of treatment occurred and
- That this involved the claimants being treated differently and less favourably than a non-Traveller was treated or would be treated in similar circumstances.

<sup>40</sup> Koeln v Schmacker ECJ C-279/93 and Gillespie v Northern Ireland Health and Social Services Board ECJ C-342/93 op cit ODEI, p14

<sup>41</sup> For example, the Burden of Proof Directive Council Directive 97/80/EC (1997)

The next section on the transposition of EU Directives into Irish Law provides indications of some of the strengths and gaps that are currently in the Irish equality legislation. While at a first glance it would appear that much of the recent equality legislation is consistent with the forthcoming EU Directives, this section outlines some of the gaps, principally in the form of exceptions and exemptions that will need to be addressed to enable the comprehensive transposition of the Directives. The most far-reaching changes would appear to be in respect of the Equal Status Act, including the scope of the Act in respect of public services.

## **2. The Transposition of EU Directives into Irish law**

Two EU Directives: The Race Directive (RD) and the Framework Employment Directive (FED) have been adopted by the EU Council pursuant to Article 13 of the Amsterdam Treaty. Article 13 has been identified by many commentators, including the EA and the NCCRI, as the seminal turning point in a more inclusive concept of equality at European level. The Irish Government's support for the inclusion of Article 13 during its period of presidency of the EU was an important factor in the eventual adoption of Article 13.

A third Directive, the Gender Equal Treatment Directive (GETD) also has to be transposed into Irish law in the near future.

Part of Article 13 states:

‘Without prejudice to other provisions in the Treaty and within the limits of its powers conferred by it upon the community, the Council acting unanimously on a proposal from the Commission and after consulting with the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’

The Directives, following from Article 13, allow the community to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The first Directive, known as the ‘Race Directive’<sup>42</sup>, binds EU Member States to implement the principle of equal treatment between persons irrespective of racial or ethnic origin in the employment and non-employment areas. Ireland must adapt its present equality legislation to comply with this Directive by July 19, 2003.

The Equality Authority has undertaken an overview of the equality legislation in Ireland, the Employment Equality Act, 1998 (the EEA) and the Equal Status Act, 2000 (the ESA), in the light of the transposition of the EU ‘Race’ Directive (RD), Framework Employment Directive (FED) and also the Gender Equal Treatment Directive (GETD)<sup>43</sup>

---

<sup>42</sup> Directive for Equal Treatment, irrespective of Race or Ethnic Origin. 2000/43/EC. 29 June 2000.

<sup>43</sup> Ireland has until 2 December 2003 to implement the Framework Employment Directive and approximately three years to implement the new Gender Equal Treatment Directive

The EA recommends in relation to the transposition of the Directives into Irish law, that the three Directives are implemented together by way of unified primary legislation rather than by way of regulation<sup>44</sup>.

The following sections of this study summarise the amendments across the nine grounds that are required by the three Directives and the amendments required by the Directives that are specific to the grounds of ‘Race’ and Membership of the Traveller community. These proposed amendments are based on the legal research and advice of the Equality Authority.

### **Amendments Across Grounds Required by Directives**

There are a number of amendments across all nine grounds in the equality legislation required by the Directives. These are summarised as follows:

- Burden of Proof
- Indirect Discrimination
- Harassment
- Positive Action
- Remedies
- Private Households

### **Burden of Proof**

Neither the EEA or the ESA contain any provisions in relation to burden of proof. However, the ODEI in its recommendations regularly apply the burden of proof applied to Gender cases across all grounds in the Equality legislation, which is:

‘Where in any proceedings facts are established by or on behalf of a person from which it may be presumed that there has been a direct or indirect discrimination in relation to him or her, it shall be the other party concerned to prove the contrary’<sup>45</sup> by way of European Communities (Burden of Proof in Gender Discrimination Cases) Regulations. This is subject to a legal challenge at present in the Irish Circuit Court.

Both the FED and the RD have provisions on the burden of proof. Therefore Irish legislation will need to be amended to implement Article 10 of the FED and Article 8 of the RD. The EA recommends that the same burden of proof should apply to all of the grounds in both Acts.

### **Indirect Discrimination**

The EA recommends that the definition of indirect discrimination in the GETD, the RD and the FED be incorporated into the EEA and the ESA across all nine grounds. The new GETD defines indirect discrimination as:

‘Where an apparently neutral provision, criteria or practice would put persons of one sex at a particular disadvantage compared with person of the other sex unless that provision criterion or practice is objectively justified by a legitimate aim and that

---

<sup>44</sup> The Equality Authority, (2002). Overview of the equality legislation in Ireland, the Employment Equality Act, 1998 (the EEA) and the Equal Status Act, 2000 (the ESA), in the light of the Transposition of the EU ‘Race’ Directive (RD), Framework Employment Directive (FED) and also the Gender Equal Treatment Directive (GETD).

<sup>45</sup> *ibid* p12

the means of achieving that aim are appropriate and necessary'<sup>46</sup>. This new article reflects the difficulties in obtaining statistical information to prove a disadvantage.

### **Harassment**

The Equality Authority recommends that the provisions on harassment should be consistent with sexual harassment and that the objective nature of the definition of harassment be deleted (the new definition does not require that the harassment be reasonably regarded as violating the dignity of the person. The conduct merely has to have the 'purpose or effect' of violating the dignity of the person'.

### **Positive Action**

This is a complex and sometimes contentious issue. Among other recommendations, the Equality Authority recommends that there should be one coherent aim for positive action, namely the achievement of full equality in practice and that positive action should be required in public sector employment and service provision where significant imbalances in equality outcomes are identified

### **Remedies**

The EA recommends, among others that:

- Trade Unions and NGO's who represent interests under the nine grounds be deemed to have a legitimate interest for the purpose of initiating proceedings for the enforcement of rights
- The ceiling of compensation in both the EEA and ESA be removed for all nine grounds and appeals to the Circuit Court option be available to all grounds.

### **Private Households**

The EA recommends that the exemption under the EEA in regard to all of the non-gender grounds be removed as it potentially adversely impacts on the protection provided for non-nationals employed as nannies or domestics.

### **Amendments required by the Directives in relation to 'Race' and the Traveller Community Ground**

The implementation of the RD will bring about significant changes to Irish equality legislation. It will greatly increase the scope and level of protection in the ESA. The EA feel there is a need for levelling up across all grounds to match the RD, otherwise there will be new hierarchy of grounds with 'race' replacing gender.

The Directive applies to 'race' and ethnic origin but fails to define either. The distinction between nationality and race will be problematic.

The EA recommends that Ireland should implement the Race Directive so that the additional protection provided by the Directive to victims of race also includes nationality.

In general the Irish equality legislation covers similar ground to the RD, but with many more exceptions. For example the EEA allows for proficiency in language to be applied in relation to teachers in primary and second level schools. This can

---

<sup>46</sup> ibid p14

discriminate against teachers from Northern Ireland or people with refugee status who have not been taught Irish.

### **Public Activities**

The biggest area of reform is under the ESA, particularly in the area of public activities. The Directive applies to social security, health care and social advantages. These are not mentioned in the ESA. The ESA only applies to public bodies to a limited extent. The prohibition on discrimination in the provision of goods and services clearly applies to State services, but does not extend to the functions, which do come under the definition of a service in the ESA.

Secondly, the statutory exemption contained in section 14 in relation to the taking of any action that is required by

‘Any enactment...’ exclude to a considerable extent a large amount of public service activity and therefore allows for discrimination on foot of other legislation<sup>47</sup>.

In relation to housing, the ESA specifically allows housing authorities to provide ‘different’ [although arguably not less favourable] treatment to persons *inter alia* on membership of the Traveller community. A significant amount of legislative provision concerning accommodation does not fall under the remit of the ESA because of the statutory exemption. The provisions on education in the ESA are confined to educational establishments and do not apply to the functions of the State.

### **The enhancement of Irish equality legislation, beyond the transposition of EU Directives**

Irish equality legislation could be enhanced beyond the transposition of EU Directives

In particular, further steps should be taken to level up the provisions in the legislation across all nine grounds. At present there is a hierarchy with gender employment rights on top.

### **Positive Duty**

There are different models of statutory duty to promote equality including those operating in Northern Ireland and Britain. In Northern Ireland Section 75 of the Northern Ireland Act 1998 imposes a duty on specified public authorities to have due regard to the need to promote equality of opportunity across all the protected grounds in carrying out their public functions.

In Britain, the UK Race Relations (Amendment Act), 2000 imposes a general positive duty on an extensive list of specific public authorities, which combines a negative obligation to eliminate racial discrimination with complementary positive obligation to promote equality of opportunity and good relations between people of different ethnic groups. The Government of Wales Act requires the National Assembly for Wales to have due regard to the principle that there should be equality of opportunity for people.

These provide possible models for consideration in Ireland, following research and consultation with key stakeholders. The most effective and efficient model of

---

<sup>47</sup> *ibid*, p 28

statutory duty should be incorporated into the equality legislation so that a statutory duty can be implemented on the public sector as employer, as service provider and as being responsible for certain functions, to promote equality across all grounds covered by the equality legislation. A similar duty could be extended to the private sector (as is the case with the fair Employment Act, 1989 in Northern Ireland).

### **3. International Convention on the Elimination of all Forms of Racial Discrimination (1969)<sup>48</sup>**

The United Nations International Convention on the Elimination of all Forms of Racial Discrimination (1969) has been recognised as the international human rights instrument with the greatest potential to impact on racism.

The ratification of the Convention sends out an important signal to the international community that Ireland is committed to tackling racism and it provides a mechanism through which progress to address racism in Ireland can be monitored and reviewed at UN level.

Under the Convention, States are pledged:

- To engage in no act or practice of racial discrimination against individuals, groups of persons or institutions and to ensure that public authorities and institutions do likewise
- Not to sponsor, defend or support racial discrimination by persons or organisations
- To review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination
- To prohibit and put a stop to racial discrimination by persons, groups and organisations; and
- To encourage integrationist or multiracial organisations and movements and other means of eliminating barriers between races, as well as to discourage anything which tends to strengthen racial division.

The Convention is monitored and reviewed by a Committee on the Elimination of all Forms of Racial Discrimination (CERD), which is comprised of 18 international experts and is an autonomous body. The secretariat for CERD is based in the Centre for Human Rights in Geneva. Meetings take place twice a year, in New York or Geneva, and CERD reports to the UN General Assembly.

Under the terms of the Convention, CERD has three key powers:

- All States are required to submit a comprehensive report to CERD every four years with brief updating reports at intervening two year periods. State representatives can also be questioned by the CERD.
- The Convention provides for State-to-State complaints and the competence of CERD to receive and act on such complaints.

---

<sup>48</sup> For further information on CERD see [www.unhchr.ch](http://www.unhchr.ch)

- The Convention allows individuals or a group of persons who claim they are victims of racial discrimination to lodge a complaint with CERD against their State, once they have exhausted the legal remedies provided by the State.

Ireland Ratified the Convention in December 2000. The Convention entered into force on 28 January 2001. The Irish Government's delay in ratification was in latter years due to the need to bring in domestic legislation that would give the Convention substance in Ireland, i.e. the equality legislation in the form of the Employment Equality Act and the Equal Status Act.

Ireland's first report was due in January 2002, but has been delayed. The report should set out:

- The size and number of ethnic minorities in Ireland
- How they are treated
- Steps being carried out to implement its key provisions

Individuals can take a complaint to CERD as Ireland has ratified Article 14, but only after they have exhausted mechanisms within Ireland. This mechanism has not been used much by other countries that have ratified this Article. In ratifying the UN convention, Ireland was one of a small number of countries that opted for Article 14.

The Department of Justice, Equality and Law Reform has indicated that it will consult with NGO's before submitting its first report to CERD. Of relevance here is the second report produced by ECRI (Council of Europe) concerning Ireland as it helps to identify the issues of concern from an international perspective<sup>49</sup>.

#### **National Action Plan Against Racism**

The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) was held in Durban, South Africa in September 2001 under the aegis of the Office of the United Nations High Commissioner for Human Rights. All countries that participated must produce a national action plan against racism that will be studied and approved by CERD.

#### **4. Other International Instruments and International Monitoring**

Ireland has signed the major universal and European human rights instruments and complies fully with their terms. In November 2000 in Rome, Ireland signed Protocol No. 12 (on anti-discrimination) to the European Convention on Human Rights. Work on the incorporation of the European Convention on Human Rights into national law is continuing. The Council of Europe Framework Convention for the Protection of National Minorities was ratified by Ireland in September 1999.

The obligations under "Discrimination (Employment and Occupation) Convention 1958 NO. 111 of the International Labour Organisation (ILO) which Ireland ratified on 22 April 1999 are met through our Employment Equality Act. Minimum rates of pay are required to be paid under the minimum pay legislation. (Migrant workers are

---

<sup>49</sup> [www.coe.int/ecri](http://www.coe.int/ecri)).

entitled to the protection of the law including labour law).

Both ECRI and the EUMC provide important data on racism in individual states within the Council of Europe and the European Union respectively. ECRI's second report on Ireland was published in April 2002.

## **5. Prohibition of Incitement to Hatred Act (1989).**

One of the legal obligations created by the ICERD is contained in article 4(a) of the document. This article requires states, amongst other actions, to:

‘Declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof’.

Having thus signed and ratified the ICERD, Ireland is under a legal obligation to ensure that the above conditions are met. In September 2001 the Minister for Justice, Equality and Law Reform announced a Review of the Prohibition of Incitement to Hatred Act, which had been enacted in 1989 over ten years before the ratification of ICERD:

‘Ireland has legislation in place for the past ten years prohibiting incitement to hatred. The Prohibition of Incitement to Hatred Act, 1989 makes it an offence to incite hatred against any group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, or membership of the Traveller community. I am aware that there has been some criticism of the effectiveness of this Act and I understand that since it was enacted only one case involving an alleged breach of the Act was referred to the Director of Public Prosecutions. That case was subsequently dismissed in the District Court. At my request officials have commenced a review of this legislation and I would welcome any suggestions which may lead to an improvement to the existing provisions of the Incitement to Hatred Act.’<sup>50</sup>

There are a number of events in Ireland that have helped identify weaknesses in the present legislation. These include:

- The comments made by a columnist with the Sunday Independent in regard to Travellers in January 1996 under the heading of ‘Time to get tough on Tinker Terror ‘Culture’’. Subsequent offensive comments made by the same columnist in regard to people with disabilities and their participation in the Olympics. After consideration by the Gardai and the DPP, action was not proceeded with. Following the decision not to proceed there were calls for the review of the legislation.

---

<sup>50</sup> NCCRI (1990) Report of the National Preparatory Conference for the World Conference on Racism. [www.nccri.com](http://www.nccri.com)

- The comments made by a Councillor in Co. Mayo, a member of the Western Health Board, in relation to the Traveller Community. This case resulted in a failed prosecution attempt, with the Judge concluding that the Councillor's words were likely to cause offence but did not constitute incitement. Following the judgement there were renewed calls for a review of legislation.
- The conviction of a Dublin bus driver in District Court under the 1989 Act, who was fined £450 and a further £450 for an assault that took place during the same incident. The conviction was subsequently quashed in Circuit Court. There were calls for a review of the act, including calls from the NCCRI, when the conviction was quashed in the circuit court.

However since the Minister's announcement of a review there have been successful prosecutions in respect of two specific cases. A further two cases were the Director of Public Prosecutions decided there was insufficient basis on which to proceed with a prosecution. The successful prosecutions are summarised as follows:

#### **David Richardson Case**

The conviction of some of the youths involved in the David Richardson case for Incitement to Hatred was the first such conviction of anyone for Incitement to Hatred under the Prohibition of Incitement to Hatred Act (1989) (see details of this case above).

#### **Dundalk School Bus Driver Case**

A school bus driver who verbally abused a 12 year-old black schoolboy with a racist epithet was convicted under the Prohibition of Incitement to Hatred Act in Dundalk District Court on September 11<sup>th</sup> 2002 after pleading guilty. The bus driver made a number of abusive comments to the boy and to another passenger. The accused apologised for his actions and said that he had previously lived in New York and he believed 'he was fully conscious of the sensitivities of race relations'.

On the charge of using words that could stir up hatred under Section 2 of the Prohibition of Incitement to Hatred Act, 1989, the Judge imposed a fine of €150. He imposed a similar penalty under Section 6 of the Probation of Offenders Act for the use of threatening, abusive or insulting behaviour with intent to provoke a breach of the peace. The defendant was also bound to the peace for two years.

After the case the boy's mother said: 'I feel good that he was found guilty and that justice was done, but I would have preferred him to get a jail sentence. This man abused a 12 year old child and the least he should get is one month in jail'.<sup>51</sup> The incident led to a deterioration of her son's academic performance and he resisted returning to school. The boy's name was not published following a request to the media by his mother.

#### **Recent Unsuccessful Cases**

Amnesty International referred the comments made by a Cork TD during the 2002 election campaign to the Gardaí, who after investigation referred them to the Director of Public Prosecutions. The TD was widely reported in the national press as saying

---

<sup>51</sup> Irish Times. September 12<sup>th</sup> 2002.

'we are against the spongers, the freeloaders, the people screwing the system. Too many are coming to Ireland and too many to Cork in my view. In the past five years there have been 35,000 applications for asylum and 80% of those have been from illegal immigrants using the refugee system to get in. I'm saying we will have to close the doors. The majority of them are here for economic reasons and they are thumbing their noses at Irish hospitality.' The DPP announced in October 2002 that the case was not proceeding.

A complaint made by the NCCRI and referred to the DPP concerning a leaflet produced by the Immigration Control Platform prior to the 2002 General Election was also not proceeded with. The leaflet which was widely distributed in the Dublin 7 area in the run up to the general election and urged people to join the Immigration Control Platform and 'Help to stop the invasion and colonisation of Ireland'.

It urged people to 'go into your town centre. Have a look around. Is this what you want for the future?' The leaflet further contained a number of sensationalised and misleading statements, which were directed at both asylum seekers and non-nationals in general.

The Act as it stands appears reasonable in itself. However the low degree of usage since it came into force suggests that it does essentially fail to address the issues it is targeted at. Thus whilst the option of revising the Act does need to be explored, the means of enforcement and regulation also need to be examined in tandem. The comments on individual clauses is contained in Section 2 however the Act does not adequately address the issue of what constitutes incitement to racial hatred. Whilst legislators in other jurisdictions have attempted (not always successfully) to grapple with this question, the current Act does not seek to grapple with the issue in any depth. This is perhaps one amongst a host of other reasons why the Act, as a piece of legislation that can regulate incitement to racial hatred has not proved useful. As can be seen in Part One of this study, and through EA and NCCRI Reports<sup>52</sup>, racism is present in Ireland, and therefore, if it is to be a useful piece of legislation the Act would need to tackle the issues more assertively.

### **Comparative Aspect: Lessons To Be Learnt**

One of the key lessons from other jurisdictions is the need to define the issue of racial vilification. If this can be understood then the central component to such an act would be in place to ensure action under it. The Australian examples bear special examination. The debate in Australia has been extremely focussed in the last few years with consideration of freedom of expression and its counter-balances.

The British example does provide some indicators as to the direction of change, although it is mainly shrouded under the Public Order Act, and whilst the maintenance of order is central to the prohibition of incitement to racial hatred, it cannot be the only deciding element. The other countries examined also provide an understanding of how different countries deal with this issue and are worth analysing in more detail.

---

<sup>52</sup> See [www.nccri.com](http://www.nccri.com)

### **International Standards**

The international standards on the issue of prohibition of racial discrimination are very clear. According to article 4(a) of the ICERD a country that is party to the treaty is required to enact legislation and other measures that prevent incitement to racial hatred. The discussion at an international human rights level recognises clearly that human rights like the right to freedom of expression have to have limits, so as not to impinge on other rights. Thus, this concept is not considered to have been eroded by such legislation. At the level of the ECHR, too, there is provision to understand that the rights discourse cannot be absolute (see Annex Three for a summary of relevant jurisprudence related to the ECHR on this issue). Thus with regards to international standards on the issue it can be said categorically that the belief is that incitement to racial hatred laws in principle are a justifiable restriction on the freedom of expression.

### **Debates To Be Taken Into Account**

Any discussion about racial hatred laws have to take into account the extent to which a state sees fit to regulate freedom of expression. Different states draw the line between the two rights at different points based on their independent histories. As a state in which the Traveller Community in particular, have faced discrimination for a considerable period of time, this line perhaps needs to be drawn more in favour of protection against incitement. In addition the changing nature of Irish society dictates that to set in place the building blocks for an inclusive society such legislation is strongly required. However the legislation needs to be unambiguous in what it seeks to achieve and needs to be accessible to those likely to need protection under it. Alternatively a role for an intermediary body could be examined which can address issues of accessibility to the legislation.

### **Internet**

What was once proscribed and prosecuted is now available on the Internet. The emergence of 'Irish' racist websites as a cheap means of spreading hate and racist propaganda. The report highlights the problems of tackling racism in the Internet but contends they are not insurmountable. The new legislation should specifically cover racism on the Internet and through other electronic means such as e-mail.

## **6. National Bodies (Specialised, Expert Bodies and Tribunals)**

### **Equality Authority**

The Equality Authority was established in October 1999. Its mandate is set out in the Employment Equality Act 1998 and is further expanded under the Equal Status Act 2000. This mandate is to:

- Work towards the elimination of discrimination and prohibited conduct under equality legislation.
- Promote equality of opportunity in relation to the matters to which equality legislation applies.
- Provide information to the public on the working of equality legislation, to keep this legislation under review and to make proposals for necessary change in the legislation.

- Provide information to the public on the Parental Leave Act 1998, the Maternity Protection Act 1994 and the Adoptive Leave Act 1995.

This mandate covers nine grounds - gender, family status, marital status, age, sexual orientation, disability, race, religion and membership of the Traveller community.

Initiatives which have a direct relevance to this study, include:

- Providing advice and legal representation to those who have experienced discrimination in cases that have a strategic impact.
- Preparing codes of practice under the legislation. The first code addresses sexual harassment and harassment in the workplace. Developing initiatives to build a consciousness of rights under the legislation among black and minority ethnic groups.
- Anti-racist-workplace week.
- Supporting employment equality reviews and action plans in businesses. Researching labour market inequalities for Black and minority ethnic groups. Developing partnership with NCCRI the National Focal Point against Racism in Ireland (see below).

**National Consultative Committee on Racism and Interculturalism. NCCRI.**

The National Consultative Committee on Racism and Interculturalism was established in July 1998, with funding from the Department of Justice, Equality and Law Reform. Its functions are:

- To act as an expert body to develop an integrated and strategic approach to racism, and its prevention, and to foster interculturalism within Ireland.
- To inform policy development and seek to build consensus through dialogue in relation to the issues of racism and interculturalism to promote the understanding and celebration of cultural diversity within Ireland.
- To establish links with other organisations or individuals involved in issues of racism and interculturalism arising from developments at European Union and International levels.

Project initiatives of the NCCRI relevant to employment, include:

- Developing the training and resource unit that has been actively involved in delivering anti racism training both to Government and Non Government agencies.
- Providing technical assistance and support for the development of a National Action Plan Against Racism, including a focus on employment
- Providing technical assistance and support for the development of a National Public Awareness Programme ‘Know racism’, which includes a focus on employment
- Publication of a range of materials, resources and publications on addressing racism in Ireland, including guidelines on anti racism training.
- A system of reporting and responding to racist incidents and the publication of a report of these incidents every 6 months, including reports related to employment

- In partnership with the Equality Authority, to act as the National Focal Point for Racism in Ireland by the EU Monitoring Centre on Racism based in Vienna.
- To continue with policy submissions and round tables, which will contribute to policy development on issues through the participation of the NGO sector.
- To inform policy in relation to the drawing up of a National Action Plan against Racism.
- To develop initiatives on a North/South basis implement awareness raising initiatives and events through continued liaison with the Equality Commission for Northern Ireland in areas of concern such as education and health.
- Supporting and advocating an anti racism dimension to the National Anti Poverty Strategy.
- Supporting community development through a specialised unit within the NCCRI.
- Capacity building and leadership training for groups representing ethnic minorities.

### **ODEI-The Equality Tribunal. Office of the Director of Equality Investigations.**

The Office of the Director of Equality Investigations was established in October 1999. It provides redress for victims of discrimination on any of the grounds in the Equality Legislation in employment and in the area of provision of goods and services. Anyone who feels that they have been discriminated against may lodge a complaint to the Director. The findings of the Director in each case are published.

### **Irish Human Rights Commission**

Arising from the Belfast Agreement, the Human Rights Commission was formally established under the Human Rights Commission Act, 2000. The Commission is a new independent body charged with the task of keeping under review the adequacy and effectiveness of our laws in relation to the protection of human rights in their widest sense. It will be within the competence of this body to commission surveys on discrimination. To date the IHRC has been active on the issue of racism through:

- The establishment of a sub committee on racism drawn from its own membership and the members of the Northern Ireland Human Rights Commissions.
- Participating in the development of the National Action Plan Against Racism.

### **The Labour Court**

The Labour Court operates as an industrial relations tribunal hearing both sides in a case and then issuing a Recommendation is a court of last resort – cases should only be referred to the Court when all other efforts to resolve a dispute have failed. It operates as an industrial relations tribunal hearing both sides in a case and then issuing a Recommendation (or Determination/Decision/Order, depending of the type of case) setting out its opinion on the dispute and the terms on which it should be settled. The Labour Court’s role under the Employment Equality Act is to:

- Hear appeals of decisions and recommendations under the Employment Equality Act, 1998.
- Investigate complaints of dismissal under the Employment Equality Act, 1998.
- Hear appeals of Non-discrimination Notices and Substantive Notices issued by the Equality Authority.

## **Annex One: Select Bibliography and Websites**

Central Statistics Office, (September 2002). Preliminary Report 2002 Census.

Directive for Equal Treatment, irrespective of Race or Ethnic Origin. 2000/43/EC. 29 June 2000.

Equality Authority. (2002) Annual Report for 2001.

European Monitoring Centre on Racism and Xenophobia, (2002).

Annex II to the RAXEN 3 contract. Guidelines for the RAXEN 3 Phase.

Farrell, F; Watt, P, (Eds.) (2001) Responding to Racism in Ireland. Veritas, p12

Garner, S and White, A (2002). Racist Attitudes in Ireland: Baseline Research for the Anti Racism Public Awareness Programme. Know Racism.

Institute of Public Administration, (2003) Yearbook and Diary.

NCCRI (1990) Report of the National Preparatory Conference for the World Conference on Racism.

NCCRI (1999). The Equal Status Act. Submission

NCCRI (2001). The Review of the Prohibition of Incitement to Hatred Act. Submission.

ODEI-the Equality Tribunal, (2002) Annual Report 2001. Part One.

ODEI-The Equality Tribunal, (2002) Annual Report 2001. Part Two: Legal Review and Case Summaries.

Equality Authority, (2002). Overview of the equality legislation in Ireland, the Employment Equality Act,

1998 (the EEA) and the Equal Status Act, 2000 (the ESA), in the light of the Transposition of the EU 'Race' Directive (RD), Framework Employment Directive (FED) and also the Gender Equal Treatment Directive (GETD).

## **Websites**

<a href="http://www.irlgov.ie/justice">www.irlgov.ie/justice</a>	Department of Justice, Equality and Law Reform
<a href="http://www.irlgov.ie/iveagh">www.irlgov.ie/iveagh</a>	Department of Foreign Affairs
<a href="http://www.odei.ie">www.odei.ie</a>	Office of the Director of Equality Investigations-The Equality Tribunal
<a href="http://www.nccri.com">www.nccri.com</a>	National Consultative Committee on Racism and Interculturalism
<a href="http://www.equality.ie">www.equality.ie</a>	The Equality Authority
<a href="http://www.eumc.eu.int">www.eumc.eu.int</a>	European Monitoring Centre on Racism and Xenophobia
<a href="http://www.knowracism.ie">www.knowracism.ie</a>	National Public Awareness Campaign
<a href="http://www.equalityni.org">www.equalityni.org</a>	Equality Commission for Northern Ireland
<a href="http://www.ecri.coe.int">www.ecri.coe.int</a>	European Commission on Racism Na Intolerance
<a href="http://www.unhchr.ch/">www.unhchr.ch/</a>	UN High Commissioner for Human Rights
<a href="http://www.nyci.ie">www.nyci.ie</a>	National Youth Council of Ireland
<a href="http://www.paveepoint.ie">www.paveepoint.ie</a>	Pavee Point Traveller's Centre
<a href="http://www.itmtrav.com">www.itmtrav.com</a>	Irish Traveller Movement
<a href="http://www.amnesty.ie">www.amnesty.ie</a>	Amnesty International (Ireland Section)
<a href="http://www.refugeecouncil.ie">www.refugeecouncil.ie</a>	Irish Refugee Council
<a href="http://www.comhlámh.org">www.comhlámh.org</a>	Comhlámh

[www.ncde.ie](http://www.ncde.ie) National Committee for Development Education  
[www.migration.ucc.ie](http://www.migration.ucc.ie) Irish Centre for Migration Studies  
[www.enar-eu.org](http://www.enar-eu.org) European Network Against Racism  
[www.unhcr.ch](http://www.unhcr.ch) Office of the UN High Commissioner for Refugees  
[www.garda.ie](http://www.garda.ie) An Garda Síochána

**Annex Two: Summary of cases referred to the ODEI (Equality Tribunal) under the Equality Legislation 2001/2002 (6 months)**

	Employment Equality			Equal Status		
	Individual	Grouped Cases		Individual		
<b>Cases referred</b>						
2000	139	102		8		
2001	260	182		854		
2002 (6 months)	142	121		520		
<b>Breakdown by Ground</b>	<b>all 2001</b>	<b>2002 (6 months)</b>		<b>all 2001</b>	<b>2002 (6 months)</b>	
Gender	118 (45.5%)	38 (27%)		14	1	
<i>Traveller</i>	3	2		641(75%)	415(80%)	
<i>Race</i>	27 (10.4%)	17 (12%)		21(2.5%)	11(2%)	
Disability	26 (10%)	20(14%)		18(2%)	20 (4%)	
Age	23(9%)	10 (7%)		37(4.3%)	11(2%)	
Marital Status	1	1		2	1	
Family Status	2	1		6	8	
Sexual Orientation	5	2		8	0	
<i>Religion</i>	1	1		1	3	
<i>Multiple Grounds</i>	43 (17%)	38 (27%)		86(10%)	47 (9%)	
No ground listed	11(4.2%)	12 (8%)		20(2%)	3	
<b>Total</b>	<b>260</b>	<b>142</b>		<b>854</b>	<b>520</b>	
<b>Breakdown of Sector</b>		<b>all 2001</b>	<b>2002 (6 months)</b>		<b>all 2001</b>	<b>2002 (6 months)</b>
	Education	42	6	Education	16	4
	Private Sector	155	59	Insurance	23	3
	Health	16	20	Pubs/ hotels /nightclubs	632	459
	Public Sector	47	57	Public Service	88	12
				Shops	33	23
				Other	62	19
<b>Total</b>		<b>260</b>	<b>142</b>		<b>854</b>	<b>520</b>
<b>Cases Decided</b>		<b>all 2001</b>	<b>2002 (6 months)</b>		<b>all 2001</b>	<b>2002 (6 months)</b>
For Complainant		14 (covering 15 persons)	9 (covering 12 persons)		16 (covering 34 persons)	46 (covering 46 persons)
For Respondent		28 (covering 162 persons)	20 (covering 20 persons)		9 (covering 12 persons)	31(covering 31 Persons)
<b>Awards</b>		<b>Euro</b>	<b>Euro</b>		<b>Euro</b>	<b>Euro</b>
Total (cumulative)		233632	94170		44314	31950
Average		16688	10497		997	695
Range		1270-107928	1000 - 20000		381 - 2793	0 - 2000
<b>Mediation</b>		<b>all 2001</b>	<b>2002 (6 months)</b>		<b>all 2001</b>	<b>2002 (6 months)</b>
Cases Referred		56	20		46	37
Cases Closed		11	5		16	17
Agreements		2	5		9	9
Withdrawn and/or Settled		24	2		2	1

## **Annex Three: Summaries of ECHR Case Law in Relation to the Review of the Prohibition of Incitement to Hatred Act**

### 1. Handyside v. UK

European Court of Human Rights, Judgement of 7 December 1976, Series A, No.24; 1 European Human Rights Record (EHRR) 737 (1979 – 80)

The importance of Media's capacity to report freely on issues of public interest established in *Handyside v. UK*, even where this concerns the dissemination of unfavourable or offensive ideas. However this right, as is evident from the phrase, 'subject to paragraph 2 of article 10,' in the below quote, is not an absolute one. The right often impacts on other rights, as a result the ECHR have sought to balance the right to freedom of expression with the state's legitimate need to limit it in certain circumstances, (e.g. morality, person's reputation, prejudice to a fair trial, incitement to hatred, public order).

'Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'

*Handyside*, publisher of *The Little Red Schoolbook* convicted on obscenity charges, the English courts found the book was likely to deprave and corrupt a proportion of children likely to read it. Even though the book had been widely published in many member states and was available in other parts of the UK, the European Court ruled that there had been no violation of Article 10 on the grounds that the state had a legitimate reason, in the context of local circumstances, to protect morals. It attached importance to the intended readership. Despite the point that the book contained mainly factual material, it also contained, "sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences" (para.52).

### 2. Lingens v. Austria

Judgement of 8 July 1986, Series A, No.103; 8 EHHR 103 (1986)

*Lingens*, published two articles critical of the Austrian Chancellor, Bruno Kreisky, accusing him of protecting and supporting former members of the Nazi SS. The Chancellor brought a private action for criminal defamation. *Lingens* was convicted, fined, and his magazine was confiscated. He complained to the Commission that his rights under Article 10 had been violated. The Court agreed.

The court in a similar vein to the US Supreme Court opined that politicians must tolerate greater scrutiny and criticism than ordinary citizens.

"More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual." 8 EHHR 103, p.419.

### 3. Oberschlick v. Austria

Judgement of 23 May 1991, Series A, No.204

As per Lingens and subsequently in *Oberschlick v. Austria*, it was accepted that proving the truthfulness of opinions or interpretations about politicians was not a necessary requirement to come under the protection of article 10.

Publication of a criminal summons laid against the Secretary-General of the Austrian Liberal Party regarding remarks he had made during an election campaign. The applicant was convicted of defamation. The Court upheld his complaint of a violation of Article 10.

### 4. Jersild v. Denmark

Judgement of 23 September 1994, Series A, No.298; 19 EHRR 1 (1995)

Jersild was a Danish journalist working for a television news programme. He reported on a group of extremist youths -the Greenjackets - who made racially prejudiced observations regarding black people and immigrants in Denmark. The youths, the journalist and the news chief were prosecuted and convicted under section 266 of the Danish Penal Code. The ECHR ruled that the penalties imposed on the media were in violation of Article 10, as the news item was not intended to engender racist views, but to inquire into a subject that was already of substantial public concern.

The ECHR accepted that the racist comments for which the Greenjackets were convicted “were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10” (p28), and that the Government had moved to safeguard its minorities against racial discrimination.

The ECHR underscored the possible impact of the medium, since “it is commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media” (p27). However, the Court opined that the penalties imposed on the media in these circumstances were not required in a democratic society for the protection of the rights of others:

“The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.” (p26 & 28).

In the *Jersild* case, the ECHR were cognisant of the target audience of the program in ascertaining whether the state’s interference was legitimate. In contrast to the *Handyside* case, in which the content of *The Little Red Schoolbook* were meant principally for children, the Greenjackets item was an element of a serious news programme targeting a well-informed audience, who necessitated less protection. With the exception of the *Otto-Preminger* case, the ECHR have been reluctant to allow interferences with the communication of ideas and information to consenting adult consumers.

### 5. Otto-Preminger Institute v. Austria

Judgement of 20 Sept. 1994, Series A, No.295-A; 19 EHRR 34 (1995)

The Austrian authorities seized an allegedly blasphemous film from a private organization on the basis that it was offensive to Christians. The Commission on

Human Rights found a violation of Article 10, but the Court ruled there had not been a violation of Article 10. At issue was whether the action was proportionate to the justifiable aim sought, and as a corollary of this 'necessary in a democratic society'. The reasoning behind the Court's conclusion was that a significant section of the population living in the region were Roman Catholic and the state had acted to protect their rights and prevent disorder, and thus this scenario was balanced in favour of the state's need to interfere with freedom of speech in the context of Article 10.

#### 6. Sunday Times v. UK

Judgement of 26 April 1979, Series A, No.30; 2 EHHR 245 (1979-80)

This matter has been considered in a number of cases. In the Sunday Times case, the ECHR emphasised the importance of the media reporting on issues of public interest. 'The thalidomide disaster was a matter of undisputed public concern... Article 10 guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed... The question of where responsibility for a tragedy of this kind actually lies is also a matter of public interest... The facts of the case...did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion. (p. 277-282)'. The Court found that an injunction prohibiting the Sunday Times newspaper from publishing an item concerning 'thalidomide children' (children who were born deformed as a consequence of thalidomide being used as a tranquilliser during pregnancy) was in violation of Article 10. The initial ruling in the English courts had been made on the basis that the piece might prejudice court proceedings then pending against the company, which had manufactured the drug. However, the court case had been in a "legal cocoon" for several years, and it was uncertain that the parents' action was ever going to come to trial.

The Sunday Times case was also important for its deliberation on the concept that a restriction was "prescribed by law". In the UK, contempt of court is a common law notion, which aims to protect the administration of justice. The Sunday Times argued that the law of contempt was intrinsically uncertain. The Court determined that the vital aspect was not whether the law was written or unwritten but whether it was clear enough for citizens to know with reasonable certainty the likely consequences of a particular action. It found that the British law on contempt of court met that standard. However, 'the Sunday Times test' does not only ask whether a law exists in the state concerned, but whether it complies with the requirements of Article 10(2).

The Sunday Times case was also important for its deliberation on the concept that a restriction was "prescribed by law". In the UK, contempt of court is a common law notion, which aims to protect the administration of justice. The Sunday Times argued that the law of contempt was intrinsically uncertain. The Court determined that the vital aspect was not whether the law was written or unwritten but whether it was clear enough for citizens to know with reasonable certainty the likely consequences of a particular action. It found that the British law on contempt of court met that standard. However, 'the Sunday Times test' does not only ask whether a law exists in the state concerned, but whether it complies with the requirements of Article 10(2).

#### 7. Goodwin v. UK

Judgement of 27 March 1996, Series A, No.17488/90; 22 EHHR 123 (1996)

The Court decided that Goodwin, a journalist, had the right not to divulge the identity of a source who had given him confidential information about a company that, if published, might have caused the company fiscal damage and redundancies. The High Court had ordered Goodwin and his publishers to disclose the source and held them in contempt when they refused. In considering the case, the European Court considered whether the disclosure order was proportional to the aim of protecting the company's interests. It determined that the balance between free speech and the rights of others should weigh in favour of the public interest, not commercial interests.

8. Observer & Guardian v. UK.

Judgement of 26 November 1991, Series A, No.216; 14 EHHR 153 (1992); and Sunday Times v. UK (No.2), Judgement of 26 November 1991, Series A, No.217; 14 EHHR 229 (1992)

The press involved had complained of a violation of Article 10 arising from an action by the Attorney-General in bringing breach of confidence actions and seeking injunctions restraining publication of extracts of Peter Wright's book, Spycatcher, which detailed his experiences in the British secret service. In 1985, the Observer and the Guardian had printed short articles on legal proceedings in Australia to prevent its publication there, and reporting some of the book's contents. The UK Government lost its case in Australia that the book breached Peter Wright's agreement to preserve confidentiality about his employment in the secret service. In April 1987, the Independent newspaper printed an extensive synopsis of the book's allegations and the Court of Appeal ruled that the injunctions were binding on all British media - any publication or broadcast of Spycatcher content would constitute contempt of court. The Sunday Times began a serialisation of the book to correspond with its publication in the US in July 1986, and was charged with contempt of court. Despite the book's unobstructed importation into the UK, the injunctions were maintained until October 1988.

The Spycatcher case was important in establishing that neither maintaining the authority of the judiciary, nor national security could justify measures to suppress material in the book once it was published in the US. It was the first time that the Court had rejected a government's claim that interference in a fundamental freedom was necessary to protect national security.