

INTO Submission to the Department of Children, Disability, Equality and Integration

Consultation on the Review of the Equality Acts

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Vere Foster House
35 Parnell Square
Dublin 1
D01 ET35

Tel: 01 804 7700
Fax: 01 8722462
Email: info@into.ie
Web: www.into.ie
General Secretary: John Boyle



Introduction

The Irish National Teachers' Organisation (INTO) represents over 50,000 teachers in primary, post-primary and special schools in the Republic of Ireland and Northern Ireland. We welcome the opportunity to respond to the **Department of Children, Disability, Equality and Integration's** Review of the Equality Acts.

At the outset, the INTO acknowledges the broad scope of the equality legislation subject to the review. In this regard our submission will focus on the key areas under the Employment Equality Acts 1998-2015 which affect our members, and will highlight their experiences in the workplace, specifically under the grounds of religion, gender and disability, as well as the current practice for the application of reasonable accommodation on the grounds of disability. Furthermore, consideration will be given to the impact of the inclusion of the ground of socio-economic discrimination under the equality grounds.

The INTO has held a longstanding and steadfast position in favour of promoting inclusivity and equality in Irish primary schools, supporting a variety of measures to achieve this. The ambition and determination for workplaces which are free from any form of discrimination must be central to the current review of the equality acts and the review must strive to ensure that existing equality legislation adequately addresses the promotion of equality and combats discrimination in schools as workplaces. By extension, the legislation should be accessible and provide for a broad scope under which to adequately address issues of discrimination arising in the workplace in order to equip employees with the necessary protection against any and all forms of workplace discrimination.

Current legislation provides for discrimination under nine grounds – that of gender, family status, sexual orientation, religion, age, disability, race, and membership of the travelling community. The INTO acknowledges the proposal in the consultation for the consideration of the scope of the current definitions of the nine existing equality grounds, including that of both gender and disability. The INTO further notes the consideration within the review for the addition of the ground of socio-economic discrimination. The INTO welcomes the consideration of broadening the scope of the protections afforded to employees against any barriers relative to their economic or social position.



Disability Ground

The Disability Act 2005 defines a disability as 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.*’ The definition of disability, as defined in Section 2 of the Employment Equality Acts, encompasses a broader definition, to include:

‘(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
(c) the malfunction, malformation or disfigurement of a part of a person's body,
(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour, and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person’.

The INTO submits that the statutory definition of disability is extremely broad and is wider than what is required by the EU Equal Treatment Framework Directive, which indicates the scope and potential of the concept of disability in recognising that alcoholism is a disability. Importantly, the Employment Equality Acts cover disabilities both past and present as well as disabilities imputed to a person and disabilities which may exist in the future. Though not an exhaustive list, examples of disabilities which have arisen in the case law to date are cerebral palsy, visual impairment, astrocytoma, wheelchair user, schizophrenia, brain haemorrhage, diplopia (double vision), various heart conditions, anxiety/depression, manic depression, multiple sclerosis, psoriatic arthritis, asthma, irritable bowel syndrome, respiratory tract and lung infections, ulcerative colitis, dyslexia, epilepsy, diabetes, curvature of the spine, quadriplegia, alcoholism, vertigo, HIV, ADHD and dyspraxia.

We do acknowledge that this definition has been criticised as being overly medically based, and therefore inconsistent with the social and rights-based definitions of disability contained in other legislation and the UN Convention on the Rights of Persons with Disabilities. The current definition makes it explicitly clear that a broad spectrum of factors is considered in determining a disability under the Act. However, we assert that the aim of any legislation in respect of disability should have the ability to capture a broad range of circumstances which may arise during the course of an employee’s career, to include both temporary and long-term disabilities, and must be capable of use in an adversarial process. In common with all unions representing workers in cases under the Act, we have had the experience of employers seeking to have claims dismissed on the grounds that condition is not covered. Any definition must be inclusive, and capable of being adjudicated upon in all relevant forums.



Reasonable Accommodation

On a practical level for our members, issues of contention in the past have related to reasonable accommodations when an employee may have a disability. While Section 16 of the Employment Equality Acts recognise that there is no legal obligation of an employer to retain an employee who even with provisions of reasonable accommodation is not able to perform the essential functions of the job, it requires an employer to take appropriate measures to facilitate persons with disabilities in accessing and participating in employment unless those measures would impose a disproportionate burden on the employer. While the INTO commends the significant changes which have been applied in the workplace in respect of the provisions for reasonable accommodations, much of the reasonable accommodation test remains the same, being one that is easy to state but difficult to apply. The Supreme Court in particular noted that the test *“is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee, as this would almost inevitably impose a disproportionate burden on an employer”*.

The 2019 case of *Daly v Nano Nagle School* confirmed that there is no mandatory duty to consult with an employee with a disability on their request for a reasonable accommodation in each and every case. Notwithstanding this, there is an existing expectation that *“a wise employer will provide meaningful participation in vindication of his or her duty under the Act”*.¹ It is our submission that the legislation ought to specifically refer to the employer’s obligation to consult with the employee on the proposed reasonable accommodation.

While not on a statutory footing, the Labour Court has stated an employer must also act without delay when it has been brought to its attention that reasonable accommodation is required for an employee with a disability to carry out their work. In light of the importance of fair procedures under Irish employment law, the INTO strongly supports this position in respect of the timely consideration of reasonable accommodation in workplace settings. The reality of the maxim of ‘justice delayed is justice denied’ can arise in circumstances where an employee’s employment becomes untenable due to an unreasonable delay by an employer to (i) consider and (ii) put in place reasonable accommodations for the affected employee. On this basis, the INTO calls for a proportionate timeframe in respect of applications for reasonable accommodation to be set out in statute in order to provide for a more accessible application of accommodations sought.

¹ *Nano Nagle School v Daly* [2019] IESC 63



Religion Ground

The INTO holds a longstanding and solidly held position in respect of the promotion of inclusion of diverse beliefs and none in schools and continues to be at the forefront in advocating for members of diverse beliefs, faiths and none. These views were reiterated by the INTO in its submission in response to the report of the Forum on Pluralism and Patronage in November, 2013. In this submission, the INTO identifies the increasing diversity of modern Irish society, asserting that it has grown “increasingly multi-cultural, multi-racial, multi-belief and multi-lingual”.² Furthermore, the INTO outlines the risks involved in the provision of Irish primary education which exclusively adheres to a particular belief and the impact of this on the positive promotion of socially and culturally inclusive schooling.

While the INTO welcomes the significantly reformed treatment of employees and prospective employees in educational institutions which are in receipt of finances precipitated by the amendment of the Equality (Miscellaneous Provisions) Act, 2015 which provides that religion is the sole ground on which an educational institution can positively discriminate. If religion is a genuine, legitimate and justified occupational requirement having regard to the institution’s ethos, the treatment by the educational institution will not constitute discrimination and an educational institution can take action to prevent the undermining of its religious ethos if it can be objectively justified by the institution’s aim and the action is appropriate, necessary and proportionate.

While the key issue in this legislation is the establishment of actual damage to the school ethos as opposed to perceived or potential damage, significant concerns remain among teachers whose personal life may not be fully congruent with the religious practice, doctrine or ethos of their school patron. These concerns centre on the potential of the religious patrons to make the case that a teacher’s personal life or professional practice is undermining or causing damage to the school ethos. Continuing to allow denominational schools to potentially prefer teachers of their own denomination or to retain the right to provide for favourable treatment on the ground of religion not of the school’s denomination would be completely counter to the objective of promoting inclusion or diverse beliefs and none and would unnecessarily perpetuate differences in the treatment of employees on the basis of their beliefs and of their entitlement to be employed in a particular school.

The INTO calls for an examination of the provisions of the Employment Equality Acts, which allows schools to discriminate against prospective and current employees on religious grounds and the INTO asserts the position that the consideration of the removal of Section 37.1 from the Employment Equality Acts in its entirety should form a central facet of this review. The provision for ‘favourable treatment on the religion ground’, as well as the provision for reasonable action to ‘prevent... a prospective employee from undermining the

² INTO, *INTO’s Response to the Consultation Paper on The role of denominational religion in the school admissions process and possible approaches for making changes*, (November 2017), 2



religious ethos' could potentially have an equally discriminatory impact on prospective employment opportunities for members. It is the INTO's clear view that Section 37.1 runs counter to the principles of inclusion and constitute legislative barriers to the equal treatment of employees. We therefore urge the review to prioritise the consideration of the negative and discriminatory impact of Section 37.1 in the promotion of inclusion in workplaces.



Gender Ground

The INTO acknowledges the scope for greater inclusiveness in the current definition of gender under the Employment Equality Acts. In line with the protection of equal employment opportunities, participation and treatment regardless of gender identity or sexual orientation, the INTO supports the provision of a broader and more inclusive definition of gender, to encompass a wide range of LGBTQ+ terminology and identities and to ensure that someone discriminated against on the basis of their gender identity is able to explicitly avail of the legislative protections. The scope for a broader definition, to include gender identity under the legislation would serve to assist schools in embedding a positive and inclusive space amongst employees. The INTO has long since supported the promotion of gender inclusive language and the provision for examples of best practice with regard to proactive inclusion of LGBTQ+ staff, as well as the provision for education which supports employees in challenging homophobic and transphobic bullying or attitudes amongst colleagues. In light of this, the INTO welcomes and supports the proposal for an increasingly inclusive definition of gender to encompass gender identity.

Menopause can undoubtedly be categorised as both an equality issue and an occupational health issue, in cases where work factors have the potential to impact significantly on a women's experience of this transitional period in their lives. There are a broad range of experiences put forward by our members in respect of symptoms and specific accommodations which may be required in the workplace in respect of women transitioning into the menopausal phase of life. The INTO support the position that the right to reasonable accommodation should be extended to conditions related to menopause, which can severely impact on women's ability to participate fully in the workplace. Of our more than 50,000 members, 85% are women. Notably, 30% of our members are aged between 40-50 and a further 10.5% are over 50. Therefore, a significant number of our members are either in the perimenopause or menopause phases of their lives.

Furthermore, although maternity and pregnancy-related discrimination are deemed to be protected in the context of gender, as part of this review consideration ought to be given to the ground of maternity and pregnancy-related discrimination as separate and distinct grounds for discrimination under the legislation, similar to protections afforded to employees in Northern Ireland. This would afford specific and stand-alone protections in respect of pregnancy and maternity related discrimination in the workplace, inclusive of recruitment, promotion and conditions of employment.



Additional Grounds for Discrimination – Socio-Economic Ground

The Equality (Miscellaneous Provisions) Bill 2017 introduces the ground of disadvantaged socio-economic status as a tenth ground for discrimination. The Bill defines 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 INTO supports the inclusion of this ground in the main and would welcome its impact in broadening the scope for prohibiting discrimination in accessing employment and with respect to conditions of employment.

Furthermore, the INTO strongly supports the inclusion of legislative measures which would contribute to the diversification of education and the teaching profession as a whole. In line with other EU countries, the addition of this ground would ensure that applications for employment and promotional opportunities would be assessed solely on the basis of skills, qualifications and ability rather than on social background or postal address. The INTO mirrors the Irish Human Rights and Equality Commission recommendation that the definition of socio-economic status is best developed by listing key practical and identifiable features of difference across social classes, to include family background such as inter-generational history of occupation, geographical location, home ownership, education background and economic situation. While the INTO has no difficulty with this particular definition, notably however, educational background has not specifically been included in the Bill.

In light of the fact that Ireland has a relatively homogenous profession, especially at primary school level and is less culturally and ethnically diverse than in other OECD countries (Hyland, 2012),³ with teachers being predominantly white, female, and of the majority ethnic and social class groupings (Keane & Heinz, 2015),⁴ the inclusion of educational background is particularly relevant in the context of the current structures of the Irish Education system and the provision of further and higher education programmes, where an employee has come to the profession later in life, utilising a less traditional route to qualification. In a time of teacher shortage in Ireland, a diverse profile within the teaching profession will serve to avoid limiting the pool of candidates who apply to initial teacher education. Conversely, more diversity in teaching would create a practical context in school communities whereby teachers could relate in a more tangible way to the socio-economic and ethnic backgrounds of the pupils they teach, offering a range of role models in which pupils can identify with.

³ Hyland, A. (2012). A Review of the Structure of Initial Teacher Education Provision in Ireland. Background Paper for the International Review Team. Commissioned by the Higher Education Authority. May 2012.

⁴ Keane, Elaine & Heinz, Manuela. (2015). Diversity in initial teacher education in Ireland: the socio-demographic backgrounds of postgraduate post-primary entrants in 2013 and 2014. *Irish Educational Studies*. 34. 1-21. 10.1080/03323315.2015.1067637



The INTO supports the addition of a socio-economic ground for discrimination. However, some concerns remain regarding the proposed definition with respect to the lack of precision and clarity of the characteristics set out, and it is recommended that an unambiguous and inclusive set of characteristics define this ground, similar to that of the existing nine grounds provided for under the legislation. In line with INTO's tradition of advocacy on behalf of both pupils and teachers affected or marginalised by socio-economic factors, in order to further diversify the teaching profession and promote equal access to the profession, the INTO calls for the inclusion of the education background under the definition of socio-economic grounds for discrimination.



Conclusion

Having regard to the above submissions and in order to promote the principle of equality in all aspects of education and the teaching profession and to enhance the appreciation of diversity in schools, the INTO supports the review in respect of the equality legislations. Most specifically, under the Employment Equality Acts 1998-2015, the INTO welcomes the scope of the review in broadening the definition of both gender and disability with respect to the further promotion of inclusivity in accessing employment or the provision for reasonable accommodations within places of employment.

In response to the possible impact of the additional grounds for discrimination, the INTO advocates for any additions which broaden the scope for the mitigation of discrimination in the workplace. Specifically, this review should consider the proposed addition of the socio-economic ground with the inclusion of a broad range of characteristics, particularly that of education. With respect to religion, as currently defined under the Acts, the INTO reiterates its long-held position that Section 37.1 should be removed in order for schools to fully promote inclusive and non-discriminatory access to promotion and recruitment for all employees.