AN BILLE UM CHOMHIONANNAS 2004
EQUALITY BILL 2004

EXPLANATORY AND FINANCIAL MEMORANDUM

Introduction


PART 1
PRELIMINARY AND GENERAL

Sections 1 and 2 are standard provisions dealing with the short title, collective citations, construction and interpretation of the Bill.

PART 2
Amendments to Employment Equality Act 1998

Section 3 amends section 2 (interpretation) of the Act of 1998 to provide for new or amended definitions for the purposes of the Act. In particular, new definitions of “contract of employment” and of
“employee” are provided, the effect of which is to include self-employed persons within the scope of the Act as required under Article 3.1 of Directives 2000/43/EC and 2000/78/EC. (Separate provision for partners in partnerships is provided for under section 7.) With respect to the protection of private and family life, a limited exclusion from the definition of “employee” is provided for in the case of personal services affecting private or family life provided in the home.

Section 4 amends section 6 (discrimination for the purposes of Act) of the Act of 1998 to align the definition of discrimination with that in the Act of 2000 and to include, as discrimination, less favourable treatment on the grounds of pregnancy or maternity leave. In addition, specific provisions relating to school-leaving, recruitment ages and compulsory retirement ages replace the exclusions from the age ground for persons aged under 18 years or aged 65 years or more.

Section 5 makes a technical amendment to section 10 (advertising) of the Act of 1998 to clarify the reference within the section, to a characteristic in relation to a discriminatory ground.

Section 6 makes a technical amendment to section 12 (vocational training) of the Act of 1998 arising from the removal, under section 4, of the exclusion from the age ground for persons aged under 18 years.

Section 7 inserts a new section 13A (partnerships) into the Act of 1998, the effect of which is to extend the scope of the Act to partners in partnerships.

Section 8 inserts a new section 14A (harassment and sexual harassment in the workplace etc.) in place of sections 23 and 32 of the Act of 1998 to take account of the definitions of the conduct provided for in the Directives.

Section 9 amends section 16 (nature and extent of employer’s obligations in certain cases) of the Act of 1998 in relation to the duty on employers to make reasonable accommodation for persons with disabilities except where this would give rise to more than a nominal cost. The amendment requires employers to take effective and practical measures to adapt the workplace unless this would impose a disproportionate burden having regard to the circumstances of the employer.

Section 10 amends section 17 (compliance with statutory requirements, etc.) of the Act of 1998 which allows exemptions on certain grounds where necessary to comply with statutory requirements. The exemption on the race ground is replaced by a new provision, based on Articles 3.2 in Directives 2000/43/EC and 2000/78/EC, allowing certain differences of treatment based on nationality. The exemption on the age ground is replaced by a new provision, based on Article 6.1 in Directive 2000/78/EC, allowing difference of treatment where justified in the context of national law.

Section 11 amends section 18 (application of equality principles to both men and women) of the Act of 1998 to provide that, in the case of less favourable treatment of a female employee on the grounds of pregnancy or maternity leave, as referred to in section 6(2A), the comparator may be either male or female.
Section 12 amends section 19 (entitlement to equal remuneration) of the Act of 1998 by deleting the specific definition within the section of “employed” and replacing the provision for indirect gender discrimination, in relation to remuneration, to accord with that required under Article 2.2 of Directive 2002/73/EC.

Section 13 amends section 22 (indirect discrimination on the gender ground) of the Act of 1998 by replacing the provision for indirect gender discrimination, other than in relation to remuneration, to accord with that required under Article 2.2 of Directive 2002/73/EC.

Section 14 deletes section 23 (sexual harassment in the workplace etc.) of the Act of 1998 (see section 8 above).

Section 15 amends section 24 (positive action on equal opportunities) of the Act of 1998 to accord with Article 2.8 of Directive 2002/73/EC under which measures to ensure full equality in practice between men and women may be maintained or adopted.

Section 16 replaces section 25 (exclusion of discrimination in certain employments) of the Act of 1998. This provision, which excludes from discrimination different treatment on the gender ground where gender constitutes an occupational requirement, is confined under the section to cases of genuine and determining requirements where the objective is legitimate and the requirement proportionate. The amendment takes account of Article 2.6 of Directive 2002/73/EC.

Section 17 amends section 26 (exceptions relating to family and personal matters) of the Act of 1998 by deleting the exception on the gender ground in employment relating to family and personal matters. A limited exclusion in the case of personal services affecting private or family life, provided in the home, across all of the discriminating grounds including gender, is provided for in section 3.

Section 18 clarifies that the provision under section 27 (Garda Síochána and prison service) of the Act of 1998 is without prejudice to that in respect of occupational requirements, under section 25 of the Act.

Section 19 amends section 29 (entitlement to equal remuneration) of the Act of 1998 by replacing the provision for indirect discrimination in relation to remuneration, on grounds other than gender, to accord with that required under Articles 2.2 of Directives 2000/43/EC and 2000/78/EC.

Section 20 amends section 31 (indirect discrimination) of the Act of 1998 by replacing the provision for indirect discrimination other than in relation to remuneration, on grounds other than gender, to accord with that required under Articles 2.2 of Directives 2000/43/EC and 2000/78/EC.

Section 21 deletes section 32 (harassment in the workplace etc.) of the Act of 1998 (see section 8 above).

Section 22 replaces section 33 (positive action permitted) of the Act of 1998 to allow, in line with Article 5 of Directive 2000/43/EC and Article 7 of Directive 2000/78/EC, positive action measures to be taken to prevent or compensate for disadvantages linked to any of the discriminatory grounds other than the gender ground. Measures to protect the health or safety at work, and to safeguard or promote the integration into the workplace, of persons with disabilities are also allowed.
Section 23 amends section 34 (savings and exceptions related to the family, age or disability) of the Act of 1998 by removing the exemption under subsection (3) whereby discrimination on the age or disability ground is not unlawful where there is clear actuarial or other evidence that significant costs would otherwise arise. Under the new provision, discrimination on the age ground is permitted in certain regards in respect of occupational benefits schemes, that is any statutory or non-statutory scheme providing for benefits to employees or any category of employees on their becoming ill, incapacitated or redundant.

Section 24 amends section 35 (special provisions related to persons with disabilities) of the Act of 1998 to provide greater clarity that the exemption from discrimination on the disability ground, in respect of the payment to an employee with a disability of a particular rate of remuneration, is permitted only where the rate is determined on the grounds that he or she has a lesser output of work in a particular period of time when reasonably compared with that of an employee without the disability.

Section 25 amends section 37 (exclusion of discrimination on particular grounds in certain employments) of the Act of 1998. This provision excludes from discrimination different treatment based on a characteristic related to any of the discriminatory grounds, except the gender ground, where the characteristic constitutes a genuine and determining occupational requirement and where the objective is legitimate and the requirement proportionate. The amendment takes account of Articles 4 of Directives 2000/43/EC and 2000/78/EC.

Section 26 amends section 74 (interpretation Part VII)) of the Act of 1998 by extending victimisation for the purposes of the Act, to include complaints of discrimination, representation or support of a complainant, being a comparator for the purposes of the Act and lawful opposition of an act which is unlawful under the Act of 2000, where such actions result in dismissal or adverse treatment of the employee. The section also provides clarity, for the purposes of sections 77, 78, 83, 87 and 90 of the Act of 1998, as to the date of referral or appeal of a case to the Director, the Labour Court or the Circuit Court.

Section 27 amends section 75 (now entitled Equality investigations) of the Act of 1998 by substituting “Director of the Equality Tribunal” for “Director of Equality Investigations”, providing that the new title of the Director and of his or her Office as “the Equality Tribunal” shall be used on or after the date of commencement of the Equality Act, and removing references to persons who had been equality officers of the Labour Relations Commission. The provision also empowers the Director to issue guidelines or guidance notes on the application or operation of the Act of 1998 and the Act of 2000 and, subject to approval, to appoint equality mediation officers in addition to staff members, and in respect of delegation of functions.

Section 28 amends section 76 (right to information) of the Act of 1998 to provide that the material information which may be sought by a person who considers he or she may have been discriminated against may not include information about the scale or resources of an employer’s undertaking.
Section 29 amends section 77 (the forum for seeking redress) of the Act of 1998 to extend the grounds on which redress under section 77 may be sought by a member of the Defence Forces, to include (along with the gender ground) the other discriminatory grounds except the grounds of age and disability and to provide for a number of technical amendments, including the circumstances in which a late claim may be accepted and the relevant date of referral where a case is late due to a misrepresentation by a respondent. Clarification is provided in relation to the relevant date of occurrence of discrimination or victimisation in various circumstances, a party’s entitlement to be represented in proceedings and in regard to appeals.

Section 30 inserts a new section 77A (dismissed of claim) into the Act of 1998 to empower the Director or the Labour Court to dismiss a claim which is made in bad faith, is frivolous, vexatious, misconceived or relates to a trivial matter. Dismissal of a claim may be appealed to the Circuit Court.

Section 31 makes technical amendments to section 78 (mediation) of the Act of 1998 to specify that an application shall be in writing and deleting the requirement for a copy of a notice issued by an equality mediation officer to accompany the application.

Section 32 amends section 79 (investigation by Director or Labour Court) of the Act of 1998 to provide that where a set of circumstances gives rise to more than one claim of discrimination, the claims in question shall be investigated as a single case.

Section 33 amends section 82 (redress which may be ordered) of the Act of 1998 to provide that, except in the case of a claim relating to equal remuneration, the maximum amount of compensation that may be ordered in a decision by the Director or in a determination by the Labour Court, applies notwithstanding that a case may contain claims of discrimination on more than one of the discriminatory grounds. In addition, the Director may not order compensation in favour of the Equality Authority and provision is made to prohibit payment of compensation for victimisation under both the Act of 1998 and the Act of 2000 and in regard to delays in referral due to misrepresentation by a respondent.

Section 34 inserts a new section 85A (burden of proof) to the Act of 1998, the effect of which is to incorporate into the Act of 1998 the provisions of Statutory Instrument No. 337 of 2001 (which is revoked) implementing Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, and extending these provisions across all of the discriminatory grounds. This takes account of Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC.

Section 35 amends section 91 (enforcement of determinations, decisions and mediated settlements) of the Act of 1998 to clarify that, in the case of a mediated settlement, the respondent may seek enforcement under this section.

Section 36 makes a technical amendment to section 98 (penalty for dismissal of employee for exercising rights) of the Act of 1998 to amend the reference to paragraphs in section 74(2) of that Act which set out the circumstances in which victimisation is deemed to occur.

Section 37 inserts a new section 99A (award of expenses) to the Act of 1998 to allow the Labour Court or the Director, where either is of the opinion that a person is obstructing or impeding an investigation or appeal under the Act, to order the person concerned to
pay to another person travel and other expenses, excluding expenses in respect of representation, which have been reasonably incurred.

Section 38 amends section 101 (alternative avenues of redress) to enable the Labour Court to direct, in an appropriate case, that redress may be sought under the Unfair Dismissals Acts, notwithstanding that the Labour Court has already investigated the case.

Section 39 inserts a new section 101A (parallel claims) to the Act of 1998 whereby, in dismissal or constructive dismissal cases before both the Director and the Labour Court, redress may not be awarded by both the Director and the Labour Court in respect of an act of discrimination or victimisation. The same principle is also applied to cases taken under both the Act of 1998 and either the Protection of Employees (Part-Time) Act, 2001 or the Protection of Employees (Fixed-Term Work) Act 2003.

Section 40 amends section 102 (striking out cases which are not pursued) of the Act of 1998 by extending the power of the Director or the Labour Court to strike out cases which are not being pursued, to include cases referred under the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977.

Section 41 makes a technical amendment to section 105 (amendment of Industrial Relations Act 1990) of the Act of 1998 to replace “the Director of Equality Investigations” with “the Director of the Equality Tribunal”.

PART 3

AMENDMENTS TO EQUAL STATUS ACT 2000

Section 42 amends section 2 (interpretation) of the Act of 2000 to provide for new or amended definitions for the purposes of the Act, in particular, a new definition of “provision” in the Act of 2000.

Section 43 amends section 3 (discrimination (general)) of the Act of 2000 to provide for the amendment of the definition of indirect discrimination to reflect the more advanced definition in the Directive 2000/43/EC (Race Directive), which defines indirect discrimination as an apparently neutral provision, which puts a person at a particular disadvantage on any of the discriminatory grounds compared with other persons, unless the provision, is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary. Also amends section 3 to provide that discrimination by motor vehicle insurers against licensed drivers under the age of 18 on the basis of age is prohibited.

Section 44 amends section 6 (disposal of premises and provision of accommodation) of the Act of 2000 to provide for the removal of the exclusion in relation to “small premises” and to provide for an exclusion from the provisions of that Act where a person lets or sublets part (other than a self-contained part) of his/her home, where the provision of the accommodation affects the person’s private or family life or that of any other person residing in the home.

Section 45 amends section 7 (educational establishments) of the Act of 2000 to provide that the Minister for Education and Science does not discriminate where, in the exercise of his or her powers he or she prescribes requirements for the making of grants for the purpose of assisting persons to attend or continue to attend an educational establishment, providing higher or further education, which confines the making of such grants to persons who are nationals of
a member state of the European Union or allows for difference of treatment to persons who are nationals of member states and persons who are not.

Section 46 amends section 11 (sexual and other harassment) of the Act of 2000 to take account of definitions of this conduct, provided for in the Race Directive.

Section 47 amends section 14 (certain measures or activities not prohibited) of the Act of 2000 by providing for an exclusion from the provisions of the Act in relation to persons who are not nationals and their entry to and residence in the State for statutory and non-statutory schemes.

Section 48 amends section 20 (definitions) of the Act of 2000 by extending the definition of complainant to allow a parent or guardian of a complainant with an intellectual or psychological disability to act in locus standi.

Section 49 amends section 21 (redress in respect of prohibited conduct) of the Act of 2000 to provide for the use of “reasonable cause” rather than the more restrictive “exceptional circumstances” when seeking an extension of time limits. It also allows the Director extend the time limits where the respondent deliberately misrepresents the facts of the case to the complainant. In addition it clarifies the date on which discrimination is taken to occur where an act is carried out over a period of time or where there is a continuous regime, practice or policy which is discriminatory involved.

Section 50 amends the Act of 2000 by the insertion of a new provision 21A to provide clarification that the date on which a claim or appeal is lodged is the date it is received by the Director or Circuit Court.

Section 51 amends section 22 (dismissal of claims) of the Act of 2000 to provide for a method of appeal against a decision of the Director to dismiss a claim because it has been made in bad faith or is frivolous, vexatious or misconceived or relates to a trivial matter.

Section 52 amends section 24 (mediation) of the Act of 2000 to provide for the cessation of the requirement on the complainant to forward a copy of the equality officer’s notice, to the effect that the case cannot be settled by mediation, to the Director with the application for the resumption of the hearing of the case.

Section 53 amends section 25 (investigation by Director) of the Act of 2000 to provide that a claim covering a number of grounds apart from victimisation must be heard as one case, but for the purposes of a hearing the victimisation claim can be investigated at the same time with a decision made on each of the claims.

Section 54 amends the Act of 2000 by the insertion of a new provision 25A to provide for representation for a party by any individual or body authorised by the party to represent him/her in proceedings before the Director.

Section 55 amends section 27 (redress which may be ordered) of the Act of 2000 to provide that awards can be made for prohibited conduct and not discrimination only. It also provides that the maximum amount of an award can only be applied in a case even where there was discrimination on more than one ground. There is an exception for the victimisation ground which can have a separate
award applied to it. Section 47 also precludes the making of an order for compensation where the Equality Authority are the complainant.

Section 56 amends section 31 (enforcement of decisions and mediated settlements) of the Act of 2000 to allow for the respondent in a mediation settlement to be able to enforce the settlement in the Circuit Court.

Section 57 amends the Act of 2000 by the creation of a new section 37A which provides that where the Director is of the opinion that a person is obstructing or impeding an investigation, the Director may order that the person pay to another person a specified amount in respect of the travelling or other expenses incurred by that other person in connection with the investigation.

Section 58 amends the Act of 2000 by the creation of a new section 38A to provide for the shifting of the burden of proof to the respondent where facts are established by or on behalf of the complainant from which it may be presumed that prohibited conduct has occurred in relation to him or her.

Financial Implications

While the provisions of the Bill will enhance and extend the scope of the existing equality legislation, they are not expected to give rise to significant additional costs for employers or service providers. In addition, it is expected that the new provisions will be adequately administered through the existing resource allocations of the Equality Authority and the Director of Equality Investigations.

In the area of employment, additional costs to employers may arise as a result of the strengthened provision in respect of accommodating disability in the workplace. However, the requirement will continue to be balanced by reference to the level of burden that would be imposed. The extension of the Employment Equality Act to the self-employed, including partners in partnerships, is not expected to result in increased costs.

In the area of service provision, there may be some cost implications where service providers are found to be discriminatory.