National Disability Authority Submission to the Review of Equality Legislation

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# Introduction and Summary

The National Disability Authority (NDA) is the independent statutory body with a duty to provide information and advice to the Government on policy and practice relevant to the lives of persons with disabilities, and to promote Universal Design.

The NDA welcomes the opportunity to make a submission on the review of the Equality Acts. We recognise that both the Equal Status Acts and the Employment Equality Act were transformative pieces of legislation that reflected society at the time and recognised a trend whereby different groups of people had traits and backgrounds that invoked unequal treatment. The legislation put in place inclusive definitions and broad protections to prevent such discrimination, and a complaints mechanism under which those discriminated against could seek redress. We welcome the proactive approach taken by Government to evaluate and improve the legislation through a wide public consultation. We hope that, through this review, Ireland will continue to lead the way in terms of creating an equal and fair society for all persons.

While the review is timely, it is appropriate to recognise the impact the various pieces of legislation, and the work of the Workplace Relations Commission (and its predecessor, the Equality Tribunal) has made to equality in Irish society. Between the Equality Tribunal and the WRC, approximately 1,500 decisions have been issued in the last 20 years, and this has culminated in a significant body of case law, which provides insight and precedence to policy-makers, academics, legal professionals and individuals.

However, the wider social impact of the legislation is harder to measure and quantify. While the case law can be read, counted and analysed, it is more difficult to pinpoint the legislation’s contribution to wider social change and enhanced equality for all. We cannot say that the legislation has succeeded in eliminating discrimination, as it certainly continues to exist. If anything, data has shown there to be an increase in instances of perceived discrimination experienced by people in recent years, although this may also be attributed to an increase in individuals’ understanding of equality rights and complaints mechanisms available to them.[[1]](#footnote-1)

Therefore it must be noted that while the legislation, and the complaints mechanism it provides, may impact the lives of individuals who take (successful) cases, it may not be the case that positive decisions have had a wider effect on the groups or communities who share traits or backgrounds with the successful individual.

The review of equality legislation is also timely, as Ireland currently finds itself in a different position to where it was 20 years ago. In that time, our national and international obligations and commitments have changed. We have legislated for same-sex marriage and given a statutory footing to a Public Sector Equality and Human Rights Duty. The Charter of Fundamental Rights of the European Union has come into existence. We have ratified the UN Convention on the Rights of Persons with Disabilities and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We have incorporated the principles and protections of the European Convention on Human Rights through the ECHR Act 2003. The Equality Authority and the Human Rights Commission have merged to create the Irish Human Rights and Equality Commission, and the Workplace Relations Commission has replaced the Equality Tribunal.

The comments and advice outlined below address issues related to the review of the equality legislation that fall within the NDA’s competencies and expertise. They are provided in the context of the legislation providing safeguards against discrimination, rather than legislation to set out a particular national approach to disability.

The submission makes points and/or recommendations in respect of the following areas:

* The need to update some of the medicalised language in the current definition of disability;
* The need for review of current exemptions under the legislation;
* The need for clarity and guidance around provision of reasonable accommodations;
* Suggestions around inclusions in the legislation recognising the extent to which persons with disabilities are at increased risk of socio-economic discrimination;
* Suggestions around the inclusion of definitions for multiple and intersecting discrimination;
* Suggestions around enhancing the potential of the Public Sector Human Rights and Equality Duty;
* Suggestions around procedural amendments to enhance the operations of the WRC under the legislation;
* The importance of robust and accurate data collection.

# Proposed amendments to the existing legislation

## Definition of ‘Disability’ under equality legislation

The NDA recognises that several different definitions of ‘disability’ are used in various contexts and pieces of legislation. This has led to a lack of consistency in defining ‘disability’ and a fragmented approach to data collection. The various definitions often referred to include examples originating both in Ireland and abroad. The NDA advises that it would be helpful to take the opportunity provided by a review of equality legislation to consider the definitions currently in use, and whether any amendments would be relevant or appropriate. A number of relevant definitions are outlined below, and their suitability to be included in the revised equality legislation is examined.

The following section will use the terms ‘medical model’ and ‘social model’. The **medical model** individualises disability and promotes the idea that people are disabled by their impairments or differences. The medical model focuses on people’s impairments from a medical perspective. The medical model assumes that persons with disabilities need to be ‘cared for’.

The **social model** - the model promoted by the UNCRPD – looks at how society is structured and how it disables people. It is not based on a person’s impairment; it relates to the barriers that exist in terms of attitudes, policy developments, lacks of access or supports that prevent people from participating in society as equals, with choice and control over their own lives. In this model, it is society that disables people from fulfilling their potential, rather than a person’s impairment.[[2]](#footnote-2)

### Equal Status Acts

The legislation currently defines ‘disability’ as

1. The total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,
2. The presence in the body of organisms causing, or likely to cause, chronic disease or illness,
3. The malfunction, malformation or disfigurement of a part of a person’s body,
4. A condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
5. A condition, disease or illness which affects a person’s thought process, perception of reality, emotions or judgement or which results in disturbed behaviour.

While noting the medical focus of this definition, the NDA advises that there are several elements of this definition that should be retained. An impairment does not need to be ‘long-term’ or ‘enduring’, as is seen in other definitions of disability (outlined below), and it does not need to interact with particular environmental or societal barriers to result in an individual’s non-participation. Discrimination can be a single event, and is not dependent on an ‘enduring’ aspect to the disability. The definition currently covers past, present and future disabilities. There is no hierarchy of disability, and invisible disabilities are covered. A person does not have to prove they are ‘sufficiently disabled’ to qualify, as is the case in other jurisdictions. Evidence shows that the definition is interpreted broadly in this jurisdiction, and complainants have not faced much resistance when seeking to invoke it. The NDA recommends that the definition of disability in these Acts should retain its broad anti-discriminatory purpose of the Acts, as originally drafted.

However, the language of the definition is based firmly in the medical model of disability, and some of the words used in the definition are no longer considered appropriate. The NDA advises that the spirit and broad applicability of the definition be retained, and that the following criteria be included in a refreshed definition:

* Appropriate and updated language that aligns with the social model of disability (including the removal of the words ‘malfunction’, ‘malformation’, ‘disfigurement’, and ‘disturbed behaviour’). The NDA suggests that reference only to a ‘trait or condition’ would capture a broad range of outcomes without the use of medical language that could be interpreted as denigrating
* Consideration of the trait when in comparison with those without the trait
* Includes visible and invisible disabilities
* Includes past, present and future disabilities.

### UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) was ratified by the State in March 2018. The overarching vision of the UNCRPD is to ensure that persons with disabilities can participate in and contribute to society on an equal basis with others and Ireland’s first State Report has recently been sent to the UN Committee on the Rights of Persons with Disabilities.

The UNCRPD defines ‘persons with disabilities’ as

“Those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

This definition uses language inspired by the social model of disability rather than the medical model, and implies that a person is disabled by barriers to their full participation in society, created by the environment around them. While the social model approach- and the language flowing from it seen throughout the UNCRPD- is promoted as the basis for Ireland’s legislation and policy in relation to persons with disabilities going forward, this definition is significantly narrower than the definition currently contained in the Equal Status Acts. It may not be appropriate to carry out the purpose of the equality legislation; that is, to guard against or adjudicate whether discrimination under equality legislation has taken place.

The UNCRPD definition states that an impairment must be long-term in order to be considered a disability. It also invokes a second threshold, not seen in the current definition in equality legislation: in order to be a disabled person, an individual must have a long-term impairment **and** this impairment must interact with various barriers in a way which hinders the individual’s participation in society on an equal basis with others. If this were to be invoked as the definition to prove discrimination on the grounds of disability, it is likely that many individuals who come under the current definition would be excluded, either on the basis of their impairment not reaching the ‘long-term’ threshold or not being in a position to adequately demonstrate the barriers which hinder their participation.

Therefore, the NDA does not recommend inserting this definition into the revised equality legislation.

### Disability Act 2005

The definition of ‘disability’ put in place by the Disability Act 2005 reads

“a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.”

This definition reflects the social model of disability, where the disability is framed as a restriction in the individual’s ability to participate by virtue of society’s constraints rather than due to a medical condition. Similar to the one used in the UNCRPD, the definition introduces a ‘time’ element to the impairment, through the use of the word ‘enduring’. It also speaks of barriers encountered by the individual as a result of their impairment. The NDA is of the position that this definition would be too restrictive to offer protection to all individuals who may be discriminated against on the grounds of disability.

The National Disability Authority Act 1999 has a definition very similar to the 2005 Disability Act definition and the NDA would also advise that this is also too restrictive to use.[[3]](#footnote-3)

### Census 2022

Disability can be defined and measured in different ways. National statistics on disability generally rely upon household surveys, whereby a person is enumerated as having a disability if they indicate so in their survey response. The fact that disability is generally self-reported within household surveys means that the subjective views of individual respondents may affect their tendency to report having a disability. The design and wording within a survey can also impact upon the likelihood that some individuals will report having a disability or not. These questions are designed for collecting data and do not necessarily translate to a legal definition of disability.

The most comprehensive national household survey in Ireland is the Census of the population. Consultation on the content for Census 2021 (now 2022) took place between October and November 2017. Submissions were invited from the public and interested bodies on the content of the questionnaire. Over 400 submissions were received in response to this public consultation. The NDA recommended some changes which were accepted, for example replacing yes / no answers with Yes, to a great extent’, ‘Yes, to some extent’, and ‘No’. This recommendation was based on a review of the Washington Group questions, which are an international classification of functioning disability and health designed to allow comparisons between countries. The NDA did not recommend that these be fully adopted, as the current Census was considered to contain more information that the Washington Group questions alone. The current Census questions for 2022 read:

16. Do you have any of the following long-lasting conditions or difficulties?

* Blindness or a vision impairment
* Deafness or a hearing impairment
* A difficulty with basic physical activities such as walking, climbing stairs, reaching, lifting or carrying
* An intellectual disability
* A difficulty with learning, remembering or concentrating
* A psychological or emotional condition or a mental health issue
* A difficulty with pain, breathing or any other chronic illness or condition

The responses to Question 16 are ‘Yes, to a great extent’, ‘Yes, to some extent’, and ‘No’.

17. As a result of a long-lasting condition, do you have difficulty doing any of the following?

* Dressing, bathing or getting around inside the home
* Going outside the home to shop or visit a doctor’s surgery
* Working at a job or business or attending school or college
* Participating in other activities, for example leisure or using transport

The responses to Question 17 are ‘Yes, a lot’, ‘Yes, to some extent’, and ‘No’.

An individual will be enumerated as having a disability in the forthcoming Census if they answer either ‘Yes, a lot’ or ‘Yes, to some extent’ for either Question 16 or Question 17. Previously, an individual would have had to answer Question 16 positively in order to answer Question 17. The National Statistics Board recommended in 2021 that this 2022 census definition be incorporated, as far as practicable, into all survey data collection, and disabled/non-disabled analyses of relevant statistics.’[[4]](#footnote-4)

### Definitions in other jurisdictions

The NDA looked at examples of overarching global definitions, and definitions used in other jurisdictions, to gauge whether any language used elsewhere would be appropriate to include in a revised definition in the equality legislation. These definitions are listed in Appendix 1, and include both social and medical model definitions. A common feature amongst these definitions in the inclusion of a time limit, and many also include interaction with environmental barriers. Others include a minimum amount of severity to be deemed to be ‘disabled’. Some of them focus on how function is impacted rather than impairments but these also tend to include interaction with environmental barriers.

The language of several of these definitions tends to be less archaic than that used in the Irish equality legislation definition and some of that terminology could be used in a revised definition.

### Recommendation on definition of disability

In Ireland, a purposive approach to defining disability is taken in equality/anti-discrimination legislation. Under this approach, the definition of disability is not the barrier to a person being covered by anti-discrimination legislation - the focus instead is on the actions and whether or not they were discriminatory. It is less restrictive than the approach taken in the UK and the US, and more helpful than the approach taken by the EU, which is to not put in place a clear definition. While the language used in the Irish definition does contain elements of the medical model, the Committee on the Rights of Persons with Disabilities has noted that a “broad, impairment-related definition of disability” could be considered compliant with the UNCRPD.[[5]](#footnote-5)

If a definition is too narrow, and demands that an impairment exists for a certain amount of time, it will exclude a cohort of people who are at risk of discrimination. Equally, if a definition introduces a second threshold of ‘barriers encountered’ that must be met, it becomes too onerous to prove.

If a definition is too broad and high-level, it will fall to the courts to interpret it, and in the past, courts have tended to veer towards a medical model interpretation of disability.

Following the examination of various definitions in use under other legislation, by other practices or in other jurisdictions, the NDA is of the position that the current definition contained in the Equal Status Acts is the most appropriate definition to use. We believe it should be retained, albeit with a number of amendments to its language.

## Genetic characteristics or heritage: issues related to discrimination

In 2014, the NDA conducted a review of the operation of Part 4 of the Disability Act, which relates to genetic testing. While Part 4 provides protection in the areas of privacy and data protection, it does not protect against discrimination. In the consultation conducted to inform the review, organisations representing persons affected by genetic conditions and other contributors advocated that the law concerning genetic information be reformed to provide protection against discrimination based on genetic characteristics or heritage. In its consultation submission, the National Centre for Medical Genetics reflected the views of most organisations representing persons affected by genetic conditions when it stated that:

‘The core principle is that individuals should not be discriminated against on the basis of their genetic heritage. The protection should not just be about the results of genetic testing.’

The NDA sought legal advice on this issue, which outlines that the Equal Status Acts provide protection on the basis of the definition of discrimination. The definition includes where a disability does not exist now, but may exist in the future, and includes perceived disability. It also protects against associative disability discrimination, (namely, discrimination due to disability of a person with whom the victim of discrimination if associated). This means that a person with genetic predisposition or family history of a genetic condition would be protected against discrimination on the ground of disability, as long as that condition would comprise a disability within the meaning of the Acts.

However, the legal advice goes on to say that:

‘while it is not at all clear, it is arguable that the 2000 Act could in theory be interpreted as including Genetic Predisposition and Family History within the meaning of ‘disability’ in that legislation. However, it must be emphasised that this view is premised on a generous and broad interpretation of the definition of ‘disability’ and there could be no guarantee that a court faced with this question would adopt such a generous interpretation. Moreover, the argument could perhaps also be made that to include Genetic Predisposition and Family History within the definition of ‘disability’ in the 2000 Act is incongruous, as it would trigger the various obligations applicable to those with disabilities in the 2000 Act to those with Genetic Predisposition and Family History, notwithstanding that many of these obligations are not necessarily relevant to those who do not have any present impairment.’

The NDA advises that any changes to the definition of disability in the Equality Acts should consider the impact on people who:

(a) do not have a disability at present but may be predisposed to developing a disability in the future because of their genetic makeup (‘Genetic Predisposition’); or

(b) do not have a disability now and are not predisposed to developing a disability in the future because of their genetic makeup but have a family member with a genetic condition (‘Family History’)

The NDA also advises that consideration should be given to exploring how protection against discrimination based on genetic heritage or features could be provided for in legislation, separate to the disability ground. This would expand the protection beyond just the disability ground, reflecting possible future uses of genetic information resulting from scientific advances in the area. For example, advancing genetic technologies can uncover potentially relevant profiles – for example the ‘risk-taking’ gene which may be valued by some employers but viewed negatively by others.[[6]](#footnote-6) Genetic advances have also identified the genes associated with leadership, which may be appealing to some employers in making employment or promotion decisions.[[7]](#footnote-7)

There is some precedent for this approach in the EU Charter of Fundamental Rights, which expressly prohibits discrimination based on genetic features. Article 21(1) of the Charter includes genetic features as a separate ground to disability:

‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, **genetic features**, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’

## Public bodies

While the legislation applies across public and private sectors, the NDA advises that there can be confusion as to what constitutes a public body, and therefore the review of the legislation offers an opportunity to clarify this. Neither the Equal Status Acts nor the Employment Equality Acts currently contains a definition of a ‘public body’. In respect of obligations placed on public bodies, the NDA has seen, in other pieces of legislation, that the absence of a comprehensive definition of ‘public body’ leads to confusion and inconsistency. The NDA suggests that this review should put in place a comprehensive definition of ‘public body’ and a list enumerating all public bodies, that can then be inserted into future legislation, or applied to existing legislation, in order to provide clarity on which bodies the legislation in question applies to.

The spirit of the equality legislation has since been reiterated in the Irish Human Rights and Equality Act 2014, Section 42 of which states that all public bodies in Ireland have responsibility to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans.

In light of the Public Sector Human Rights and Equality Duty, the NDA recommends that a definition of “public body” should be part of the Acts to underpin this extra obligation placed on public bodies. It is suggested that the definition currently used in the IHREC Act 2014 is used.[[8]](#footnote-8)

The NDA notes that a helpful enumeration of public bodies is contained in the First Schedule of the Official Languages Act 2003, which makes its implementation more straightforward. The NDA recommends that the revised legislation includes something similar that is up to date and provides a repository of public bodies that could be applied to all other pieces of legislation that contain obligations for public bodies.

### Public Sector Human Rights and Equality Duty

The Public Sector Human Rights and Equality Duty has now been in effect for 6 years, and many public bodies and government departments have embraced it, through participating in pilots run by IHREC, putting in place training for staff or including the Duty in their annual reports and strategic plans. There have been examples of good practice in terms of self-reporting by public bodies, and IHREC has run several awareness-raising campaigns. However, there is limited evidence that points towards a comprehensive shift in culture within public bodies and the delivery of public services, as was possible with the potential of the Duty. This may be as a result of the nature of the obligation, which puts the onus on public bodies themselves to improve, with little provision for monitoring and sanctions. The review of the equality legislation provides an opportunity to examine how enforcement of the implementation of the Duty, and sanctions for non-implementation, may be strengthened.

## Exemptions under the legislation

Government Departments are covered by the Equal Status Acts, to the extent that they are providing services to the public or part of the public. There are a number of detailed exemptions in the Equal Status Acts, depending on the ground and the area concerned. An important exemption relevant to Government Departments is Section 14, which states that any action required by legislation is exempt from the Equal Status Acts.

This allows for ‘legislated discrimination’, because it provides that anything that is required by legislation cannot constitute discrimination.

This is a blanket exemption available to Government Departments, and introduces a discrepancy between the obligations on the State and the obligations on the private sector. The State can effectively legislate itself out of the requirement not to discriminate against members of the public across the nine grounds, without any justification for invoking it. Regardless of the reasoning behind this section at the time of drafting and adopting, it is difficult to continue justifying this broad exemption available to the State, and the review of the equality legislation is a timely opportunity to clarify and narrow it, so it is only applicable in exceptional cases.

An example of this practice being applied very broadly can be seen in AB v Road Safety Authority.[[9]](#footnote-9) The High Court determined that the Road Safety Authority had not discriminated against a woman living in Direct Provision by refusing her application for a driver’s licence, on the basis that a piece of secondary legislation (a statutory instrument) required her to provide evidence of “normal residence” in the State.

Other exemptions under the Act that should be revised during this review relate to the legislation’s relationship with An Garda Síochána. Since the introduction of the legislation, there has been confusion around which sections are applicable to An Garda Síochána, and from which sections the organisation is exempt. This confusion was evidenced by the case of Brian Fitzpatrick and Ronald Boyle, who commenced proceedings against An Garda Síochána, claiming that they had been discriminated against on the grounds of age. Both individuals had been refused entry to An Garda Síochána as they were older than 35 years of age, which is the maximum age for recruitment of Gardaí put in place by the Garda Síochána (Admission and Appointments) Regulations 1988. Due to the need for a Judicial Review, and a referral to the Court of Justice of the European Union, it took 15 years for the two individuals to secure their successful rulings. The NDA advises that this review should consider how An Garda Síochána can be explicitly included under the prohibition on discrimination. If there are to be exemptions for An Garda Síochána (for example, similar to exemptions under Part 5 of the Disability Act) they should be exceptional, and the justification for same should be clear.

## Reasonable accommodation

The Employment Equality Acts apply to employees and potential employees in both the public and private sectors in a wide range of employments including full-time, part-time and temporary employees. Unlike general unfair dismissals legislation, there is no minimum service requirement to invoking the protections contained in the Employment Equality Acts. In addition to prohibiting less favourable treatment, the Employment Equality Acts legally oblige employers to take reasonable steps to accommodate the needs of both employees and job applicants with disabilities, except where to do so would impose a disproportionate burden on them. Denial of reasonable accommodation can be a freestanding cause of action under the Employment Equality Acts and amounts to discrimination on the disability ground.

As well as the Employment Equality Acts, the Disability Act 2005 places obligations on public bodies to, in so far as practicable, take all reasonable measures to promote and support the employment by it of persons with disabilities, and to meet compliance targets relating to the recruitment and employment of persons with disabilities.

The UN Convention on the Rights of Persons with Disabilities recognises the right of persons with disabilities to work, on an equal basis with others. Article 27 further requires States Parties to safeguard and promote the realisation of the right to work of persons with disabilities by taking appropriate steps to ensure that reasonable accommodation is provided to persons with disabilities in the workplace. The UNCRPD limits the obligation on employers to provide reasonable accommodation where to do so would impose a disproportionate or undue burden on them.

A General Comment is currently being developed by the Committee on the Rights of Persons with Disabilities regarding Article 27. A General Comment is developed when the Committee is of the view that States Parties need further guidance and interpretation of a particular Article. To date, the Committee has adopted seven General Comments. In the current draft of the General Comment on Article 27, it states that

The duty to provide reasonable accommodation is a cooperative and interactive process applicable from the moment a request for accommodation is received and requires the employer to enter into dialogue with the employee. Its provision is limited by the concept of ‘disproportionate or undue burden’. This requires an objective analysis of the ‘proportional relationship between the means employed and its aim’—enjoyment of the right to work and employment.

The Framework Directive on equal treatment in employment and occupation of 2000 (“the Employment Equality Directive”)[[10]](#footnote-10) requires European Union Member States to prohibit discrimination on the grounds of disability in the fields of employment, occupation and vocational training. This Directive also requires employers to provide reasonable accommodation to employees and prospective employees with disability, to the extent that doing so would not impose a disproportionate burden to the organisation. The Employment Equality Acts are the principal means by which the State has transposed, or given effect to, the Employment Equality Directive into Irish law.

Reasonable accommodations are also known as “appropriate measures” under Section 16 of the Employment Equality Acts. Reasonable accommodations are defined as effective and practical changes that an employer is required to put in place to enable a person with a disability to access employment or carry out their work on an equal footing with others, unless this would give rise to a disproportionate burden on the employer.[[11]](#footnote-11) Reasonable accommodations may include, but are not limited to:

* Adapting the premises or the equipment
* Patterns of working times
* Providing training or other supports
* Distribution of tasks.

Reasonable accommodation must only be provided where the provision of such measures would not impose a disproportionate burden on the employer. The factors to be taken into account in assessing whether a reasonable accommodation request would impose a disproportionate burden on the employer include, in particular:

* The financial and other costs entailed in providing the accommodation
* The resources available to the employer’s business
* The possibility of obtaining public funding or other assistance

There have been relatively few decisions on what constitutes a disproportionate burden.

The NDA published a report entitled ‘Reasonable Accommodations: Obstacles and Opportunities to the Employment of Persons with a Disability’ in 2019. In this report, the NDA carried out an analysis of a select number of Workplace Relations Commission and Labour Court decisions concerning alleged failures by employers to provide reasonable accommodation.

Through this analysis, the NDA learned that the most common reason why employers were found to be in breach of the obligation to provide reasonable accommodation in the Workplace Relations Commission and the Labour Court review was for failing to comply with the procedural components of the duty. In particular, employers failed to:

* undertake sufficient enquiries to ascertain the extent of the employee’s disability and the factual position concerning the employee’s capability
* consider what, if any, special treatment or facilities may be available by which the employee could become fully capable of undertaking the full range of duties associated with his or her post
* consult with and allow the employee concerned a full opportunity to participate at each level of the process

The review of the Workplace Relations Commission and Labour Court decisions highlighted that some employers are not aware of the extent of their procedural and substantive obligations to provide reasonable accommodation under employment equality legislation and that some employers do not have policies and procedures in place to deal with requests for reasonable accommodation. The review also found a low level of awareness of the supports and grants available to employers to provide reasonable accommodations to staff.

The majority of decisions analysed as part of the review concerned employees taking cases against private sector employers. Cases against public sector bodies represented less than 25% of the 82 case examined as part of that analysis. In 2012, Bolger, Bruton and Kimber reported that many of the cases taken against employers in this jurisdiction have been against public sector employers.[[12]](#footnote-12) The reason for the reduction in cases against public sector employers since then is unclear, however, it may indicate that improvements have been achieved for those with disabilities seeking access to or currently employed within the public service, or that good policies and procedures on reasonable accommodation exist in the public sector. This may also indicate that more work must be done to make private sector employers aware of and understanding their obligations.

The **ISO/IEC Guide 71:2014 Guide** **for addressing accessibility in standards** could be considered in the context of providing guidance around improving accessibility which may lead to fewer instances of discrimination. This Guide provides useful information for defining accessibility requirements and recommendations for products, services and built environments for a person with a diverse range of disabilities and their capabilities and abilities based on the World Health Organisation’s International Classification of Functioning, Health and Disability (ICF) which includes sensory abilities and characteristics, physical abilities and characteristics and cognitive abilities.

A Reasonable Accommodation Fund, held by the Department of Social Protection, is available to support employers in providing reasonable accommodations. This review may provide an opportunity to review the provision of this fund and increase awareness around it.

Barriers also occur when service providers misunderstand the primacy of obligations under various pieces of legislation. Section 4 of the Equal Status Acts provides that discrimination includes a refusal or failure by a service-provider to do all that is reasonable to accommodate a person with a disability by providing special treatment or facilities, if without such special treatment or facilities, it would be unduly difficult for the person to avail himself or herself of the service. In a recent newsletter, the Data Protection Commission (DPC) featured a case study concerning a Deaf person who needed to use a sign language interpreter when engaging with a service-provider. This individual was declined access to the service as the organisation refused to deal with the sign language interpreter. The organisation cited “GDPR and data protection concerns” as the reason for the non-engagement.[[13]](#footnote-13) The DPC does not believe that either the GDPR or the Data Protection Act 2018 prevents or prohibits the use of a sign language interpreter, a Text Relay Service or other similar system where a person who is deaf or hard of hearing needs to use these services when engaging with a service provider. Measures put in place to protect a customer’s personal data should not disproportionately disadvantage those who require reasonable accommodations.

The NDA advises that the revised legislation remove all ambiguity around the duties of employers, public bodies and service providers to provide reasonable accommodation. This provision in the legislation is a prime example of what the legislation initially hoped to achieve: to promote dignity, respect and inclusion and to abolish discrimination. To achieve this, through both the revision of the legislation and its subsequent implementation, the NDA recommends that:

* The idea of a ‘nominal cost’ should be removed from the legislation. This is confusing and subjective, and it is enough to say that reasonable accommodation should be provided for except for in situations where it would put a ‘disproportionate burden’ on the employer or provider. This is the approach taken in the UNCRPD
* The Equal Status Acts and the Employment Equality Acts could give consideration to how a failure to provide reasonable accommodations could constitute discrimination, and whether this should be articulated in the legislation
* Both guidance and a code of practice concerning the provision of reasonable accommodations in the employment context, including the recruitment process, should be developed.
* A code of practice would explain the complexities of the law in this area, and direct employers about how they can comply with their statutory obligations under the Employment Equality Acts.[[14]](#footnote-14) A code of practice would also assist persons with a disability who are seeking to understand their entitlements in this area. The NDA understands that IHREC is progressing a draft Code of Practice on Reasonable Accommodation
* It is envisaged that guidelines would be broader than a Code of Practice, with the latter focused on legal requirements and compliance, and admissible in evidence in court proceedings. Guidelines on reasonable accommodations would provide a non-mandatory, practical resource for employers and promote good practice, which in many cases extends beyond minimum legislative requirements. The NDA has committed to developing such guidelines in 2022
* Both the guidance and the code of practice should provide for consistency of approach across the public sector regarding the provision and evaluation of reasonable accommodations, and could also offer good practice guidance to benefit private sector employers
* The revised legislation should legislate for ongoing comprehensive awareness raising to employers regarding their obligations and to persons with disabilities regarding their rights. This includes awareness and training on the appropriate applicability of GDPR and the Data Protection Act 2018, which would lead to a reduction in the amount of refusals of reasonable accommodations.

# Additions to the existing legislation

## New ground of socio-economic status

The Equality (Miscellaneous Provisions) Bill 2017 sought to amend the Employment Equality Act 1998 and the Equal Status Act 2000 by prohibiting discrimination on the basis of a person’s social and economic background. The Bill defined ‘disadvantaged socio-economic status’ as

“a socially identifiable status of social or economic disadvantage resulting from poverty, level or source of income, homelessness, place of residence, or family background.”

The hope behind this proposed additional ground for discrimination was to address inherent disadvantage by tackling systemic poverty and social exclusion, as well as combatting prejudice, stigma and stereotyping. As deprivation, disadvantage and social exclusion can often be cyclical or intergenerational, this addition could help to provide for more equal opportunities for individuals to access employment and housing, regardless of their socio-economic background, and could potentially break the cycle in which people find themselves.

The inclusion of this ground would also be in line with a recommendation made by UN Committee on Economic, Social and Cultural Rights during its 2015 review of Ireland’s implementation of the International Covenant on Economic, Social and Cultural Rights. The Committee advised that Ireland extend its grounds for discrimination to cover discrimination based on ‘social origin’ and other related characteristics, in order to comply with the Covenant. The Equality (Miscellaneous Provisions) Bill lapsed when the last Government was dissolved in 2020.

The NDA advises that people with disabilities are much more likely to experience poverty and social exclusion than people without disabilities. In 2019, 13 per cent of people with disabilities in Ireland were living in consistent poverty, as compared to 4 per cent for persons without disabilities.[[15]](#footnote-15) One of the main drivers of poverty among persons with disabilities is barriers to employment opportunities. While being in employment can help to considerably reduce the risk of poverty, working people with disabilities still experience higher poverty risks than those working without disabilities.

The NDA therefore advises that the inclusion of the new ground of ‘disadvantaged socio-economic status’ in the revised legislation would benefit persons with disabilities.

## Victimisation

Victimisation is technically a ‘ground’ under the legislation, but there is a significant lack of clarity which, the NDA is aware, has resulted in confusion at times. Victimisation occurs where an individual tries to invoke their rights and the respondent retaliates. Often, the individual will claim ‘bullying’ rather than using the appropriate language of ‘victimisation’. There is no consistency in the case law around this practice. The NDA advises that this section of the legislation is clarified and strengthened, and that consistent language is used which would lead to a bank of case law that could provide guidance and precedence.

## Intersectionality

The UNCRPD speaks of intersectionality in its preamble, in which it recognises that persons with disabilities may be subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status. The Convention contains specific articles on women with disabilities and children with disabilities, and often obliges States Parties to put in place gender- and age- appropriate accommodations, policies and legislation. The Committee on the Rights of Persons with Disabilities gives several examples of the types of intersectional discrimination faced by women with disabilities in its General Comment No. 3.

At the tenth session of the Conference of States Parties to the UNCRPD in 2017, a roundtable looking at the impact of multiple discrimination on persons with disabilities published a statement that included definitions of two key terms. “**Multiple discrimination**” is defined as a situation in which a person experiences discrimination based on two or more grounds, which compounds or aggravates it. **Intersecting discrimination** refers to a situation in which several grounds are inseparably intertwined.”[[16]](#footnote-16)

In a situation which is discriminatory towards all women, and discriminatory towards all persons with disabilities, a woman with disabilities would experience multiple, compounding discrimination. In a situation which is not discriminatory towards non-disabled women or non-disabled men, but which is discriminatory toward women with disabilities, it is the combination of the individual’s disability and gender which produces a unique discrimination that cannot be identified using the gender and disability grounds separately or on top of one another. This is an intersecting discrimination.

According to the Irish Human Rights and Equality Commission, there are examples of intersectional approaches (see Lindberg vs Press Photographers Association of Ireland)[[17]](#footnote-17), as well as multiple discrimination approaches (see Hannon vs. First Direct Logistics Ltd)[[18]](#footnote-18), being taken in Irish Courts. The EU Commission also recognises that “In Ireland, multiple and intersectional discrimination regularly arises in the case law of the Workplace Relations Commission (and formerly the Equality Tribunal) taken under the Employment Equality Acts and the Equal Status Acts, which allow complaints to be referred on any combination of discriminatory grounds under the Acts. [[19]](#footnote-19) However, IHREC states that “much of the Tribunal’s case law focuses on one or other of the nine statutory grounds of discrimination.”[[20]](#footnote-20)

The UN (2017) recommends that “[…] the inclusion and participation of persons with disabilities and their representative organizations in cross-sectoral, multi-stakeholder partnerships, and the development and strengthening of these partnerships, will advance efforts to address the impact of multiple and intersecting forms of discrimination for persons with disabilities.”[[21]](#footnote-21)

Similarly, the EU Commission states that “inclusive and accessible consultation, strengthening dialogue mechanisms and the voice of marginalised groups are also key components in improving the understanding of intersectionality.”[[22]](#footnote-22)

The NDA recommends that the revised legislation explicitly outlines the definitions of multiple discrimination and intersecting discrimination, and the provision for cases to be taken on this basis, within the updated legislation.

# Procedural amendments to be provided for by revised legislation

### Workplace Relations Commission

The NDA is aware of several concerns regarding the functioning of the Workplace Relations Commission (WRC), and advises that the review of the equality legislation is a timely opportunity to consider and remedy these concerns.

In the first instance, the NDA believes that the revised legislation should introduce a new name for the WRC, as its current title does not accurately reflect the breadth of work it undertakes. It is confusing for complainants to bring claims under the Equal Status Acts to the WRC, when their claims may relate to discrimination outside of a work environment. The NDA recommends that the title of ‘Equality Tribunal’ is reinstated through the revised legislation.

Given the Supreme Court’s decision that WRC adjudicators participate in the administration of justice, as outlined in Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General, the revised legislation should ensure that the qualifications and training required to become an adjudicator are clearly set out.[[23]](#footnote-23)

In 2020, the WRC made a successful transition to virtual hearings and adjudications, and its ability to adapt, evolve and continue to provide its service during the pandemic was very positive. However, there remains a large backlog of cases, which has only been added to in the last 18 months, due to both Covid-19 and the Zalewski case. It is also likely that further cases will be taken once a legal framework is introduced around the right to work from home, and employers grapple with its implementation. The review should explore what resources the WRC will need in the coming years in order to work through the backlog of cases, and to ensure that justice is administered in a timely manner.

In terms of processes, the NDA notes several areas for improvement and amendment that should be considered under the review legislation:

* **Timeframes**: The Equality Acts set a six-month time limit for making discrimination complaints, even where a complainant may be delayed in making a complaint due to their following an internal complaints procedure. This time limit is very restrictive and flexibility to it should be considered. Similarly, Section 21(2) of the Equal Status Acts puts an onus on a complainant to notify the respondent of their intention to make a complaint, within two months of the alleged incident of discrimination. In the first instance, this timeframe is very short. Secondly, a lack of awareness around this administrative step on the part of the complainant can often deem a complaint null and void before it ever reaches the WRC. Finally, this mandatory step could give rise to victimisation, which may make it difficult for a complainant to progress their complaint. This onus only relates to complaints taken under the Equal Status Acts, and not under other pieces of legislation also dealt with by the WRC. It is also not in line with discrimination complaint mechanisms in other EU jurisdictions.

The NDA recommends that the six-month deadline for complaints be extended, and that the mandatory administrative step of notifying a respondent be removed from the revised legislation.

* **Cost**: The UN Committee on the Rights of Persons with Disabilities states that people with disabilities can encounter barriers accessing justice and equal access to the law, including physical, communication, information and cost barriers.[[24]](#footnote-24) While there is no charge for lodging a complaint with the Workplace Relations Commission, the NDA notes that the Workplace Relations Commission cannot award legal costs to either side and that civil legal aid is not available for employment equality claims, irrespective of the complexity of the case or the needs of the individual.[[25]](#footnote-25)
* **Legal Aid**: Legal Aid is not available to complainants of cases in the WRC (as it is a quasi-judicial tribunal), regardless of how serious or complex the discrimination, harassment or victimisation case may be. Unrepresented litigants need a sound understanding of national and EU law, and they must make arguments on these laws while facing the employer or service provider against whom they are taking the case. These employers and service providers can very often afford to pay for experienced legal representation- this discrepancy does not provide for equal access to justice. Research has shown that complainants are much more likely to be unsuccessful in their claims when they are unrepresented, yet for many, the cost of hiring legal representation is not an option.

In a report prepared by the LLM students undertaking the Human Rights Law Clinic module in Trinity College Dublin,[[26]](#footnote-26) statistics showed that, of the cases brought before the WRC between 1 January 2019 and 31 January 2021, complainants lost over 75% of the cases. From January 2018 to the end of January 2021, claimants with professional representation won more than 30% of the cases before the WRC and claimants with union representation won 32.6% of their cases. For those claimants without representation, there was a loss rate of more than 86% before the WRC. Overall, unrepresented claimants had a success rate of less than 14%, indicating that legal representation more than doubles a claimant’s chance of success.

Civil legal aid is available in other jurisdictions, notably England, which Ireland often looks to for guidance on legislation. Other jurisdictions also resource NGOs to take equality cases on behalf of individuals, which does not happen in Ireland, but could be explored as an option, especially in cases that have the potential to affect large groups of people or bring about significant societal change.

The NDA advises that civil Legal Aid should be provided for discrimination cases to those who need it. We also suggest that the initiative of resourcing NGOs to take cases on behalf of individuals is explored.

* **Documentation**: There is no dedicated online form for complaints under the Equal Status Acts. Complainants are required to use the same form as that used for complaints under the Employment Equality Acts. The form contains compulsory fields in relation to employment which are wholly irrelevant to complaints under the Equal Status Acts. This is not appropriate, and only adds to the confusion people feel when taking equality and discrimination cases to the WRC. This review should result in the creation of a specific complaint form for complaints under the Equal Status Acts.
* **Supports**: Under the Employment Equality Acts, complainants often receive support, information and guidance from trade unions. However, there is no equivalence in support resources under the Equal Status Acts. FLAC has taken on a role in this regard but is operating under resource constraints, especially as providing information in respect of WRC cases is only one area of its work. This review should look at how and where complainants can find support and information, and seek to fill the existing gaps, either by providing comprehensive guidance or by resourcing other organisations to do so.

Supports should be provided in as many forms of communication as necessary- including Plain English, Easy-to-Read, Irish Sign Language, captioned videos- and should appear on websites that meet the accessibility standards set under the European Union (Accessibility of Websites and Mobile Applications of Public Sector Bodies) Regulations 2020.

* **Compensation**: The current limit on the amount of financial compensation for discrimination complaints is €15,000, regardless of how severe the discrimination or its effects are. There is also a cap of €13,000 on compensation for discrimination in access to employment (for example, discrimination in recruitment or at an interview). EU law requires sanctions for discrimination to be effective, proportionate and dissuasive[[27]](#footnote-27). The NDA advises that these maximum limits will have less impact on larger employers and service providers, and suggests the revised legislation could give due consideration to whether limits on the level of compensation remain appropriate, and if revisions in this matter are made, what guidance should be provided to WRC adjudicators around calculating appropriate compensation, perhaps similar to the Personal Injuries Guidelines.

## Data collection and dissemination

Finally, the NDA has a particular role to strengthen and promote the collection of data and statistics relevant to people with disabilities, and to ensure public data can be disaggregated using disability as a variable. We have been working closely with colleagues across a number of departments to promote improved data collection processes and we have been pleased to see recent improvements and developments. Examples of improvements in data standards include the addition of new disability markers in government administrative datasets and the greater disaggregation of data by disability type. These improvements fulfil obligations under Article 31 of UNCRPD.

As has been frequently highlighted by researchers and academics, the collection of data on persons with disabilities is fragmented, and often frustrates the development of inclusive policy. The NDA would like to take this opportunity to suggest that the importance of the collection and dissemination of relevant data should be highlighted in the revised legislation. The recording and dissemination of this information can then be used to inform and guide future decision-making and service design.

Under Part 5 of the Disability Act 2005, the NDA has a statutory role to monitor, evaluate and report on the employment of persons with disabilities in the public sector. The NDA also has a role in highlighting the challenges public bodies experience and the progress they are making regarding increasing the recruitment and retention of persons with disabilities, and in supporting employees to feel comfortable in sharing their disability status. The NDA’s Review of Part 5 contains recommendations to enhance the Part 5 process, in order to obtain richer data on the employment of persons with disabilities. These developments in the Part 5 process may be successful in capturing data that could drive the equality, diversity and inclusion agenda in the public sector.

The EU Commission[[28]](#footnote-28) states that “At Member State level, identifying the population groups will require multidimensional and multisector data disaggregation and targeted analysis. Data and statistics for each of the sub-groups should be accompanied by analysis to understand root causes and the ‘why’ for the inequalities or discrimination observed. Only after assessing the full effects of intersectional discrimination can policies be tailored to meet the needs of the target population. Single level disaggregation analysis often fails to adequately reflect the characteristics of those who experience intersectional discrimination or disadvantage.”

The NDA also notes that the EU Directive on open data and the re-use of public sector information came into force in 2019, providing common rules for a European market for government-held data.[[29]](#footnote-29) The Directive encourages EU Member States to make as much information available for reuse as possible. It addresses material held by public sector bodies in EU countries, at national, regional and local levels. This includes material held by ministries, state agencies, municipalities, and organisations funded mostly by or under the control of public authorities such as meteorological institutes. A significant share of equality relevant data held by public bodies remains unpublished in Ireland. The Directive places an obligation on public bodies to publish this data, and presents a significant opportunity to deliver new insights relevant to disability, equality and discrimination in Ireland.

In respect of data collection, the NDA recommends that:

* The revised Acts are informed by evidence from existing Irish equality data sources, both quantitative and qualitative, including evidence gathered and analysed through consultation with stakeholders.
* The Equality Data Audit is continually updated, and an Equality Data Strategy is put in place to address gaps and imbalances in the current body of equality data.[[30]](#footnote-30) Opportunities to link Census data on various equality grounds and administrative data should be maximised similar to the recent Pathfinder report linking Census disability data to administrative data including employment and income data.[[31]](#footnote-31)
* Public bodies should be clear on the relationship between data collection and data protection legislation. They should understand that they can collect, use and share data with appropriate safeguards
* The review of the equality legislation could explore methods of collaboration with Departments and agencies to strengthen the systematic collection, analysis and sharing of robust, comparable and disaggregated equality data, particularly addressing gaps and imbalances. Such data can provide reliable evidence in administrative or judicial cases regarding discrimination through data that point to direct or indirect discrimination, as well as evidence regarding intersecting and multiple discrimination. This approach would also support the implementation and monitoring of various UN Conventions ratified by Ireland, including UNCRPD, in addition to international policy commitments such as the Sustainable Development Goals, as well as other national laws and policies. The NDA highlights the European Commission’s Guidelines on improving the collection and use of Equality Data in this regard.[[32]](#footnote-32)
* The review of the equality legislation should consider the new obligations placed on public bodies to publish open data, much of which will be relevant to disability, equality and discrimination.

# Conclusion and Recommendations

Once again, the NDA welcomes the opportunity to make a submission to this review of the equality legislation. We fully support the initiative taken by the Department of Children, Equality, Disability, Integration and Youth to ensure that the legislation is fit for purpose in a society that is much different to Irish society 20 years ago. We believe that this proactive work will ensure that people are protected against discrimination, and can easily access redress if not.

The NDA did not consult directly with persons with disabilities on this submission but much of the content is informed by our interactions with persons with disabilities on various topics. The NDA is aware that some Disabled Persons Organisations (DPOs) and disability organisations were conducting wide consultations with their members on the equality legislation. The NDA advises that the views of persons with disabilities, in particular those of DPOs, are considered as part of this review and the NDA are happy to advise further in this regard.

The NDA’s recommendations- that have been stated in the submission above- are outlined below:

* Develop guidance for courts regarding the introduction of new processes and terms under the revised legislation
* Put in place awareness-raising initiatives for the public about the legislation in general, including all new provisions in the revised legislation and practical guidance in respect of carrying out procedures provided for by the legislation, for example how to pursue a claim. This awareness-raising should include information in accessible formats, including Easy-to-Read, Plain English and Irish Sign Language
* The Department of Children, Equality, Disability, Integration and Youth should engage in ongoing, inclusive and accessible consultation and dialogue with Disabled Persons Organisations, as well as with organisations and individuals representing other marginalised groups with experience of intersectional discrimination.
* The definition of “disability” in these Acts should retain its broad anti-discriminatory spirit and purpose, but its language should be updated
* The term “public body” should be comprehensively defined, and should remove the confusion introduced by different definitions of the term in various pieces of legislation. Public bodies with obligations under the revised legislation should be enumerated
* The review of the equality legislation provides an opportunity to examine how enforcement of the implementation of the Public Sector Human Rights and Equality Duty, and sanctions for non-implementation, may be strengthened
* The review of the equality legislation is a timely opportunity to revise, clarify and narrow exemptions under Section 14, which currently allows for ‘legislated discrimination’ by Government Departments
* This review should provide clarity on the obligations on An Garda Síochána under the legislation
* In respect of reasonable accommodation:
* The idea of a ‘nominal cost’ should be removed from the legislation. It is sufficient to say that reasonable accommodation should be provided for except for in situations where it would put a ‘disproportionate burden’ on the employer or provider
* The Equal Status Acts and the Employment Equality Acts could give consideration to how a failure to provide reasonable accommodations could constitute discrimination, and whether this should be articulated in the legislation
* Both guidance and a code of practice concerning the provision of reasonable accommodations in the employment context, including the recruitment process, should be developed. Both the guidance and the code of practice should provide for consistency of approach across the public sector regarding the provision and evaluation of reasonable accommodations
* The revised legislation should legislate for ongoing comprehensive awareness raising to employers regarding their obligations and to persons with disabilities regarding their rights. This includes awareness and training on the appropriate applicability of GDPR and the Data Protection Act 2018.
* A new ground of “disadvantaged socio-economic status” should be introduced by the revised legislation
* The definition of “victimisation” under the legislation should be clarified and strengthened
* Explicit definitions for “multiple discrimination” and “intersecting discrimination” should be introduced by the revised legislation
* In respect of the Workplace Relations Commission (WRC):
* The revised legislation should consider a new name for the WRC, as its current title does not accurately reflect the breadth of work it undertakes
* The revised legislation should ensure that the qualifications and training required to become an adjudicator are clearly set out
* The review should explore what resources the WRC will need in the coming years in order to work through the backlog of cases
* The six-month deadline for complaints should be extended, and the mandatory administrative step of notifying a respondent should be removed from the revised legislation
* Civil Legal Aid should be provided for discrimination cases to those who need it. The initiative of resourcing NGOs to take cases on behalf of individuals should also be explored
* This review should result in the creation of a specific complaint form for complaints under the Equal Status Acts
* This review should look at how and where complainants can find support and information, and seek to fill the existing gaps, either by providing comprehensive guidance or by properly resources organisations to do so
* Supports should be provided in as many forms of communication is necessary- Plain English, Easy-to-Read, Irish Sign Language, captioned videos- and should appear on websites that meet the accessibility standards set under the European Union (Accessibility of Websites and Mobile Applications of Public Sector Bodies) Regulations 2020
* Caps on compensation should be amended or removed in the revised legislation.
* In respect of data collection:
* The importance of the collection and dissemination of relevant data should be highlighted in the review, and guidance on its use and dissemination should be made available
* The review should explore methods of collaboration with Departments and agencies to strengthen the systematic collection, analysis and sharing of robust, comparable and disaggregated equality data, particularly addressing gaps and imbalances
* The Equality Data Audit should be continually updated, and an Equality Data Strategy should address gaps and imbalances in the current body of equality data. Opportunities to link Census data on various equality grounds and administrative data should be maximised similar to the recent Pathfinder report linking Census disability data to administrative data including employment and income data
* Public bodies should be clear on the relationship between data collection and data protection legislation. They should understand that they can collect, use and share data with appropriate safeguards
* The review of the equality legislation should consider the new obligations placed on public bodies to publish open data, much of which will be relevant to disability, equality and discrimination.

Appendix 1- Definitions used in different jurisdictions

### Human Rights Act 1992 (New Zealand)

In New Zealand, the Human Rights Act 1992 states that ‘disability’ means:

* physical disability or impairment
* physical illness
* psychiatric illness
* intellectual or psychological disability or impairment
* any other loss or abnormality of psychological, physiological, or anatomical structure or function
* reliance on a guide dog, wheelchair, or other remedial means
* the presence in the body of organisms capable of causing illness.

### Equality Act 2010 (England and Wales) A person (P) has a disability if:

* P has a physical or mental impairment, and
* the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities

### Americans with Disabilities Act 1990

1. The term "disability" means, with respect to an individual

* (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
* (B) a record of such an impairment; or
* (C) being regarded as having such an impairment (as described in paragraph (3))

1. Regarded as having such an impairment, for purposes of paragraph (1)(C):

* (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
* (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

### European Union

The Court of Justice of the EU has defined disability as an impairment that is “long-term” and which, in the field of professional life, “hinders an individual’s access to, participation in, or advancement in employment”.[[33]](#footnote-33)

### The WHO’s International Classification of Functioning, Disability and Health

The International Classification of Functioning, Disability and Health (ICF) has been developed over a number of years by the World Health Organization (WHO) and formally adopted by its General Assembly in 2001. Its aim, as a classification system, is to provide a language and framework for the description of health and health-related states that can be used consistently across different countries and settings. It provides a description of situations with regard to human functioning and its restrictions and serves as a framework to structure this information in a meaningful and easily accessible way.

‘Disability’ is defined in the ICF as

“An umbrella term for impairments, activity limitations and participation restrictions. It denotes the negative aspects of the interactions between an individual (which a health condition) and that individual’s contextual factors (environmental and personal factors).”

Central to this definition of disability is the relationship between the individual (with a health condition) and environmental factors (physical, social and attitudinal). It is the interaction of the person’s health characteristics and their contextual factors (environment, personal) that produces disability.

This definition or derivatives have been used in certain international standards and guides. For example **ISO/IEC Guide 71:2014 Guide** **for addressing accessibility in standards** provides useful information for defining accessibility requirements and recommendations for products, services and built environments for a persons with a diverse range of disabilities and their capabilities which includes sensory and physical abilities and characteristics and cognitive abilities

### Washington Group on Disability Statistics

The Washington Group on Disability Statistics was established in 2001 under the UN Statistical Commission. Its goal is to develop and test tools to collect internationally comparable disability statistics, and to help actors better identify persons with disabilities. The Committee on the Rights of Persons with Disabilities often refers to the Washington Group questions when providing recommendations on data collection and disaggregation to States Parties.

The Washington Group Short Set on Functioning assesses whether the respondent has a disability based on responses to questions that assess difficulties with six universal basic activities (functions) – seeing, hearing, walking, self-care, cognition and communication. The questions are as follows:

1. Do you have difficulty seeing, even if wearing glasses?
2. Do you have difficulty hearing, even if using a hearing aid?
3. Do you have difficulty walking or climbing steps?
4. Do you have difficulty remembering or concentrating?
5. Do you have difficulty (with self-care such as) washing all over or dressing?
6. Using your usual language, do you have difficulty communicating (for example understanding or being understood by others)?

Each question has four response categories: ‘No, no difficulty’; ‘Yes, some difficulty’; ‘Yes, a lot of difficulty’; ‘Cannot do it at all’.

The questions do not ask a respondent to identify as having a ‘disability.’ Rather, an individual’s answers to the six questions are used to define whether that person is ‘with disability’ or ‘without disability’ where disability is generally understood to mean at greater risk for limitations in participation. Respondents who answer ‘a lot of difficulty’ or ‘cannot do it at all’ to at least one of the six functioning questions should be considered a person with disability for the purpose of data disaggregation.

1. CSO Statistical Release, 4 July 2019, Equality and Discrimination https://www.cso.ie/en/releasesandpublications/er/ed/equalityanddiscrimination2019/ [↑](#footnote-ref-1)
2. Independent Living Movement of Ireland (May 2020) **Why we need to talk about the “Disability Sector”** Available at: https://ilmi.ie/why-we-need-to-talk-about-the-disability-sector/ [↑](#footnote-ref-2)
3. “disability”, in relation to a person, means a substantial restriction in the capacity of a person to participate in economic, social or cultural life on account of an enduring physical, sensory, learning, mental health or emotional impairment; [↑](#footnote-ref-3)
4. National Statistics Board (2021) Quality Information for All – Numbers Matter. National Statistics Board Strategic Priorities for Official Statistics 2021-2026. [↑](#footnote-ref-4)
5. UN Committee on the Rights of Persons with Disabilities, General Comment No. 6, paragraph 73(b). [↑](#footnote-ref-5)
6. Quinn, de Paor, Blanck. (2014), Genetic Discrimination: Transatlantic Perspectives on the Case for a European Level Legal Response, Routledge p163 [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. “public body” means:

   (a) Department of State (other than, in relation to the Department of Defence, the Defence Forces) for which a Minister of the Government is responsible,

   (b) a local authority within the meaning of the Local Government Acts 1925 to 2014,

   (c) the Health Service Executive

   (d) a university or institute of technology,

   (e) an education and training board established under section 9 of the Education and Training Boards Act 2013 and 2014,

   (f) any other person, body or organisation established—

   (i) by or under an enactment (other than the Companies Acts) or charter,

   (ii) by any Scheme administered by a Minister of the Government, or

   (iii) under the Companies Acts in pursuance of powers conferred by or under another enactment, and financed wholly or partly by means of money provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government,

   (g) a company (within the meaning of the Companies Acts) a majority of the shares in which are held by or on behalf of a Minister of the Government,

   (h) any other person, body, organisation or group financed wholly or partly out of moneys provided by the Oireachtas that stands prescribed for the time being (being a person, body, organisation or group that, in the opinion of the Minister, following consultation with the Commission, ought, in the public interest and having regard to the provisions and spirit of this Act, to be prescribed). [↑](#footnote-ref-8)
9. [2021] IEHC 217. [↑](#footnote-ref-9)
10. **Council Directive 2000/78/EC of 27 November 2000** establishing a general framework for equal treatment in employment and occupation. [↑](#footnote-ref-10)
11. **Employment Equality Acts 1998-2015**, section 16(4)(a). [↑](#footnote-ref-11)
12. Bolger, M., Bruton, C. & Kimber, C. (2012) **Employment Equality Law**, Dublin: Round Hall. [↑](#footnote-ref-12)
13. https://www.dataprotection.ie/en/dpc-guidance/blogs/can-i-talk-account-holder-contacting-organisations-behalf-someone-else [↑](#footnote-ref-13)
14. The Irish Human Rights and Equality Commission is preparing a new legal code of practice to promote greater employment of people with disabilities. Irish Human Rights and Equality Commission, **‘Discrimination Against People with Disabilities in Employment a Persistent and Pernicious Roadblock to Worker’s Dignity and Inclusion’** [press release], available from their website at <https://www.ihrec.ie/discrimination-against-people-with-disabilities-in-employment-a-persistent-and-pernicious-roadblock-to-workers-dignity-and-inclusion/>. [↑](#footnote-ref-14)
15. Figures sourced from SILC data 2019, See: https://www.esri.ie/publications/identification-of-skills-gaps-among-persons-with-disabilities-and-their-employment [↑](#footnote-ref-15)
16. https://www.un.org/disabilities/documents/COP/crpd\_csp\_2017\_2.pdf [↑](#footnote-ref-16)
17. Lindberg v. Press Photographers Association of Ireland, DEC-S2011-041. [↑](#footnote-ref-17)
18. Hannon v. First Direct Logistics Limited, DEC-E2011-066. [↑](#footnote-ref-18)
19. Fennelly, D., Selected Issues in Irish Equality Case Law 2008-2011, Equality Authority, Dublin, 2012. Available at https://ihrec.ie/download/pdf/selected\_issues\_in\_irish\_equality\_case\_law\_20082011ea\_123\_doc\_final.pdf [↑](#footnote-ref-19)
20. IHREC “Selected Issues in Irish Equality Case Law 2008–2011” pg 56. Available at: https://ihrec.ie/download/pdf/selected\_issues\_in\_irish\_equality\_case\_law\_20082011ea\_123\_doc\_final.pdf [↑](#footnote-ref-20)
21. UN (2017) (See above) [↑](#footnote-ref-21)
22. EU Commission Advisory Committee on Equal Opportunities for Women and Men. “Opinion on intersectionality in gender equality laws, policies and practices.” Available at: <https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/opinion_intersectionality_2020_en_0.pdf> [↑](#footnote-ref-22)
23. [2021] IESC 24. [↑](#footnote-ref-23)
24. UN Committee on the Rights of Persons with Disabilities (2018) **General Comment No.6 on equality and non-discrimination**, Geneva: Office of the United Nations High Commissioner for Human Rights, p.13. [↑](#footnote-ref-24)
25. The Workplace Relations Commission has not been “prescribed” as a tribunal for the purposes of section 27(2)(b) of the **Civil Legal Aid Act 1995** and therefore civil legal aid is not available in employment equality cases. [↑](#footnote-ref-25)
26. TCD LLM Human Rights Law Clinic module (April 2021) **A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland** [↑](#footnote-ref-26)
27. Tobler, Christa (2005) **ECJ case law on effective, proportionate and dissuasive remedies.** Available at:https://eu.vlex.com/vid/ecj-effective-proportionate-dissuasive-455424 [↑](#footnote-ref-27)
28. EU Commission Advisory Committee on Equal Opportunities for Women and Men, **Opinion on intersectionality in gender equality laws, policies and practices**. Available at: <https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/opinion_intersectionality_2020_en_0.pdf> [↑](#footnote-ref-28)
29. Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1561563110433&uri=CELEX:32019L1024 [↑](#footnote-ref-29)
30. The NDA understands an Equality Data Strategy is currently under development. [↑](#footnote-ref-30)
31. Income, Employment and Welfare Analysis of People with a Disability 2019 [Income, Employment and Welfare Analysis of People with a Disability 2019 - CSO - Central Statistics Office](https://www.cso.ie/en/releasesandpublications/fp/fp-iewad/incomeemploymentandwelfareanalysisofpeoplewithadisability2019/) [↑](#footnote-ref-31)
32. EU Commission (2021) ‘Guidelines on improving the collection and use of equality data.’ https://ec.europa.eu/info/sites/default/files/en-guidelines-improving-collection-and-use-of-equality-data.pdf [↑](#footnote-ref-32)
33. Joined Cases C-335/11 and C-337/11, Ring; Case C-363/12, Z; Case C-354/13, Kaltoft. [↑](#footnote-ref-33)