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## **EUROPEAN SOCIAL CHARTER**

Comments by the Irish Human Rights and Equality  
Commission on the 19<sup>th</sup> National Report on the  
implementation of the European Social Charter

submitted by

**THE GOVERNMENT OF IRELAND**

Article 2, 4, 5, 6, 21, 22, 26, 28 and 29  
for the period 01/01/2017 - 31/12/2020

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# Comments on Ireland's 19<sup>th</sup> National Report on the implementation of the European Social Charter

Irish Human Rights and Equality Commission

July 2022



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

# Comments on Ireland's 19<sup>th</sup> National Report on the implementation of the European Social Charter

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## Introduction

The Irish Human Rights and Equality Commission (‘IHREC’) is Ireland’s ‘A’ Status National Human Rights Institution (‘NHRI’) and the National Equality Body. The Commission is also the Independent National Rapporteur on the Trafficking of Human Beings;<sup>1</sup> awaits statutory designation as the Independent Monitoring Mechanism under the UN Convention on the Rights of Persons with Disabilities (‘UNCRPD’)<sup>2</sup>; and will be assigned the role of the National Preventative Mechanism co-ordinating body under the Optional Protocol to the Convention against Torture (‘OPCAT’), pending ratification.<sup>3</sup>

In its *Strategy Statement 2022-2024*,<sup>4</sup> IHREC has committed to prioritising a number of thematic areas, including seeking greater economic equality in employment and income; access to justice; futureproofing, to respond to crises that threaten rights and equality; and encouraging, reporting on and enforcing the compliance of public bodies with the Public Sector Equality and Human Rights Duty. In particular, IHREC seeks to contribute to greater economic equality, including through improved equality of access to decent work, with a focus on groups facing high or systemic labour market discrimination and barriers.<sup>5</sup> Economic inequality impacts on everyone, but especially on marginalised groups. It also undermines the realisation of many fundamental human rights.

International research shows that much economic inequality is inherited over time and across generations.<sup>6</sup> Central Statistics Office (‘CSO’) data demonstrates how this is also true in Ireland, as economic inequality is exacerbated through inheritance.<sup>7</sup> However, tax on inherited wealth in Ireland is small, relative to that on wages and salaries and indirect taxes, such as VAT.

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<sup>1</sup> See Section 10 of this report.

<sup>2</sup> The [Assisted Decision-Making \(Capacity\) \(Amendment\) Bill 2021](#) will amend the *Irish Human Rights and Equality Act 2014* to provide a statutory basis for the Commission’s designation as the Independent Monitoring Mechanism under the UNCRPD.

<sup>3</sup> See Section 11 of this report.

<sup>4</sup> Irish Human Rights and Equality Commission, [Strategy Statement 2022-2024](#) (December 2021), p. 3.

<sup>5</sup> Irish Human Rights and Equality Commission, [Strategy Statement 2022-2024](#) (December 2021), p. 11.

<sup>6</sup> Piketty, T. 2014. *Capital in the Twenty-First Century*. Cambridge, MA: Belknap Press of Harvard University Press; World Inequality Report 2022 <https://wir2022.wid.world/>

<sup>7</sup> See: [cso.ie](https://cso.ie), [Household Finance and Consumption Survey 2018](#), Intergenerational Transfer of Wealth



We sometimes think that Ireland is more equal than our Western European neighbours, in wage or salary terms. However, recent Eurostat figures analysed by the Nevin Research Institute<sup>8</sup> show that this is not the case. The highest 10% of wage earners in Ireland earn four times what the lowest 10% earn, while the highest 10% of earners in Sweden earn just over twice what the lowest 10% earn. The differences between top and bottom earners are higher in Ireland than in all other high-income Western European countries, including the UK. While the UK, Sweden and Germany have reduced the wage differentials between the top and bottom since 2006, Ireland has not. As the ability to participate fully in society means participating on equal terms with others economically, reducing economic inequality needs to be a priority.

In February 2022, the Government of Ireland submitted its 19<sup>th</sup> National Report to the European Committee of Social Rights ('the Committee') on the implementation of the Revised European Social Charter ('the Charter').<sup>9</sup> This National Report is focused on the accepted provisions in thematic group three, 'Labour Rights' for the reference period 1 January 2017 to 31 December 2020. The purpose of this submission is to provide the Committee with additional information to support its examination of Ireland's 19<sup>th</sup> National Report.<sup>10</sup>

IHREC notes that the State has not accepted the following provisions of the Charter:

- Article 8(3) on the right of employed mothers who are nursing their children to be entitled to sufficient time off for the purpose;

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<sup>8</sup> See the Nevin Research Institute <https://www.nerinstitute.net/blog/wages-ireland-are-more-unequally-distributed-any-other-high-income-eu-country> Table 1

<sup>9</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021).

<sup>10</sup> IHREC has previously commented on Ireland's 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> National Reports on the implementation of the Revised European Social Charter. See IHREC, [Comments on Ireland's 14<sup>th</sup> National Report on the Implementation of the European Social Charter](#), (April 2017), IHREC, [Comments on Ireland's 15<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (May 2018), IHREC, [Comments on Ireland's 16<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (May 2019), IHREC, [Comments on Ireland's 17<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (June 2020) and IHREC, [Comments on Ireland's 18<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (June 2021).

- Article 21(a-b) on the right of workers to be informed about the economic and financial situation of their employer and to be consulted on decisions which could potentially affect the interests of workers, in particular decisions which could impact their employment;
- Article 27(1)(c) on the responsibility of the State to develop or promote services, public or private, in particular child day-care services and other childcare arrangements;
- Article 31(1-3) on the responsibility of the State to promote access to housing of an adequate standard, to prevent and reduce homelessness with a view to its gradual elimination, and to make the price of housing accessible to those without adequate resources.

IHREC previously recommended in its comments on the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> National Reports for the State to fully review the possibility of accepting all the provisions of the Charter.<sup>11</sup> In 2020, the Government of Ireland provided written information to the Committee in relation to its examination of the non-accepted provisions. The Committee considered that there were no major obstacles to acceptance by Ireland of Articles 8.3, 27.1 and 31.<sup>12</sup> IHREC is also of the view that the acceptance of these provisions is of particular importance as part of Ireland's human rights leadership during its Presidency of the Council of Europe's Committee of Ministers,<sup>13</sup> and the commitments made by the State to address the housing crisis, reform the childcare system and provide additional supports for breastfeeding.<sup>14</sup>

With regard to Article 21, the Committee concluded that the information provided was not detailed enough to assess the current situation. However, as the Irish authorities considered

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<sup>11</sup> IHREC, [Comments on Ireland's 16<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (May 2019), pp. 1-2, IHREC, [Comments on Ireland's 17<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (June 2020), pp. 2-3 and IHREC, [Comments on Ireland's 18<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (June 2021), pp. 4-5.

<sup>12</sup> European Committee on Social Rights, [Fourth Report on the Non-Accepted Provisions of the European Social Charter: Ireland](#) (7 September 2021), p. 3.

<sup>13</sup> On 20 May 2022, Ireland took over the rolling six-month Presidency of the Council of Europe's Committee of Ministers, at a meeting of foreign ministers held in Turin, Italy.

<sup>14</sup> For example see Department of the Taoiseach, [Programme for Government: Our Shared Future](#) (2020).

that the situation was in line with the requirements of the provision, it invited the State to accept Article 21. IHREC notes that the selective acceptance of the provisions of the Charter was only intended to be a temporary phenomenon and not a rule.<sup>15</sup>

The realisation of the rights protected by the Charter is of fundamental importance, in particular, in relation to the protection of structurally vulnerable groups. There does not appear to be any substantive reason why the State cannot now accept the non-accepted provisions.

**IHREC is concerned in relation to the ongoing failure by the State to accept all of the provisions under the Charter, in particular, in circumstances where there does not appear to be any substantive reason for the non-acceptance of the remaining provisions.**

**IHREC recommends that the State accepts all of the provisions under the Charter.**

There has been a repeated failure to properly protect economic, social and cultural rights in Irish domestic law, and to honour fully Ireland's international commitments in this respect. The international and transnational rights instruments to which Ireland is a party, including the European Social Charter, cannot fully protect Ireland's core economic, social and cultural rights unless they are incorporated into domestic law.<sup>16</sup> This is because of Ireland's tradition of dualism, where international instruments do not have domestic legal effect on ratification, but require additional implementation.<sup>17</sup> Therefore, the State must act proactively in the implementation and the recognition of economic, social and cultural rights agreed in international and transnational rights instruments, to ensure that all people, including structurally vulnerable groups, enjoy and are protected by those rights in practice.

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<sup>15</sup> European Committee on Social Rights, [Fourth Report on the Non-Accepted Provisions of the European Social Charter: Ireland](#) (7 September 2021), p. 3.

<sup>16</sup> For example, the UN Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights have not been incorporated into domestic law. While the European Convention on Human Rights has been incorporated at sub-constitutional level, IHREC is of the view that this approach should not be favoured as the primary way to protect economic, social and cultural rights.

<sup>17</sup> Article 29.6 of the [Constitution](#) provides that 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.

IHREC is of the view that economic, social and cultural rights must be protected in the Irish legal order, and that the best way to effectively ensure protection of these rights in practice is the incorporation of these rights at a constitutional level. It is crucial that they are included in the core rights provisions of the Irish Constitution, as standalone, justiciable rights, and backed by appropriate supplementary statutory protections and policy measures. This would ensure that these rights are taken seriously as core rights concerns, and not treated as lesser than other rights protections.<sup>18</sup>

**IHREC recommends that the State enshrine economic, social and cultural rights in the Constitution of Ireland.<sup>19</sup>**

The Covid-19 pandemic has exposed and increased inequalities in Ireland by disproportionately affecting structurally vulnerable groups,<sup>20</sup> and has created economic challenges and uncertainty.<sup>21</sup> In particular, the pandemic exposed inequalities in the labour market and differential risk of exposure to the virus among particular sectors and groups of workers.<sup>22</sup> New divisions in the labour market emerged, between those who were in a position to work from home, and those who were put on temporary layoff or lost their job with considerable job insecurity.<sup>23</sup> Some employments were also defined as ‘essential’, including healthcare workers, transport operatives, and retail workers.

The Covid-19 pandemic has dramatically affected labour rights, with remote or flexible working becoming common across many sectors of employment.<sup>24</sup> Due to the nature of the

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<sup>18</sup> The position of IHREC will be set out in further detail in a forthcoming policy statement on the incorporation of economic, social and cultural rights into the Irish Constitution.

<sup>19</sup> IHREC has made this recommendation in its previous reports to the Committee. See for example, IHREC, [Comments on Ireland's 17<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (June 2020).

<sup>20</sup> IHREC defines a structurally vulnerable person as someone who is particularly vulnerable to violations of their civil and political rights due to political, economic, social and cultural structures. Instead of focusing on the personal characteristics of individuals and groups and viewing them as lacking agency, ‘structural vulnerability’ refers to the structures in place which render certain sectors of the population particularly vulnerable to human rights abuses.

<sup>21</sup> C. Casey, O. Doyle, D. Kenny and D. Lyons [Ireland's Emergency Powers During the COVID-19 Pandemic](#) (February 2021) and Conefrey, McNerney, O'Reilly, Walsh, [‘Easing the Pain? Estimating the Economic Impact of Domestic and Global Policy Responses to the Pandemic’](#), *Economic and Social Review*, (2021) 52(2) 161.

<sup>22</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 17.

<sup>23</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 126.

<sup>24</sup> Eurofound, *Ireland: Working life in the Covid-19 pandemic 2021*.

pandemic, this change occurred rapidly, with no advance planning or preparation. New and previously unexperienced employment issues arose, with specific health and safety risks, including unsuitable workplace ergonomics and psychosocial stress factors such as isolation, electronic surveillance and ‘hyperconnected’ working methods.<sup>25</sup>

IHREC notes with concern the absence of human rights and equality consideration in Ireland’s National Recovery and Resilience Plan.<sup>26</sup> The societal challenges caused by the pandemic continue to impact structurally vulnerable groups as we begin to rebuild. This impact must be assessed, and the State should futureproof its human rights commitments as it faces into future crises, including the climate crisis which threatens to have an unequal impact on society.

**IHREC recommends that the State conducts research on the impact of the pandemic on labour rights, to assess permanent changes to the labour market and to assist in futureproofing for future crises. Disaggregated data is required to assess the pandemic’s differential impact on groups of workers and sectors in the Irish labour market.**

**IHREC recommends that the State futureproof its human rights commitments against future crises, having particular regard to the position of structurally vulnerable groups.**

**IHREC recommends that the State undertakes a human-rights and gender responsive revision<sup>27</sup> of the National Recovery and Resilience Plan’s Priority Three: Social and Economic Recovery and Job Creation<sup>28</sup> and the associated reforms in order to strengthen European Social Charter labour rights; and set out how it will monitor implementation and impact.**

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<sup>25</sup> European Committee of Social Rights, [Statement on COVID-19 and social rights](#), 24 March 2021, at p. 4; Geary, J. and Belizon, M., [Working at home and employee well-being during the Covid-19 pandemic: First findings from the UCD Working in Ireland Survey, 2021](#).

<sup>26</sup> Through its National Recovery and Resilience Plan, the Irish Government has secured a significant investment from the European Commission to mitigate the public health, economic and social crisis caused by the Covid-19 pandemic. However, the Irish Plan does not specifically address human rights or equality concerns. See Department of the Taoiseach, [The National Recovery and Resilience Plan](#) (2021).

<sup>27</sup> OHCHR, [A human rights-based approach to COVID-19 economic response and recovery](#) (March 2022).

<sup>28</sup> Investments valued at €181 million.

## Article 2: The right to just conditions of work

### Article 2.1 – The right to disconnect

IHREC notes the risks identified by the Committee about teleworking and working from home practices, which often lead to *de facto* longer working hours, due to a blurring of the boundaries between work and personal life, and that consideration must be given to ensuring that home-based workers can disconnect from the work environment.<sup>29</sup> Remote working became common and normalised across many employment sectors during the pandemic.<sup>30</sup> As noted above, this change occurred rapidly, with no advance planning or preparation and employees were exposed to new health and safety risks.<sup>31</sup>

Between March 2020 and May 2021, 23.4% of the Irish workforce worked exclusively from home; 9.5% worked the majority of the period at home; 11% worked 4-8 months from home; 6% worked 1-3 months from home; and 4% worked for less than a month from home.<sup>32</sup> There was an intensification of employees' effort levels, which was associated with an increase in employees' stress levels, an inability to disconnect from work and diminishing health and wellbeing. This was particularly pronounced among female employees. 43% of women reported an impairment in their mental health and wellbeing, in comparison to approximately a third of men. Women were also more likely to report that their physical health had deteriorated, as well as their relationship with those with whom they lived.<sup>33</sup>

In its National Report, the State has described the new Code of Practice for Employers and Employees on the Right to Disconnect which came into effect on 1 April 2021.<sup>34</sup> Failure to

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<sup>29</sup> European Committee of Social Rights, [Statement on COVID-19 and social rights](#), 24 March 2021, at p. 3. As noted in the introduction, employees were exposed unsuitable workplace ergonomics and psychosocial stress factors such as isolation, electronic surveillance and 'hyperconnected' working methods.

<sup>30</sup> See figures in Geary, J. and Belizon, M., [Working at home and employee well-being during the Covid-19 pandemic: First findings from the UCD Working in Ireland Survey, 2021](#), at p. 8.

<sup>31</sup> European Committee of Social Rights, [Statement on COVID-19 and social rights](#), 24 March 2021, at p. 4.

<sup>32</sup> Geary, J. and Belizon, M., [Working at home and employee well-being during the Covid-19 pandemic: First findings from the UCD Working in Ireland Survey, 2021](#).

<sup>33</sup> Geary, J. and Belizon, M., [Working at home and employee well-being during the Covid-19 pandemic: First findings from the UCD Working in Ireland Survey, 2021](#), pp. 27-28.

<sup>34</sup> Workplace Relations Commission, [Code of Practice for Employers and Employees on the Right to Disconnect](#), in in Government of Ireland, [19th National Report on the Implementation of the European Social Charter](#) (31 December 2021), pp.14-15, 104-105.

follow the Code is not an offence in itself, but the Code is admissible in evidence before the Workplace Relations Commission,<sup>35</sup> the Labour Court or the courts, and if any provision appears to be relevant to any question arising in the proceedings, it shall be taken into account in determining the question.<sup>36</sup> The Code defines the right to disconnect as being an employee's right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails, telephone calls or other messages, outside normal working hours. It identifies three main elements:

- The right of an employee not to routinely perform work outside normal working hours;
- The right not to be penalised for refusing to attend work outside of normal working hours; and
- The duty to respect another person's right to disconnect (e.g., by not routinely emailing or calling outside normal working hours).

**IHREC is concerned that recent protections relating to the right to disconnect were not in place on the outbreak of the Covid-19 pandemic, and during the reference period of this reporting cycle.**

**IHREC is further concerned that the right to disconnect is not sufficiently robust and requires stronger enforcement powers and legislative protections in order to adequately protect employees, particularly women.**

### Article 2.1 – Overtime work

IHREC notes that the case law of the Committee provides that working overtime must not simply be left to the discretion of the employer or the employee and the reasons for

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<sup>35</sup> The Workplace Relations Commission is a statutory adjudication body which lies outside of the traditional courts structure which hears and adjudicates on the majority of employment complaints. A party may appeal a decision of the Workplace Relations Commission to the Labour Court, which is also a statutory adjudicative body outside the traditional courts system. However, the Irish Supreme Court has recently held that these bodies are involved in the administration of justice (*Zalewski v. Adjudication Officer* [2021] IESC 24).

<sup>36</sup> Section 20 of the *Workplace Relations Act 2015*.

overtime work and its duration must be subject to regulation.<sup>37</sup> There is no legal right to additional remuneration for overtime in Ireland (discussed further under Article 4 below) and the requirement to work overtime is determined by contract, not by statute.

While the *Organisation of Working Time Act 1997* ('1997 Act') sets the maximum average weekly working hours at 48 hours per week,<sup>38</sup> that figure is calculated over a reference period of 4 or 6 months. The 1997 Act also provides for particular rest periods which may assist in protecting an employee from some abuses of overtime in a particular week,<sup>39</sup> but an employee may not be adequately protected from unreasonable demands by an employer, for example, being required to work overtime at late notice.

**IHREC is concerned that the regulation of overtime work is not in conformity with Article 2.1 of the Charter and measures are required to protect workers from abuses of overtime and unreasonable demands.**

#### **Article 2.4 – Lack of appropriate compensation measures for exposure to occupational health risks**

IHREC recalls the Committee's finding that Ireland was not in conformity with Article 2.4 on the ground that it had not been established that workers exposed to occupational health risks, despite the existing risk elimination policy, were entitled to appropriate compensation measures.<sup>40</sup> IHREC notes the State's response in its National Report,<sup>41</sup> explaining that occupational health and safety legislation does not venture into the area of compensation for acceptance of exposure to risk. The State's position remains that it is best to tackle occupational health and safety problems by a process of hazard identification, risk assessment and consequently risk management, rather than compensate workers either financially or with extra leave for undertaking dangerous work.

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<sup>37</sup> Digest of the Case Law of the European Committee of Social Rights, p. 65.

<sup>38</sup> Section 15 of the *Organisation of Working Time Act 1997*.

<sup>39</sup> Sections 11 and 13 of the *Organisation of Working Time Act 1997*.

<sup>40</sup> European Committee of Social Rights, [Conclusions 2014 - Ireland – Article 2.4](#).

<sup>41</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), pp. 20-21.



While State Parties enjoy a certain margin of discretion to determine the activities and risks concerned, they must at least consider sectors and occupations that are manifestly dangerous and unhealthy.<sup>42</sup> IHREC is concerned that the State does not recognise the importance of the role of compensation in promoting health and safety in the workplace. The compensation is not a windfall payment or benefit for risk taking; it is compensation in the form of reduced working hours and additional paid holidays to provide workers sufficient and regular time to recover from the associated stress and fatigue.<sup>43</sup> It promotes occupational health and safety by allowing workers an additional period of time to rest, which assists employees in being fit and vigilant for their work. This is good hazard identification, risk assessment and risk management, and would align well with the State's stated position.

**IHREC is concerned that the State remains in non-conformity with Article 2.4 of the Charter and must act to recognise the role of compensation (financial or extra leave) in promoting health and safety in the workplace, particularly in sectors and occupations that are manifestly dangerous and unhealthy.**

#### Article 2.4 – Impact of the pandemic on essential and frontline workers

IHREC recalls that the requirement to eliminate or reduce risks in inherently dangerous or unhealthy occupations under Article 2.4 is closely linked to Article 3 of the Charter (right to safe and healthy work conditions).<sup>44</sup>

On the outbreak of the Covid-19 pandemic in Ireland, certain workers were designated as 'essential workers', and were permitted to continue working, in circumstances where other employees were required to stop working or to work from home. These employees included healthcare workers, retail workers, members of An Garda Síochána (the Irish police force), prison guards and transport operatives.<sup>45</sup>

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<sup>42</sup> Digest of the Case Law of the European Committee of Social Rights, p. 68.

<sup>43</sup> Digest of the Case Law of the European Committee of Social Rights, p. 68.

<sup>44</sup> Digest of the Case Law of the European Committee of Social Rights, p. 68.

<sup>45</sup> Redmond, P., McGuinness, S., [Essential Workers during the Covid-19 pandemic](#) (May 2020), ESRI Survey and Statistical Report Series No. 85.

The health and safety of those working in essential and frontline services was particularly impacted during the pandemic, with health sector workers more likely to become infected with Covid-19.<sup>46</sup> Women and certain groups (those of Asian and African origin) were more likely to work in the health sector and, therefore, were more exposed to risk of infection.<sup>47</sup> It is also suggested that the Covid-19 pandemic may have exacerbated already high levels of work stress in the health sector.<sup>48</sup>

There was also a high incidence of Covid-19 in the meat processing sector, which is dominated by low-wage migrant labour.<sup>49</sup> The pandemic exacerbated the poor working conditions in the meat sector.<sup>50</sup> It is estimated that approximately 60% of workers employed in meat production are non-Irish nationals, mostly from Eastern European and non-EU countries.<sup>51</sup> Poor working conditions, including pressure to work at speed on production lines, and the lack of sick pay were found to be typical in a recent survey of migrant workers in the meat sector. Out of 151 respondents, 60% of workers said that they had been injured while working at a meat plant.<sup>52</sup>

The Special Committee on Covid-19 Response<sup>53</sup> noted that meat plants were a significant ‘hotspot’ for Covid-19 infections, and that while meat processing is highly regulated regarding food safety and hygiene, the same level of regulation and protection was not extended to workers and their conditions of employment. The Committee further noted that the Health and Safety Authority was slow to begin inspections of meat plants, and

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<sup>46</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 127.

<sup>47</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 126.

<sup>48</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), pp. 126-127.

<sup>49</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 127. See also European Federation of Food Agriculture and Tourism Trade Unions, [Covid-19 outbreaks in slaughterhouses and meat processing plants: State of affairs and proposals for policy action at EU level](#) (30 June 2022).

<sup>50</sup> See SIPTU, [Ireland’s Meat Processing Sector: From a low-road to a sustainable high-road strategy](#) (February 2021) for a detailed discussion of the poor working conditions in the meat processing sector.

<sup>51</sup> Migrant Rights Centre Ireland, [Working to the Bone: Experiences of Migrant Workers in the Meat Sector in Ireland](#) (November 2020), p. 4. See also note that this figure will most likely not include undocumented workers.

<sup>52</sup> Migrant Rights Centre Ireland, [Working to the Bone: Experiences of Migrant Workers in the Meat Sector in Ireland](#) (November 2020).

<sup>53</sup> [Special Committee on Covid-19 Response, Final Report](#) (October 2020).

when it did, a high proportion of inspections were preannounced. Workers in the meat processing industry were also noted as being particularly vulnerable to poor working conditions as a result of the work permit regime.<sup>54</sup>

**IHREC is concerned that essential workers were not sufficiently protected from the impact of Covid-19 during the reference period, and that pre-existing poor working conditions were exacerbated by the pandemic.**

**IHREC is concerned that the State should embed learning from the impact of Covid-19 through measures to eliminate or reduce risks in inherently dangerous or unhealthy occupations, particularly those with structurally vulnerable employees such as low-paid women and migrants.**

#### Article 2.5 – Working consecutive days

IHREC recalls the Committee’s 2014 finding of non-conformity in respect of Article 2.5 on the ground that there are inadequate safeguards to prevent employees having to work for more than twelve consecutive days without a rest period.<sup>55</sup> This issue has not been addressed and the Code of Practice on Compensatory Rest continues to permit derogation by collective agreement.<sup>56</sup>

**IHREC is concerned that Ireland remains in non-conformity with Article 2.5 in relation to this derogation and that the State needs to act to provide adequate safeguards to prevent employees having to work for more than twelve consecutive days without a rest period.**

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<sup>54</sup> [Special Committee on Covid-19 Response, Final Report](#) (October 2020), p. 18.

<sup>55</sup> European Committee of Social Rights, [Conclusions 2014 - Ireland – Article 2.5](#).

<sup>56</sup> See Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), p. 22.

## Article 4: The right to a fair remuneration

### Equality of access to decent work

Under Article 4.1, Parties undertake to recognise the right of workers to a remuneration that is sufficient to give them and their families a decent standard of living. Economic inequality affects all structurally vulnerable groups and prevents the realisation of many fundamental rights. Reducing this gap is crucial for social cohesion, social inclusion and improving the quality of life for those experiencing or at the risk of poverty.<sup>57</sup> Improved equality of access to decent work and fair remuneration, in particular for groups facing high or systemic labour market barriers, is central to the improvement of greater economic equality.<sup>58</sup>

In its *Strategy Statement 2022-2024*, IHREC seeks to promote the principle and practice of a living wage and adequate welfare incomes, including by addressing legislative and policy gaps for the establishment of a living wage.<sup>59</sup> A living wage is a measure of income that allows an employee a basic but socially acceptable standard of living, and tends to be significantly higher than a minimum wage.<sup>60</sup> The establishment of a living wage ensures that people are able to live with dignity and in economic security.<sup>61</sup>

IHREC notes the comments in the National Report in relation to the development of a living wage.<sup>62</sup> It further notes the recent developments in this regard, including the recommendation by the Low Pay Commission to set a fixed threshold approach of

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<sup>57</sup> The Central Statistics Office, [Survey on Income and Living Conditions \(SILC\) 2021](#), records that the at risk poverty rate for the calendar year 2020 was 11.6%. See also NERI commentary on SILC 2020 – Nugent C, [The economy grows, employment increases and 143,000 more individuals \(47,000 workers\) can't afford the basics](#) (14 September 2020).

<sup>58</sup> Irish Human Rights and Equality Commission, [Strategy Statement 2022-2024](#) (December 2021), at p. 11.

<sup>59</sup> Irish Human Rights and Equality Commission, [Strategy Statement 2022-2024](#) (December 2021), p. 11.

<sup>60</sup> Eurofound, [Concept and practice of a living wage](#), Publications Office of the European Union (2018), p. 13; Low Pay Commission, [Living Wage Report](#) (March 2022), p. 4.

<sup>61</sup> See Nugent C, *Hourly Earnings Inequality in high -income EU countries and the UK: Evidence from the Structure of Earnings Survey*, NERI Report Series No. 7, (June 2021) for an analysis of Irish wages which suggests that Irish wages are more unequally distributed than in any other high-income European country when comparing hourly earnings at the 10<sup>th</sup> and 90<sup>th</sup> percentiles.

<sup>62</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), p. 39-42.

calculating the living wage at 60% of the median hourly wage in the economy.<sup>63</sup> IHREC also notes that the Government has opened a public consultation on this issue.<sup>64</sup>

**IHREC is concerned that there were legislative and policy gaps in relation to the right to a living wage during the reference period, despite the State’s obligations to ensure the right of workers to a remuneration that will give them and their families a decent standard of living.**

In Ireland, specific groups have a significantly higher risk of low pay. Young people, migrants from Eastern Europe, lone parents, and those with low educational attainment are at significantly higher risk of low hourly wages and low weekly work.<sup>65</sup> Women have lower weekly pay than men, but not low hourly pay.<sup>66</sup> In a national longitudinal study, 58% of 22 year olds surveyed had been in full-time or part-time employment when the pandemic struck. Almost half of those who were put on temporary layoff, or who lost their job, experienced a long-term impact on their employment quality and pay levels for the following years.<sup>67</sup>

The Special Committee on Covid-19 Response noted that the transmission of Covid-19 in congregated settings such as nursing homes, direct provision centres and meat plants was facilitated by the fact that workers felt compelled to attend for duty, even though they were potential carriers of the virus, due to the absence of income support if they reported sick to their employer. It further noted that some migrant workers, because of the low pay in these

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<sup>63</sup> Low Pay Commission, *Living Wage Report* (March 2022), p. 4. See also Doris, A, O’Neill, D, Sweetman, O, *Research on the Introduction of a Living Wage in Ireland, Final Report*, Department of Economics, Maynooth University (31 March 2022).

<sup>64</sup> <https://enterprise.gov.ie/en/Consultations/Public-consultation-on-phase-in-of-living-wage.html>.

<sup>65</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, *Monitoring Decent Work in Ireland* (IHREC and ESRI) (2021), pp. x, 68-75.

<sup>66</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, *Monitoring Decent Work in Ireland* (IHREC and ESRI) (2021), p. 74.

<sup>67</sup> See National Longitudinal Study of Children, Growing Up in Ireland, *Growing Up in Ireland: Key Findings: Special Covid-19 Survey*, p. 19. See also Nugent, C., *Trends in the Irish Labour market – Special Focus: The impact of the coronavirus (so far)*, NERI Report Series No. 9.

industries, were forced to cohabitate with fellow workers in overcrowded living conditions and thus, could not self-isolate.<sup>68</sup>

The European Commission has identified that over 15% of women are inactive in the labour market. 10% of women are working part-time in Ireland, because of caring responsibilities, and 40% of those women report a lack of suitable care services.<sup>69</sup> During the early stages of the pandemic, families with young children faced particular difficulties managing work with the closure of schools and childcare facilities. People with caring responsibilities experienced an abrupt withdrawal of health care, social care and educational supports, including closure of day services and the reduction and removal of home care.<sup>70</sup> 75% of carers who juggled caring with full-time employment provided over 50 hours of care per week.<sup>71</sup> In a study carried out during the pandemic, it was found that just over half of all essential employees had children.<sup>72</sup> The majority of essential workers (almost 70%) were female. Of the essential workers who had a partner and children, 80% had a partner that also worked, and approximately 20% of those partners were also essential employees. The study noted that a substantial proportion of essential workers were likely to have significant childcare needs that intensified as a result of school closures.<sup>73</sup> IHREC notes the research evidence that women had to reduce their working hours or take a break from paid employment during the pandemic, as well as changes in the position of women in their organisations, due to their primary involvement in home-schooling, child and eldercare.<sup>74</sup>

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<sup>68</sup> The Committee recommended the provision of a statutory sick pay scheme for low paid workers and to make Covid-19 a notifiable disease under health and safety regulations: [Special Committee on Covid-19 Response, Final Report](#) (October 2020), pp. 15-16.

<sup>69</sup> IHREC, [Submission to the Citizens Assembly](#) (March 2020).

<sup>70</sup> Phelan, Daly, Byrne, Dunne, *'Exploring Experiences of Carers in the Covid 19 pandemic'*, School of Nursing and Midwifery, Trinity College Dublin (2022). TASC Policy Brief Series, [The Ireland We Want: The home care sector post Covid-19](#), (June 2020).

<sup>71</sup> Family Carers Ireland, *'The State of Caring'*, (2022).

<sup>72</sup> Redmond, P. and McGuinness, S., [Essential Employees During The Covid-19 Crisis](#), Dublin: Economic and Social Research Institute (April 2020).

<sup>73</sup> Redmond, P. and McGuinness, S., [Essential Employees During The Covid-19 Crisis](#), Dublin: Economic and Social Research Institute (April 2020).

<sup>74</sup> U. Barry, [The Care Economy, Covid-19 Recovery and Gender Equality – A Summary Report](#) (2021) and IBEC, [Women and Covid-19](#) (2021). Of the 271 respondents in the latter survey, almost half of respondents (48%) said that more women than men had requested for changes to their working patterns to facilitate caring responsibilities. The survey also shows that 31% of respondents said that more of their female employees than their male counterparts had requested unpaid leave to facilitate caring responsibilities over the past 12 months. 20% of organisations had noticed a change in the position of women in their organisations over the

**IHREC is concerned that specific groups of workers are at particular risk of violations of their right to fair remuneration, and that existing low pay conditions, including for migrant workers, exacerbated the impact of the pandemic.**

**IHREC is concerned that in the absence of a National Action Plan for Care, and recognition of the economic and social value of care as a form of work, family carers, and particularly women, face barriers in securing remuneration that will provide them with a decent standard of living.**

### **‘Zero-hour’ contracts, the platform/gig economy and precarious employment**

IHREC notes that precarious and low-paid workers, including those in the gig economy, remain at particular risk of long working hours and inadequate rest periods in order to make a decent living.<sup>75</sup> These workers are particularly vulnerable to crises such as the Covid-19 pandemic, and preparatory measures and protections must be implemented in order to protect them.<sup>76</sup>

In its National Report, the State describes the legislation which has amended the *Organisation of Working Time Act 1997* to prohibit zero-hour contracts.<sup>77</sup> This amendment does not cover all categories of precarious work. For example, it may not apply where the expectation of work is based solely on the employee having done work of a casual nature on prior occasions, even if the number of those occasions or other circumstances are such to give rise to a reasonable expectation that they would be required by the employer to do work for the employer.<sup>78</sup> The legislation does not apply to work done in emergency circumstances, or short-term relief work to cover routine absences for the employer.<sup>79</sup> The legislation applies to employees, but not independent contractors. There is therefore a

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past 12 months, citing changes such as increased pressure and stress for women, childcare responsibilities, and requests from women for worktime flexibility to accommodate childcare and/or eldercare.

<sup>75</sup> European Commission on Social Rights, *Question on Group 3 provisions (Conclusions 2022) Labour Rights*, p. 2.

<sup>76</sup> Irish Human Rights and Equality Commission, *Strategy Statement 2022-2024* (December 2021), at p. 17.

<sup>77</sup> Government of Ireland, *19<sup>th</sup> National Report on the Implementation of the European Social Charter* (31 December 2021), at pp. 10-11.

<sup>78</sup> Section 18(1)(c) of the *Organisation of Working Time Act 1997*, as amended by s. 15 of the *Employment (Miscellaneous Provisions) Act 2018*.

<sup>79</sup> Section 18(3) of the *Organisation of Working Time Act 1997*.

significant gap between the prohibition of zero-hour employment contracts and the protection of all workers from the risks of zero-hour work practices. Furthermore, while the legislation has introduced some improvements to zero-hour contracts, including by requiring employers to make certain minimum payments where an employee is not required to work, employees may continue to experience instability of income and may find it difficult to engage in financial planning. The unpredictability of hours and income are major challenges to employees, and can impact on stress levels, access to mortgages<sup>80</sup> and the restricted ability to organise family life, including childcare.<sup>81</sup>

IHREC notes that there is a substantial data gap in capturing workers in the informal economy, in platform employment and those at the margins of the labour market, who are potentially the most vulnerable, as well as challenges in measuring unpaid work.<sup>82</sup> However, recent IHREC-supported research has found evidence that younger people report higher rates of temporary work, and women report slightly higher levels of temporary work than men.<sup>83</sup>

**IHREC is concerned about the lack of adequate protections for employees in precarious employment, zero-hour contracts and workers in the platform or gig economy, including measures to ensure their right to a fair remuneration.**

### Bogus or false self-employment

The issue of bogus or false self-employment is of significance in this context. It arises where a worker who is working as an employee with a contract of service, is treated as though they are under a self-employed independent contract for services. Where a worker is misclassified in this way, they are deprived of important employment rights and protections,

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<sup>80</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 25.

<sup>81</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 26.

<sup>82</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), pp. xi, 123.

<sup>83</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 123.



and certain social welfare benefits. It affects Pay Related Social Insurance Fund payments ('PRSI') and the treatment of tax.

In Ireland, there are three different statutory bodies which determine employment status:<sup>84</sup> the Department of Social Protection (for PRSI purposes), the Office of the Revenue Commissioners (for the purposes of tax treatment), and the Workplace Relations Commission (for the purpose of determining employment rights). The decisions of these bodies are not binding on one another.

While this issue has been the subject of ongoing discussion,<sup>85</sup> other than the introduction of a general code of practice on the question of employment status,<sup>86</sup> little has been done to take proactive measures to protect employees from bogus or false self-employment.

**IHREC is concerned that legislative and policy gaps result in employees not being adequately protected from bogus or false self-employment.**

### Different rates of remuneration for disabled employees

IHREC notes that section 35(1) of the *Employment Equality Act 1998* allows employers to provide different rates of remuneration for disabled employees. While IHREC recognises that this may have been introduced to provide an element of support for sheltered or supported employment, it is of the view that this is a major qualification on the principle of equal pay for disabled persons and, in fact, perpetuates inequality.<sup>87</sup>

IHREC also notes that the proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union,<sup>88</sup> recognises that disabled people have a higher probability of being minimum wage or low wage earners.

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<sup>84</sup> For further detail on this issue, see Government of Ireland, [Code of Practice on Determining Employment Status](#), (July 2021).

<sup>85</sup> See for example, the two Bills which have lapsed on this issue: [Protection of Employment \(Measures to Counter False Self-Employment\) Bill 2018](#) and [Prohibition of Bogus Self-Employment Bill 2018](#).

<sup>86</sup> Government of Ireland, [Code of Practice on Determining Employment Status](#), (July 2021).

<sup>87</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021, at p. 39.

<sup>88</sup> [Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union](#) COM(2020) 682, p. 17.

**IHREC is concerned that the provision for different rates of pay for disabled employees is discriminatory, and amounts to inadequate legal protection for their right to a fair remuneration.**

### Article 4.1 – Reduced minimum wage

IHREC recalls the Committee’s 2014 finding of non-conformity in respect of Article 4.1 on the ground that the reduced national minimum wage, applicable to adult workers on their first employment or following a course of studies, was not sufficient to ensure a decent standard of living.<sup>89</sup> In its National Report, the State has provided a response and has described some of the amendments to the relevant legislation.<sup>90</sup>

While the provision in the legislation in relation to trainees has been repealed,<sup>91</sup> the relevant Minister still has the power to prescribe a percentage of the national minimum wage to employees who are under the age of 18 years, who are 18 years of age, and who are 19 years of age.<sup>92</sup> The Minister is required to have regard to the labour market, the costs of employment and levels of youth employment in prescribing percentages to those workers.<sup>93</sup> The Minister has exercised this power and has prescribed that the national minimum hourly rate of pay is:

- 70% of the national minimum hourly rate of pay for employees under 18 years of age;
- 80% of the national minimum hourly rate of pay for employees who are 18 years of age;

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<sup>89</sup> European Committee of Social Rights, [Conclusions 2014 - Ireland – Article 4.1](#).

<sup>90</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), pp. 50 *et seq.*

<sup>91</sup> Section 16 of the National Minimum Wage Act 2000, repealed by s. 3(b) of the Employment (Miscellaneous Provisions) Act 2018.

<sup>92</sup> Section 15(1) of the National Minimum Wage Act 2000, as amended.

<sup>93</sup> Section 15(3) of the National Minimum Wage Act 2000.

- 90% of the national minimum hourly rate of pay for employees who are 19 years of age.<sup>94</sup>

The percentages prescribed by the Minister for Employment Affairs and Social Protection are the minimum allowed by the legislation.<sup>95</sup>

It should also be noted that a number of persons remain excluded from the protections of the *National Minimum Wage Act 2000*, including family members of the employer, and apprentices within the meaning of or under the *Industrial Training Act 1967* or the *Labour Services Act 1987*.<sup>96</sup>

**IHREC is concerned that the State remains in non-conformity with Article 4.1 as the reduced national minimum wage applicable to adult workers on their first employment or following a course of studies is not sufficient to ensure a decent standard of living and has a disproportionate impact on young people entering the workforce.**

#### Article 4.2 – Right to an increased remuneration for overtime work

In its 2014 and 2016 Conclusions, the Committee found that Ireland was in non-conformity with the right to an increased remuneration for overtime being guaranteed to all workers.<sup>97</sup>

There remains no statutory right to increased remuneration for overtime work. Employees are reliant on the terms of their contracts in this regard and there is no guarantee for remuneration for overtime.

**IHREC is concerned that the State remains in non-conformity with Article 4.2 as there is no guarantee for workers to a right to increased remuneration for overtime work.**

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<sup>94</sup> The [National Minimum Wage \(Prescription of percentages of hourly rates of pay\) Order 2019](#) (S.I. No. 72 of 2019).

<sup>95</sup> Section 15(4) of the National Minimum Wage Act 2000.

<sup>96</sup> Section 5(1) of the National Minimum Wage Act 2000.

<sup>97</sup> European Committee of Social Rights, [Conclusions 2014 – Ireland – Article 4-2](#); [Conclusions 2016 – Ireland – Article 4-2](#).

## Article 4.3 - Update on the gender pay gap

The World Economic Forum ranked Ireland 56<sup>th</sup> globally in 2020 for its wage and income gender gaps,<sup>98</sup> despite finding that Ireland had been on a positive trend for education and economic participation and opportunity.<sup>99</sup> In 2018, the gender pay gap in Ireland was reported to be at 13.9 per cent.<sup>100</sup> The *Gender Pay Gap Information Act 2021*<sup>101</sup> has recently been introduced into Irish law.<sup>102</sup> It has introduced regulations which require employers to publish information in relation to the remuneration of their employees for the purpose of showing whether there are differences referable to gender.<sup>103</sup>

**While IHREC welcomes this development which recognises the right of men and women to equal pay for work of equal value under Article 4.3, it is concerned that this legislation's delayed commencement meant that it was not in place during the reference period.**

IHREC also notes that it recently prepared a Code of Practice on Equal Pay<sup>104</sup> with the approval of the Minister for Children, Equality, Disability, Integration and Youth and after consultation with relevant organisations representing equality interests. The Code seeks to promote the development and implementation of procedures that establish workplaces where employees receive equal pay for like work. The provisions of the Code are admissible in proceedings before a court or the WRC or Labour Court. The code aims to give practical guidance to employers, employers' organisations, trade unions and employees on the right to equal pay, the elimination of pay inequality and the resolution of pay disputes.

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<sup>98</sup> World Economic Forum, [Global Gender Gap Report 2020](#) (2020), p. 29.

<sup>99</sup> World Economic Forum, [Global Gender Gap Report 2020](#) (2020), p. 29.

<sup>100</sup> IBEC, [Mind the gap: An introduction to gender pay gap reporting](#) (2018). Data from the Central Statistics Office also indicates that, over the reporting period (2017-2020), median annual earnings for men were, on average, €5,409 higher than for women each year. Commission calculations based on: CSO.ie, [Earnings Analysis using Administrative Data Sources 2020](#) - Median Annual Earnings by Sex, 2017-2020.

<sup>101</sup> <https://www.irishstatutebook.ie/eli/2021/act/20/enacted/en/print.html>. See also the [Employment Equality Act 1998 \(Section 20A\) \(Gender Gap Information\) Regulations 2022](#) (S.I. No. 264 of 2022).

<sup>102</sup> The legislation was commenced on 22 May 2022 – see [Gender Pay Gap Information Act \(Commencement\) Order 2022](#) (S.I. No. 263 of 2022). Legislation for this issue was first proposed by way of a private member's bill in 2017 – [Irish Human Rights and Equality Commission \(Gender Pay Gap Information\) Bill 2017](#).

<sup>103</sup> The [proposed EU Pay Transparency Directive](#) may introduce additional measures in relation to pay equity and pay transparency.

<sup>104</sup> IHREC, [Code of Practice on Equal Pay](#) (March 2022).

## Article 4.4 – Periods of notice applicable to employees and civil servants

IHREC recalls the 2014 Conclusions of the Committee found that the periods of notice applicable to employees and civil servants are inadequate.<sup>105</sup> Section 4 of the *Minimum Notice and Terms of Employment Act 1973* provides for the minimum period of notice for an employee who has been in employment for a continuous period of thirteen weeks or more, based on length of service as follows:-

if the employee has been in the continuous service of his employer for less than two years, one week;

if the employee has been in the continuous service of his employer for two years or more, but less than five years, two weeks;

if the employee has been in the continuous service of his employer for five years or more, but less than ten years, four weeks;

if the employee has been in the continuous service of his employer for ten years or more, but less than fifteen years, six weeks;

if the employee has been in the continuous service of his employer for fifteen years or more, eight weeks.<sup>106</sup>

IHREC notes that in the Digest of the Case Law of the European Committee of Social Rights, while the concept of ‘reasonable notice’ has not been defined in the abstract and the situations are assessed on a case by basis, the following periods of notice and/or compensation in lieu thereof were not in conformity with the Charter:

- five days’ notice after less than three months of service (Conclusions 2007, Albania)
- one week’s notice after less than six months of service (Conclusions XIII-3 (1995), Portugal);

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<sup>105</sup> European Committee of Social Rights, [Conclusions 2014 – Ireland – Article 4-4](#).

<sup>106</sup> [Minimum Notice and Terms of Employment Act 1973, Section 4\(1\) & \(2\)](#).

- two weeks' notice after more than six months of service (Conclusions XVI-2 (2003), Poland);
- less than one month's notice after one year of service (Conclusions XIV-2 (1998), Spain);
- eight weeks' notice after at least ten years of service (Conclusions 2010, Turkey);
- twelve weeks' notice for workers dismissed for long-term working incapacity who have five or more years of service (Conclusions 2010, Estonie).<sup>107</sup>

**IHREC is concerned that the periods of notice provided for by Irish legislation are not in conformity with Article 4.4 of the Charter.**

### Article 4.5 – Deductions from an employee's wage

IHREC recalls the 2014 conclusions of the Committee that Ireland was in non-conformity with Article 4.5 on the grounds that the safeguards preventing workers from waiving their rights to limiting wage deductions were inadequate, and after authorised deductions, the wages of workers with the lowest pay did not allow them to provide for themselves or their dependents.<sup>108</sup>

Workers should not be allowed to waive their right to limitation of deductions from their wage and the way in which such deductions are determined should not be left at the disposal of the sole parties to the employment contract.<sup>109</sup> The deductions should only be authorised in certain circumstances, which are well-defined in a legal instrument.

Section 5(1) of the *Payment of Wages Act 1991* provides that an employer may not make a deduction from the wages of an employee unless:

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<sup>107</sup> Digest of the Case Law of the European Committee of Social Rights, pp. 90-92.

<sup>108</sup> European Committee of Social Rights, [Conclusions 2014, Ireland](#), Article 4-5.

<sup>109</sup> Digest of the Case Law of the European Committee of Social Rights, p. 92.

(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute;

the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment; or

in the case of a deduction, the employee has given his prior consent in writing to it.

Section 5(2) of the *Payment of Wages Act 1991* prohibits the deduction of wages of a employee in respect of any act or omission of the employee or any goods or services supplied to or provided for the employee by the employer (the provision of which is necessary to the employment). However, this is permitted in certain circumstances, including where the deduction is made by virtue of a term of the contract of employment and is of an amount that is fair and reasonable having regard to all of the circumstances.<sup>110</sup>

**IHREC is concerned that deductions from wages may still be determined by employers and employees in the context of a contractual agreement. Such deductions may also be authorised in circumstances which are not well-defined in the legislation. For these reasons, IHREC is of the view that the situation has not been brought into conformity with Article 4.5 of the Charter.**

IHREC also recalls the Committee's concern that the *Payment of Wages Act 1991* does not place an absolute limit on the total amount of deductions from wages, and that the provision for 'fair and reasonable' deductions does not guarantee that the portion of wages remaining would be adequate to ensure the subsistence of workers and their dependants.<sup>111</sup>

**IHREC is concerned that after authorised deductions, the wages of workers with the lowest pay does not allow them to provide a decent standard of living for themselves or**

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<sup>110</sup> Section 5(2) of the Payment of Wages Act 1991.

<sup>111</sup> European Committee of Social Rights, [Conclusions 2014, Ireland](#), Article 4-5.

**their dependants, and this matter has not been brought into conformity during the reference period.**



## Article 5: The right to organise

### Trade union membership

The employee voice is expressed by trade union membership, and states have a key role to play in facilitating employee representation.<sup>112</sup> Trade union membership is largely unaddressed in overall employment strategies or equality strategies in Ireland.<sup>113</sup>

While Irish data on trade union membership is conflated with data on membership of staff associations, a recent study shows that Ireland has comparably lower rates of trade union coverages than Germany, France and Denmark.<sup>114</sup> 26% of the employed population are trade union or staff association members, with employees born in Ireland being more likely to be a trade union member than employees born elsewhere. Younger workers are less likely to be members of a union or staff association.<sup>115</sup>

**IHREC is concerned at the lower rates of trade union membership in Ireland, particularly among employees born outside of Ireland and young workers; and that Irish data continues to conflate trade union membership with data on membership of staff associations.**

### Prohibition against military representative associations from joining employees' organisations

IHREC recalls that in its the decision in Collective Complaint 112/2014 *European Organisation of Military Associations (EUROMIL) v. Ireland*, the Committee found a violation

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<sup>112</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), pp. 77 and 89.

<sup>113</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 78. See for example, the [Migrant Integration Strategy](#), the [National Strategy for Women and Girls 2017-2020](#), [National LGBTI+ Inclusion Strategy 2019-2021](#) and [National Traveller and Roma Inclusion Strategy 2017-2021](#). While the [Comprehensive Employment Strategy for People with Disabilities 2015-2024](#) sets out a commitment to develop trade union supports and employment opportunities, it does not focus on the access to trade union membership and recognition.

<sup>114</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 85.

<sup>115</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 82.

of Article 5 on the grounds that the complete prohibition against military representative associations from joining national employees' organisations was not necessary or proportionate. In the recent findings of the Committee on the follow-up to this collective complaint, it noted that Ireland has not yet removed the complete prohibition against military representative associations from joining employees' organisations.<sup>116</sup>

IHREC notes the comments by the Government of Ireland in relation to pending litigation involving the Permanent Defence Force Other Ranks Representative Association ('PDFORRA').<sup>117</sup> However, it must be observed that there was no progress made on this issue during the reference period and that the State remained in a position of non-conformity.

Although outside the reference period being examined by the Committee, IHREC notes the recent developments on this issue. The Minister for Defence has made statements on his offer of conditional temporary consent to PDFORRA and the Representative Association of Commissioned Officers ('RACO') to seek associate membership with the Irish Congress of Trade Unions ('ICTU') solely for the purpose of being involved in forthcoming pay negotiations.<sup>118</sup> The Minister has stated that the issue is complex and that there will be a requirement for a range of matters to be resolved for a longer term facilitation by Government to ensure that the State's ability to control and direct its armed forces remains absolute.

The Minister also referred to the recent Report of the Commission on the Defence Forces ('CoDF'), which made recommendations in relation to affiliation with ICTU.<sup>119</sup> The CoDF observed that ICTU had amended its rules and constitution to provide a means through

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<sup>116</sup> European Committee of Social Rights, [Follow-up to decisions on the merits of collective complaints: Findings 2021](#), p. 114.

<sup>117</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), at p. 114.

<sup>118</sup> Department of Defence, [Statement regarding offer to Representative Associations ahead of upcoming pay negotiations](#) (24 May 2022); Department of Defence, [Statement regarding offer to RACO for pay negotiations](#) (2 June 2022).

<sup>119</sup> [Report of the Commission on the Defence Forces \(9 February 2022\)](#), pp. 98-100. In December 2020, an independent Commission was established by the Government of Ireland to undertake a comprehensive review of the Defence Forces. The Commission published its report in February 2022.

which the representative bodies could associate with it, while respecting the unique mandate of its membership. The CoDF noted that while the Defence Forces were beneficiaries of the public sector pay determination process, they were in fact precluded from participating in it in any meaningful way, as their representative bodies were not permitted to associate with, or affiliate to ICTU. It stated its belief that as such, the representative associations were more spectators than participants in the process.<sup>120</sup>

The CoDF noted that in many states, military trade unions may be part of a federation of trade unions and that despite concerns over potential external influence, the experience has generally been positive.<sup>121</sup> The CoDF recommended that the Defence Forces' representative associations should be facilitated if they wish to pursue associate membership of ICTU. It believed that this would enable the associations to be active and central participants in future public service pay bargaining processes, with their views and perspectives integrated into such processes. It noted that an added benefit to association with ICTU would be the opportunity that would arise for the associations, and their membership, to observe and be more aware of the range of positive developments and new norms that occur across the wider public service.<sup>122</sup> The CoDF saw no reason, in principle, why full affiliation with ICTU could not be accommodated, but acknowledged that there was greater complexity in relation to the absolute requirement for the Defence Forces to fulfil its aid to the civil power and aid to the civil authority role. It stated that such issues would need to be fully resolved before full membership could be facilitated by Government. The CoDF noted the possibility of aligning with provisions of existing An Garda Síochána legislation concerning the offence of promoting industrial unrest.<sup>123</sup>

**IHREC welcomes the recent developments in relation to membership by military representative associations but is concerned that these are temporary and limited measures. IHREC is further concerned that there is no commitment to implement these**

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<sup>120</sup> [Report of the Commission on the Defence Forces \(9 February 2022\)](#), pp. 98-99.

<sup>121</sup> [Report of the Commission on the Defence Forces \(9 February 2022\)](#), pp. 99.

<sup>122</sup> [Report of the Commission on the Defence Forces \(9 February 2022\)](#), pp. 99.

<sup>123</sup> [Report of the Commission on the Defence Forces \(9 February 2022\)](#), pp. 99.

measures on a permanent basis, or any timeline for the introduction of permanent measures.

**IHREC is of the view that the State should remove the complete prohibition against military representative associations from joining national employees' organisations, in order to bring the current legislative framework into conformity with Article 5 of the Charter.**

### The authorisation of certain 'closed shop' practices by law

IHREC notes that in 2014 the Committee stated that:

“domestic law must clearly prohibit all pre-entry or post-entry closed shop clauses and all union security clauses (automatic deductions from the wages of all workers, whether union members or not, to finance the trade union acting within the company).”<sup>124</sup>

IHREC notes that this situation did not change during the reference period.

However, IHREC draws the Committee's attention to the decision of the Irish Court of Appeal in *O'Connell v. Building and Allied Trade Union* [2016] IECA 338,<sup>125</sup> where it was held that the defendant trade union had breached the plaintiff's constitutional right to earn a livelihood when it refused him full membership of the union, in circumstances where it enjoyed an effective monopoly over the relevant market.

**IHREC is of the view that no action was taken to remedy the situation during the reference period and there is ongoing non-conformity with Article 5.**

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<sup>124</sup> European Committee of Social Rights, [2014 Conclusions – Ireland, Article 5](#).

<sup>125</sup> [O'Connell v. Building and Allied Trade Union](#) [2016] IECA 338.

## Article 6: The right to bargain collectively

### Legislation required to protect the right to collective bargaining

In seeking to achieve greater economic equality, it is necessary to challenge and change policies and laws that exacerbate income and wealth inequalities in Ireland.<sup>126</sup>

Trade unions have no legislative right to be recognised in the workplace for collective bargaining purposes and employees have no right to make representations to their employer through their union. For this reason, an anomaly exists where many union members (one-third of all union members in 2013) are members of unions which cannot engage in collective bargaining with an employer on their behalf.<sup>127</sup>

IHREC is observing the developments and welcomes the language contained in the proposal for an EU Directive on Adequate Minimum Wages in the European Union.<sup>128</sup> In particular, Article 4 aims at increasing the collective bargaining coverage, requiring States to take action to promote the capacity of social partners to engage in collective bargaining on wage setting, and to encourage constructive, meaningful and informed negotiations on wages. It proposes to require Member States where collective bargaining coverage does not reach at least 70% of workers, to provide for a framework for collective bargaining and establish an action plan to promote collective bargaining.

IHREC is also observing the developments and awaits the outcome of the Labour Employer Economic Forum High-Level Working Group on collective bargaining which was established in March 2021.<sup>129</sup>

However, during the reference period, there was no statutory provision for the right to collective bargaining.

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<sup>126</sup> Irish Human Rights and Equality Commission, *Strategy Statement 2022-2024* (December 2021), p. 11.

<sup>127</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, *Monitoring Decent Work in Ireland* (IHREC and ESRI) (2021), p. 77; Turner T. and O'Sullivan M., 'Economic crisis and the restructuring of wage setting mechanisms for vulnerable workers in Ireland', *Economic and Social Review* (2013) 44, 197-219.

<sup>128</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN>.

<sup>129</sup> <https://www.gov.ie/en/publication/ba010-leef-high-level-group-on-collective-bargaining/>.

IHREC is concerned that the right to collective bargaining is not provided for, or protected by domestic law.<sup>130</sup> Given the exercise of this right represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter and the ongoing pandemic impact and worsening economic inequality in Ireland, immediate action by the State is required to address this gap and the imbalance of power in the labour market.

#### Article 6.4 - Prohibition on the right to strike for the police

IHREC recalls that in its 2013 decision, the Committee found that the arrangements for industrial relations in An Garda Síochána, including the complete abolition of the right to strike, were not in compliance with Article 5 and Articles 6.2 and 6.4.<sup>131</sup>

In its recent findings on the follow-up to the collective complaint, *European Confederation of Police (EuroCOP) v. Ireland*,<sup>132</sup> the Committee noted the positive progress in relation to measures taken by the State to remedy the non-compliance. However, it concluded that although the situation had been brought into conformity with Articles 5 and 6.2, the situation had not been brought into conformity with Article 6.4.

In its National Report, the Government of Ireland stated that the unique position of An Garda Síochána was such that the withdrawing of labour in any strike action was likely to impact on policing, the security of the State or the maintenance of public authority. It stated that it recognised that this placed a particular obligation to ensure that the dispute resolution processes in place for An Garda Síochána were robust and effective, and that the members of An Garda Síochána were not disadvantaged as a result.<sup>133</sup>

IHREC welcomes the measures taken by the State to bring the other matters into conformity with the Charter, but notes that the absolute prohibition on the right to strike remains in place.

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<sup>130</sup> IHREC, [Strategy Statement 2022-2024](#) (December 2021), p. 11.

<sup>131</sup> [Complaint No. 83/2012 European Confederation of Police \(EuroCOP\) v. Ireland.](#)

<sup>132</sup> European Committee of Social Rights, [Follow-up to decisions on the merits of collective complaints: Findings 2021](#), p. 99.

<sup>133</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), pp. 97-98.

**IHREC is of the view that the State should remove the complete abolition of An Garda Síochána members' right to strike, in order to bring the current legislative framework into conformity with Article 6.4 of the Charter.**<sup>134</sup>

### Article 6.4 – Protections relating to strike action

IHREC recalls that the Committee found Ireland to be in non-conformity with Article 6.4 in its 2014 conclusions,<sup>135</sup> on the basis that an employer may dismiss all employees for taking part in a strike.<sup>136</sup> IHREC observes that this position did not change during the reference period.

IHREC also recalls that the Committee found Ireland to be in non-conformity with Article 6.4 in its 2014 conclusions,<sup>137</sup> on the grounds that only authorised trade unions holding a negotiation licence, their officials and members are granted immunity from civil liability in the event of a strike. IHREC notes that Ireland has offered information in its National Report on the reason for the requirement for a deposit and an 18 month waiting period to obtain a negotiation licence.<sup>138</sup>

**IHREC is concerned that the State continues to be in non-conformity with Article 6.4 of the Charter.**

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<sup>134</sup> IHREC, [Comments on Ireland's 17<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (June 2020) , p. 4 and IHREC, [Comments on Ireland's 18<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (June 2021), p. 6.

<sup>135</sup> [Conclusions – 2014, Ireland – Article 6.4.](#)

<sup>136</sup> See Section 5 of the Unfair Dismissals Act 1977.

<sup>137</sup> [Conclusions – 2014, Ireland – Article 6.4.](#)

<sup>138</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), at pp. 94-95.

## Article 22: The right to take part in the determination and improvement of the working conditions and working environment

### Response to the Covid-19 pandemic

In its National Report, the State refers to the commitment to legislate for the right to request remote working and to develop a new code of practice on the right to disconnect (which was introduced in April 2021).<sup>139</sup> IHREC refers to its comments above in relation to Article 2 of the Charter and the right to disconnect.

IHREC notes that there has been a public consultation on the right to request remote working, and awaits publication of the Government's proposed Bill.<sup>140</sup>

**IHREC is concerned that these measures were not in place during the reference period, and, in particular, on the outbreak of the Covid-19 pandemic.**

### The entitlement of disabled employees to consult with employers in relation to reasonable accommodation

Workers have the right to take part in the determination and improvement of working conditions and the working environment under Article 22. Parties to the Charter undertake to adopt or encourage measures enabling workers or their representatives to contribute to the determination and improvement of working conditions, work organisation and working environment and to the protection of health and safety.

Under the *Employment Equality Act 1998*, an employer is required to take appropriate measures/reasonable accommodation to enable a disabled employee to have access to employment, to participate or advance in employment, or to undergo training, unless the

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<sup>139</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), p. 103.

<sup>140</sup> The [General Scheme of the Right to Request Remote Work Bill 2021](#) has been published and a public consultation has been held.



measures would impose a disproportionate burden on the employer.<sup>141</sup> Such appropriate measures/reasonable accommodation means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned. This may include the adaptation of equipment, patterns of working time, distribution of tasks or the provision of training or integration services.<sup>142</sup>

In the recent Irish Supreme Court case of *Nano Nagle v. Daly*,<sup>143</sup> MacMenamin J. stated that while there may not always be a duty of consultation with an employee in relation to reasonable accommodation, a wise employer will provide meaningful participation in vindication of his or her duty under the Act. Employees should be given the opportunity to engage and consult with employers in relation to their specific needs and what reasonable accommodations they require. In engaging and consulting with employees in this matter, employers will be less exposed to claims of discrimination. Employers should be assisted in understanding their obligations under the legislation and in understanding what constitutes reasonable accommodation for a particular employee. While employees are ultimately protected in the event that reasonable accommodation is not provided, a proactive duty on employers to consult with employees in relation to reasonable accommodation could prevent issues progressing to such a stage.

**IHREC is concerned that disabled employees do not have an express right to consult with their employer in relation to the provision of reasonable accommodation in the workplace. IHREC is therefore of the view that disabled employees are not adequately afforded the right to take part in the determination and improvement of the working conditions and working environment under Article 22; and that the State needs to urgently legislate for a proactive duty on employers.**

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<sup>141</sup> Section 16(3) of the *Employment Equality Act 1998*.

<sup>142</sup> Section 16(4) of the *Employment Equality Act 1998*.

<sup>143</sup> [2019] IESC 63, para. 150.

## Other relevant developments

IHREC notes that the European Commission has issued an infringement notice<sup>144</sup> on Ireland in respect of the transposition of the EU Directive on European Works Councils<sup>145</sup> and called on Ireland to amend its legislation. The European Commission has identified a number of shortcomings in Irish legislation, which fails to guarantee the right of workers' representatives, the Special Negotiating Body (a body of workers' representatives) or the European Works Council to go to a national court over disputes related to breaches of the rights and obligations under this Directive. This concerns, for instance, disputes related to the right to request assistance and presence of an expert in negotiation meetings or disputes related to confidentiality obligations. IHREC awaits the outcome of that process.

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<sup>144</sup> [https://ec.europa.eu/commission/presscorner/detail/EN/inf\\_22\\_2548](https://ec.europa.eu/commission/presscorner/detail/EN/inf_22_2548).

<sup>145</sup> Directive 2009/38/EC.

## Article 26: The right to dignity at work

Irish equality legislation protects employees from harassment and sexual harassment in the workplace.<sup>146</sup>

Those terms are defined in the legislation as follows:

- (i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and
- (ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,

being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.<sup>147</sup>

The discriminatory grounds protected under the *Employment Equality Act 1998* are therefore very important to the issue of harassment.<sup>148</sup>

Recent research shows that there are higher rates of discrimination in the workplace among women, ethnic minorities, those with a disability, non-Irish nationals, and non-Catholics.<sup>149</sup> In 2020, 939 employment equality complaints were received by the Workplace Relations Commission.<sup>150</sup> The majority of complaints of employment discrimination related to the grounds of disability, gender, family status, age and race. The Dublin Rape Crisis Centre also conducted a survey in late 2018 on sexual harassment.<sup>151</sup> 75.7% of respondents reported

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<sup>146</sup> Section 14A of the *Employment Equality Act 1998*.

<sup>147</sup> Section 14A(7) of the *Employment Equality Act 1998*.

<sup>148</sup> The *Employment Equality Acts* currently prohibit discrimination on specific grounds, including Age, Civil Status, Disability, Family Status, Gender, Housing Assistance Payment, Membership of the Traveller Community, Race, Religion, and Sexual Orientation.

<sup>149</sup> F. McGinnity, H. Russell, I. Privalko and S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and ESRI) (2021), p. 109.

<sup>150</sup> Workplace Relations Commission, [Annual Report 2020](#), p. 23.

<sup>151</sup> Dublin Rape Crisis Centre, [Discussion Paper: Workplace Sexual Harassment and Abuse](#) (2021).

having experienced sexual harassment, with the majority reporting the harassment as having occurred in the workplace.

**IHREC is concerned about the ongoing prevalence of discrimination and sexual harassment in the Irish labour market; and is of the view that the State needs to take immediate action to measurably reduce levels of discrimination and eradicate sexual harassment.**

IHREC notes that it has recently produced a Code of Practice on Sexual Harassment and Harassment at Work<sup>152</sup> with the approval of the Minister for Children, Equality, Disability, Integration and Youth and after consultation with relevant organisations representing equality interests. The code seeks to promote the development and implementation of policies and procedures that establish working environments free of harassment in which the dignity of everyone is respected. The code is admissible in evidence before a court or the WRC or Labour Court. The code seeks to give practical guidance to employers, organisations, trade unions and employees on what is meant by employment-related sexual harassment and harassment, how it can be prevented, and what steps ensure that adequate procedures are readily available to deal with the problem and to prevent its recurrence.

### Review of equality legislation

IHREC notes that there is no provision for discrimination on the grounds of socio-economic status in the Employment Equality and Equal Status Acts, nor does the legislation recognise intersectional discrimination. This is significant in the context of Article 26, given the interaction between harassment and the discriminatory grounds.

Research commissioned by IHREC found that a person's socio-economic status has a significant impact on both their exposure to discrimination and their responses to it.<sup>153</sup> In this regard, IHREC recalls the reference to 'social origin' in Article E of the Charter in relation to non-discrimination. Furthermore, adopting an intersectional approach to discrimination

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<sup>152</sup> IHREC, [Code of Practice on Sexual Harassment and Harassment at Work](#), (February 2022).

<sup>153</sup> IHREC and ESRI, McGinnity, Grotti, Kenny and Russell, [Who experiences discrimination in Ireland? Evidence from QNHS Equality Modules](#) (2014), p. 14.

is key to ensuring that the unique disadvantage experienced by a person as a result of a combination of grounds can be fully understood by examining them together, rather than apart.<sup>154</sup> Although it has no formal or binding legal status, intersectionality is prevalent across a wide range of EU equality policy documents.<sup>155</sup>

The Commission notes the State's commitment to examining the introduction of a new ground of discrimination based on socio-economic status in the Employment Equality and Equal Status Acts.<sup>156</sup> IHREC has made a detailed submission to the Government of Ireland on the review of the equality legislation, and made a number of recommendations for reform.<sup>157</sup> IHREC is of the view that these recommendations are also relevant to Article 26, and notes that they have yet to be addressed.

**IHREC is concerned that employees harassed on the grounds of socio-economic status and intersectional discrimination were not adequately protected by the existing equality legislation during the reference period; that the State's intention to 'examine the introduction of a new ground of discrimination, based on socio-economic disadvantaged status'<sup>158</sup> is insufficiently ambitious; and that the State's commissioned research has yet to be published.<sup>159</sup>**

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<sup>154</sup> See S. Fredman, [Intersectional discrimination in EU gender equality and non-discrimination law](#) (European Commission and European network of legal experts in gender equality and non-discrimination) (2016) 27-28. See generally, K. Crenshaw, 'Demarginalising the intersection of race and sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 University of Chicago Legal Forum 139.

<sup>155</sup> European Commission, *A Union of equality : EU anti-racism action plan 2020-2025* (2020); European Commission, *EU Roma strategic framework for equality, inclusion and participation for 2020-2030* (2020); European Commission, *Union of Equality: LGBTIQ Equality Strategy 2020-2025* (2020); European Commission, *Action Plan on Integration and Inclusion 2021-2027* (2020); European Commission, *A Union of Equality: Gender Equality Strategy 2020-2025* (2020); and European Commission, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030* (2021).

<sup>156</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), at p. 114.

<sup>157</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021. Those recommendations include a consideration of access to justice under the Equality Acts, a review of the existing discriminatory grounds, exemptions to the legislation and procedural and other issues, including compensation limits.

<sup>158</sup> See Government of Ireland, [Programme for Government: Our Shared Future](#) (June 2020), at p. 77.

<sup>159</sup> Dail Eireann Debate, [Equality Issues](#), 3 December 2020.

## Access to justice for violations of the right to dignity at work

There are a number of barriers to accessing justice for violations of the right to dignity at work. Deficits in access to justice are reduced through increased assistance to vindicate rights, with effective remedies before the courts and the WRC.<sup>160</sup> IHREC has called for the next generation of equality legislation to address the existing procedural and accessibility issues impacting on access to justice.<sup>161</sup>

**IHREC is concerned about systemic shortcomings in accessing justice for violations of the right to dignity at work in Ireland; and is of the view that the State must immediately address the evidenced procedural and accessibility issues.**

Central Statistics Office data from 2019 demonstrates that just 3% of people who experienced discrimination made an official complaint or took legal action.<sup>162</sup> IHREC is also concerned that victims of harassment may struggle to access justice in reporting and making complaints in relation to dignity at work under the existing equality legislation. As noted above, 75.7% of respondents reported having experienced sexual harassment in a 2018 survey by the Dublin Rape Crisis Centre, with the majority reporting the harassment as having occurred in the workplace. The majority of those who experienced harassment did not report their harassment. The reasons given for not reporting harassment included the consequences of reporting, not being believed, being judged, shame and fear. 39% of those who did report harassment said that they used formal procedures, with 50% reporting informally. 64% of respondents who reported harassment were not satisfied with the outcome of the reporting.<sup>163</sup>

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<sup>160</sup> IHREC, [Strategy Statement 2022-2024](#) (December 2021), at p. 13.

<sup>161</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021, at p. 6.

<sup>162</sup> Central Statistics Office, *Equality and Discrimination: Quarter 1 2019* (2019). See also, F. McGinnity, R. Grotti, O. Kenny and H. Russell, *Who experiences discrimination in Ireland? Evidence from the QNHS Equality Modules (IHREC and ESRI)* (2017) 10.

<sup>163</sup> Dublin Rape Crisis Centre, [Discussion Paper: Workplace Sexual Harassment and Abuse](#) (2021).

**IHREC is concerned that victims of sexual harassment and harassment in the workplace may not have sufficient supports to aid them in reporting harassment, and in some circumstances are deterred from reporting harassment.**<sup>164</sup>

A further significant barrier for a victim of harassment in accessing justice is the failure to provide civil legal aid to complainants bringing complaints before the WRC and the Labour Court. The restrictive nature of the civil legal aid scheme has been strongly and repeatedly criticised by IHREC and international experts.<sup>165</sup>

The availability or absence of legal assistance and representation can determine whether or not a person can access court and tribunal proceedings or participate in them in a meaningful way. In practice, many respondents are represented by legal counsel before the WRC, which gives rise to an inequality of arms.<sup>166</sup> Large or multi-national companies often deploy significant resources and legal advisors, while individual complainants are limited to the minimum legal advice and support.<sup>167</sup>

Legal aid must be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice. The blanket exclusion in employment and equality cases fails to account for the complexity of an individual case, or the additional barriers to accessing justice faced by specific groups, including those on low incomes, minority ethnic communities, lone parents, disabled people and older people. The prevalence of low paid, precarious employment and the lack of recognition of care-giving can also have an adverse impact on the ability of women to challenge discrimination in the workplace, which is further exacerbated by the absence of civil legal aid.<sup>168</sup>

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<sup>164</sup> IHREC has recommended that the amendment of the Equality Acts include provision for the recognition of trade unions and non-governmental organisations and allow for representative actions on behalf of named complainants, as well as in an organisation's own name – see IHREC, [Submission on the Review of the Equality Acts](#), December 2021, pp. 11-12.

<sup>165</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021, at p. 8.

<sup>166</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021, at p.9; FLAC, [Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan Against Racism in Ireland](#) (2021) at p. 4; Community Law and Mediation, [A submission by Community Law & Mediation to the Citizens' Assembly on Gender Equality](#) (2020) at p. 2.

<sup>167</sup> European Union Agency for Fundamental Rights, [Access to justice in cases of discrimination in the EU: Steps to further equality](#) (2012) 43, 50, 58.

<sup>168</sup> For further information, see IHREC, [Submission on the Review of the Equality Acts](#), December 2021.

IHREC is concerned that individuals who experienced discrimination or harassment were unable to bring their equality claims before the Workplace Relations Commission during the reference period due to the absence of civil legal aid and the failure of the State to extend the scope of the Legal Aid Board to equality cases by designating the Workplace Relations Commission as a prescribed tribunal under Section 27(2) of the Civil Legal Aid Act 1995.

IHREC notes and welcomes the recent announcement by the Minister for Justice of the review of the Civil Legal Aid Scheme.<sup>169</sup>

### Compensation/redress

The Committee requested the State to explain whether any limits apply to the compensation that might be awarded to a victim of sexual and moral (or psychological) harassment for moral and material damages.<sup>170</sup> The State has briefly set out the applicable compensation levels in its National Report.<sup>171</sup>

IHREC has repeatedly recommended the removal of those limits of compensation.<sup>172</sup> There is symbolic value to the limit at which compensation is set, which demonstrates the seriousness with which discrimination is taken by the legislature. There is also an obvious link between the maximum amount of compensation that can be awarded and the dissuasive and deterrent effect of the law.

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<sup>169</sup> Department of Justice, [Press Release](#), (2 June 2022)

<sup>170</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), at p. 120, Question C.

<sup>171</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), at p. 120.

<sup>172</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021, at p. 41; Equality Authority, *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000* (2003) 20; Equality Authority, *Embedding Equality in Immigration Policy: Submission on the discussion document of the Department of Justice, Equality and Law Reform on the Immigration and Residence Bill* (2006) 12; IHRC, *Observations on the Equality Bill* (2004) pp. 3-4; IHREC, *Submission to UN Committee on the Elimination of Discrimination Against Women* (2017) pp. 35-36; IHREC, [Comments on Ireland's 16<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (May 2019), p. 46; and IHREC, *Submission to the Citizens' Assembly on Gender Equality* (2020), pp. 28-29.



**IHREC is concerned that the limits on compensation did not adequately reflect the seriousness of discrimination and harassment during the reference period, and compensation should be set to dissuade and deter those who discriminate.**

**IHREC is of the view that statutory compensation limits on complaints of discrimination under the Employment Equality and Equal Status Acts should be removed immediately.**

**IHREC is of the view that these limits should be replaced with a coherent, accessible compensation system that calculates awards relative to the size of the enterprise involved.**

### Protected disclosures

Harassment is recognised as a form of penalisation under the *Protected Disclosures Act 2014*.<sup>173</sup> The Protected Disclosures (Amendment) Bill 2022<sup>174</sup> contains some proposed amendments to the legislation. Of significance is that it is proposed to expand the definition of worker to include volunteers, shareholders and prospective employees. It is also proposed to extend the recourse to interim relief to penalisation other than dismissal (including harassment), and to provide for criminal penalties for penalisation.

**IHREC is concerned that these proposed protections were not in place during the reference period, and that there was a gap in the legislation.**

### Non-disclosure agreements

Through its casework, IHREC has become concerned by the prevalence of confidentiality clauses in agreements to settle equality cases.<sup>175</sup> While in certain circumstances, their use may be appropriate, the almost automatic assumption of the necessity of such clauses raises significant concerns. The elimination of discrimination and promotion of equality, as well as the ability of complainants to pursue redress, must be primary considerations in all

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<sup>173</sup> Section 3(1) of the Protected Disclosures Act 2014.

<sup>174</sup> [Protected Disclosures \(Amendment\) Bill 2022](#). This legislation is being introduced to transpose [Directive \(EU\) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law](#) (the EU Whistleblowing Directive) into Irish law.

<sup>175</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021, at pp. 43-44.

equality proceedings and the normalisation of non-disclosure agreements ('NDAs') potentially impedes this.

The use of NDAs may have many impacts, including:

- victims feeling isolated, and being unable to confide in family and friends;
- organisations using NDAs to silence victims and avoid challenging or reforming organisational cultures that facilitate harassment, abuse or discrimination;
- perpetrators being facilitated to continue harassing others, with NDAs preventing patterns being identified and exposed;
- researchers and policymakers struggling to identify the prevalence and nature of sexual harassment and discrimination due to the secrecy surrounding NDAs.<sup>176</sup>

The dearth of information or research on this area has made it difficult to identify the true extent of such agreements. In April 2020, the National Women's Law Centre said employers continue to use non-disclosure and non-disparagement agreements to prevent individuals from disclosing harassment.<sup>177</sup> More recently, the Dublin Rape Crisis Centre has highlighted that rather than finding that NDAs protect victims, research has asserted that their elimination (in relation to workplace allegations of harassment or abuse) may actually enhance access to justice.<sup>178</sup> In its recent report on the prevalence of NDAs, prepared in response to the growing public awareness of the potentially unethical use of NDAs, and within the context of the review of Irish equality legislation, the Government of Ireland noted that its research indicated that NDAs are commonly used in a range of contexts within Ireland and other jurisdictions, but there are significant research and data gaps, and that the inherent secrecy of NDAs presents challenges in rectifying these gaps.<sup>179</sup> IHREC notes the

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<sup>176</sup> Government of Ireland, [The prevalence and use of Non-Disclosure Agreements \(NDAs\) in discrimination and sexual harassment disputes](#) (February 2022), p. 2.

<sup>177</sup> National Women's Law Centre, [Limiting Nondisclosure And Nondisparagement Agreements That Silence Workers: Policy Recommendations](#) (2020) 1.

<sup>178</sup> Dublin Rape Crisis Centre, [Discussion Paper: Workplace Sexual Harassment and Abuse](#) (2021) 14.

<sup>179</sup> Government of Ireland, [The prevalence and use of Non-Disclosure Agreements \(NDAs\) in discrimination and sexual harassment disputes](#) (February 2022), pp. 2-3, pp.26-33, p. 50.

recommendation in this report that further research is required if policy makers are to have a clearer picture of this important issue.<sup>180</sup>

A guiding principle of any efforts to reform the law in this area is that respondents may not impose these agreements and complainants may only enter them freely, having been fully informed of their rights.<sup>181</sup> IHREC further notes that a Private Member's Bill has been introduced proposing an amendment to the *Employment Equality Act 1998* in relation to the use of NDAs.<sup>182</sup>

**IHREC is concerned at the prevalence of confidentiality agreements in equality cases and that their use is undermining the right to dignity at work.**

**IHREC is concerned that the prevalence of confidentiality agreements in equality cases hampers the promotion of awareness, information and prevention of sexual harassment and recurrent reprehensible or distinctly negative and offensive actions directed against individual workers under Article 26, and the State has not taken all appropriate measures to protect workers from such conduct.**

**IHREC is of the view that greater regulation of confidentiality agreements in all equality cases should be introduced, and that reforms should be guided by the principles of eliminating discrimination and promoting equality, and facilitating access to an effective remedy.**

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<sup>180</sup> Government of Ireland, [The prevalence and use of Non-Disclosure Agreements \(NDAs\) in discrimination and sexual harassment disputes](#) (February 2022), pp. 50-51.

<sup>181</sup> IHREC notes the recommendations for best practice from national and international sources received by the Government in its recent research on NDAs, including: All parties should receive legal advice prior to signing; Signatories should not be rushed or coerced into signing an NDA; Employees who sign NDAs should be provided with a copy of the agreement; Complainants would benefit from an agreed exit story and/or non-derogatory clause between employer and employee, to ensure that they can successfully pursue employment elsewhere; NDAs should not prevent complainants from being able to draw upon personal and social supports, exemptions should be made for discussing their experiences with close friends, family members, medical personnel and regulatory authorities; NDAs should not be used to preserve toxic workplace cultures or to stifle investigations of misconduct; NDAs should not act as a barrier to researching sexual harassment or discrimination, amnesties should be granted to allow signatories to discuss their experiences with researchers or in public in anonymised format; and NDAs should be time bound. See Government of Ireland, [The prevalence and use of Non-Disclosure Agreements \(NDAs\) in discrimination and sexual harassment disputes](#) (February 2022), pp. 49-50.

<sup>182</sup> [Employment Equality \(Amendment\) \(Non-Disclosure Agreements\) Bill 2021](#).

**IHREC is of the view that the Workplace Relations Commission should publish anonymised data on the use of non-disclosure agreements, including whether the parties had representation, as well as the monetary payments made.**

### Domestic workers

IHREC considers the express exclusion of domestic workers from the definition of employee in the *Employment Equality Act 1998* to constitute a *de facto* exemption for employers of domestic workers with regards to their recruitment practices, and has repeatedly recommended their inclusion in the definition.<sup>183</sup> The definition does not include ‘a person employed in another person’s home for the provision of personal services for the persons residing in that home where the services affect the private or family life of those persons’.<sup>184</sup> This exclusion is not in compliance with the Framework Employment Directive<sup>185</sup>, Racial Equality Directive<sup>186</sup> or Gender Recast Directive.<sup>187</sup>

The exclusion is express and absolute, and does not require the establishment of a genuine occupational requirement. The lack of protection against discrimination and harassment in this regard has a disproportionate effect on women, particularly migrant women who make up the majority of domestic workers.<sup>188</sup>

**IHREC is concerned that Irish law does not adequately protect the right of domestic workers to dignity at work, and is of the view that the Employment Equality Acts need to be amended to address this legislative gap.**

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<sup>183</sup> IHREC, [Submission on the Review of the Equality Acts](#), December 2021, at p. 38.

<sup>184</sup> Section 2(1) of the Employment Equality Act 1998.

<sup>185</sup> Council Directive (EC) 78/2000 on establishing a general framework for equal treatment in employment and occupation.

<sup>186</sup> Council Directive (EC) 42/2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>187</sup> Council Directive (EC) 54/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>188</sup> IHREC, [Submission to the UN Committee on the Elimination of Discrimination Against Women on Ireland’s combined sixth and seventh periodic reports](#) (2017), p. 91.

## Article 28: The right of workers' representatives to protection in the undertaking and facilities to be accorded to them

IHREC recognises the importance of Article 28 in ensuring the effective exercise of workers' representatives to carry out their functions. IHREC notes the comments and information provided by the Government of Ireland in its National Report.<sup>189</sup>

IHREC continues to monitor the observance of Article 28 by the State.

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<sup>189</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), pp. 121-126.

## Article 29: The right to information and consultation in collective redundancy procedures

IHREC recognises the importance of Article 29 in ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies. IHREC notes the comments and information provided by the Government of Ireland in its National Report.<sup>190</sup>

IHREC continues to monitor the observance of Article 29 by the State.

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<sup>190</sup> Government of Ireland, [19<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (31 December 2021), pp. 127-134.





Coimisiún na hÉireann um Chearta  
an Dulne agus Comhlonannas  
Irish Human Rights and Equality Commission



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