Advice of the Ombudsman for Children on the General Scheme of the Education (Admission to Schools) Bill 2013

November 2013

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1. **Introduction**

1.1. The Minister for Education and Skills published the General Scheme of the Education (Admission to Schools) Bill 2013 ("the General Scheme") on 2 September 2013. The aim of the proposed legislation and associated regulations is to provide a new framework to govern school admissions policies for all primary and post-primary schools.

1.2. Section 7 of the Ombudsman for Children Act 2002 provides that the Ombudsman may advise Ministers of the Government on any matter relating to the rights and welfare of children, including the probable effect of implementing proposals for legislation. The following advice on the General Scheme has been prepared in accordance with this statutory function.

1.3. Since its establishment in 2004, the Ombudsman for Children's Office has received over 8,000 complaints, of which a significant number have related to the theme of education. Through the course of its investigatory work, this Office has had occasion to examine the operation of admission policies and the interaction between parents and schools in that context. The findings and recommendations arising from those cases are directly relevant to the legislative and regulatory framework governing schools admissions, and they have been highlighted in this Office's annual reports to the Houses of the Oireachtas and in direct communications with the Department of Education and Skills.

1.4. The principal observations and recommendations have been that:

- The effective operation of a new regulatory framework for enrolment needs to be closely allied to a good complaints-handling policy and culture in schools;
- Setting out the criteria that may and may not be applied by all schools in considering admission applications should enhance the quality of decision-making and provide a common basis for explaining the rationale for refusals to parents and children;
- Appeals mechanisms must be accessible and meaningful;
- An external authority should be able to intervene in the admission process of a school in the interests of children where necessary;
- Lack of clear communication between schools and parents can be a significant problem - ensuring better and more consistent communication in the context of decisions regarding admissions is essential;
- When the cumulative effect of schools' individual decisions is to leave a child without a school place, a central authority should be able to intervene to protect the child's right to education – the need for such a provision was highlighted by an investigation undertaken by the Ombudsman for Children's Office into the case of a child in the care of the State who had been refused admission to over twenty schools;

- Schools need to be supported in devising robust admissions policies and procedures, thereby minimising parents' grievances with the enrolment process; and
- The fair and equitable allocation of school places to children with special educational needs must be a central component of any changes to the regulatory framework for school enrolment.

1.5. In light of the foregoing, the Ombudsman for Children broadly welcomes the General Scheme. Many of the concerns previously expressed by this Office to the Oireachtas and to the Department of Education and Skills have been addressed, such as:

- consistency between admission policies;
- transparency in admission procedures;
- communication of reasons for refusal to parents;
- soft barriers to enrolment; and
- central oversight of cases in which children cannot access a school place.

1.6. However, there are a number of areas in which the legislation could be enhanced to serve the interests of children, namely:

- Admission and oversubscription criteria;
- Appeals mechanisms; and
- Oversight and monitoring

1.7. The comments below have been informed by the investigatory work of the Ombudsman for Children's Office and by Ireland's international human rights obligations. This Office has also had regard to the existing legislative framework underpinning the enrolment process and the background to the current proposals; however, as these issues have been addressed in detail elsewhere, they have not been repeated in this advice.[1]

1.8. It must be acknowledged that the passage of this legislation through the Houses of the Oireachtas will take place against the background of other fundamental reforms in the education sector, particularly regarding diversity of school types and the associated question of patronage. These reforms have been informed by the extensive work undertaken by bodies such as the Forum on Pluralism and Patronage in the Primary Sector and the Irish Human Rights Commission.

1.9. The Ombudsman for Children is mindful that these wider issues are contextually important and interact with the operation of enrolment legislation in a number of ways. However, the focus of the advice that follows is on the specific question of the primary and secondary legislation that will govern the enrolment process for schools; consequently, it does not explore broader elements of ongoing reform in the education sector.

[1] Department of Education and Skills, *Discussion Paper on a Regulatory Framework for School Enrolment* (June 2011), Part 1 – Background and Context.

2. International human rights standards

2.1. There is a range of international human rights standards relevant to the question of school admission and the right to access education. Ireland has engaged with a number of human rights monitoring mechanisms that have, however, highlighted concerns regarding Ireland's compliance with those standards. These concerns have largely related to the diversity of school types in Ireland and current legislation governing school admission.

United Nations Convention on the Rights of the Child (UNCRC)

2.2. Article 2 of the UNCRC requires States Parties to respect and ensure the rights set out in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In order to achieve this, States are required to take all appropriate measures to ensure that the child is protected against all forms of discrimination.

2.3. The UN Committee on the Rights of the Child – the group of independent experts charged with monitoring the implementation of the Convention - has commented that discrimination on the basis of the grounds listed in Article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child, and is capable of undermining the capacity of the child to benefit from educational opportunities.[2] The principle of non-discrimination applies equally to private institutions and individuals as well as to the State, and this must be reflected in legislation.[3]

2.4. Article 3 of the UNCRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The UN Committee on the Rights of the Child has outlined its understanding of this obligation in the legislative context by indicating that States must be able to demonstrate how the best interests have been examined and assessed, and what weight has been ascribed to them in the relevant decision.[4] In addition, the Convention imposes an obligation to undertake a continuous process of child rights impact assessment to predict the impact of any law on children and the enjoyment of their rights, as well as an obligation to evaluate the relevant law after it has entered into force.[5] The UN Committee has also expressed the view that

[2] UN Committee on the Rights of the Child, *General Comment No. 1: The Aims of Education* (2011) UN doc. CRC/GC/2011/1 at www.ohchr.org (date accessed: 6 October 2013).
[3] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (Geneva: United Nations Publications, 2007) at p. 21.
[4] UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2014) UN doc. CRC/C/GC/14 at www.ohchr.org (date accessed: 6 October 2013) at para 14 (b).
[5] *Ibid*. at para 35.

individual decisions taken by administrative authorities in the area of education must be assessed and guided by the best interests of the child, as for all implementation measures.[6]

2.5. Article 4 of the Convention requires States to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. The Committee on the Rights of the Chid has made it clear that rights are not effective without measures being taken to enforce them and to offer redress where they have been violated. In particular, it has recommended that States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives to challenge rights violations.[7] According to the Committee, these should include the provision of "child-friendly information, advice, advocacy … and access to independent complaints procedures … with necessary legal and other assistance."[8]

2.6. A further element of the general measures for the implementation of the Convention relates to decentralisation and delegation of responsibility from central government. The UN Committee has found it necessary to emphasise that decentralisation of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State party's Government to fulfil its obligations to all children within its jurisdiction, regardless of the State structure.[9]

2.7. The UN Committee on the Rights of the Child has also emphasised the important of data collection and analysis as a prerequisite for effective implementation of the Convention. In particular, the Committee has commented that the "collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation."[10] The Committee noted further that it is essential not merely to establish effective systems for data collection, but to ensure that the data collected are evaluated and used to assess progress in implementation, to identify problems and to inform all policy development for children.[11]

2.8. Article 12 of the UNCRC obliges States to assure to children who are capable of forming their own views the right to express those views in all matters affecting them, with due weight given to those views in accordance with the age and maturity of the children. It further specifies that opportunities to be heard have to be provided in any judicial or administrative proceedings affecting the child. The UN Committee has identified administrative proceedings in an educational context as a typical example of this.[12] The right to be heard applies both to proceedings which are initiated by the child, such as appeals against school exclusion, as well as to those initiated by others which affect the child.[13] The UN Committee has stressed the importance of making proceedings accessible and age-appropriate.[14]

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[6] *Ibid.* at para 30.
[7] UN Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation* (2003) UN doc. CRC/C/GC/5/2003 at www.ohchr.org (date accessed: 6 October 2013) at para 24.
[8] *Ibid.*
[9] *Ibid.* at para 40.
[10] *Ibid.* at para 48.
[11] *Ibid.*
[12] UN Committee on the Rights of the Child*, General Comment No. 12: The right of the child to be heard* (2009) UN doc. CRC/C/GC/12 at www.ohchr.org (date accessed: 6 October 2013) at para 32.
[13] *Ibid.* at para 33.
[14] *Ibid.* at para 34.

2.9. Article 14 of the UNCRC requires States to respect the right of the child to freedom of thought, conscience and religion. It provides further that States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

2.10. Article 28 of the UNCRC provides for the right of the child to education.[15] The right to education must be achieved on the basis of equal opportunity, reflecting the fact that large numbers of children suffer discrimination in access to education, particularly children with disabilities, minorities and children from rural communities.[16] In this regard, Article 29 provides that the right to education shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential. The degree to which an education system develops all children's potential depends in part upon the availability of education to all children on the basis of equality of opportunity.[17]

2.11. In terms of specific comments made by the UN Committee on the Rights of the Child on legislation relating to admission in Ireland, the Committee reiterated the concern previously raised by the UN Committee on the Elimination of Racial Discrimination[18] when Ireland's report on its implementation of the UNCRC was examined in 2006. The Committee on the Rights of the Child noted that non-denominational or multidenominational schools represent a small proportion of the total number of primary education facilities and encouraged the establishment of non-denominational or multidenominational schools and that the State amend the existing legislative framework to eliminate discrimination in school admissions.[19]

International Covenant on Economic, Social and Cultural Rights (ICESCR)

[15] Article 28 provides that: "1. States Parties recognise the right of the child to education and with a view to achieving this progressively and on the basis of equal opportunity, they shall in particular:
(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
(c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Make educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries."
[16] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (Geneva: United Nations Publications, 2007) at p. 407.
[17] *Ibid.* at p. 440.
[18] UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Ireland* (2005) UN doc. CERD/C/IRL/CO/2 at para 18.
[19] UN Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations, Ireland* (2006) UN doc. CRC/C/IRL/CO/2 at www.ohchr.org (date accessed: 6 October 2013) at para 60 and 61.

2.12. Article 13 of the ICESCR recognises the right of everyone to education. The UN Committee on Economic, Social and Cultural Rights has commented that while the precise and appropriate implementation of the right to education will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels should exhibit the essential features of availability, accessibility (physically, economically and without discrimination), acceptability (form and substance is acceptable to students and parents) and adaptability.[20]

2.13. In elaborating on the non-discrimination aspect of the right to education, the Committee has emphasised that the prohibition against discrimination enshrined in the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.[21] The Committee has affirmed that establishing separate educational systems or institutions for particular groups does not necessarily constitute a breach of the Covenant, as provided for in Article 2 of the UNESCO Convention against Discrimination in Education (1960).[22] However the Committee has highlighted that States must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.[23]

International Covenant on Civil and Political Rights (ICCPR)

2.14. Article 18 of the ICCPR provides that everyone shall have the right to freedom of thought, conscience and religion and requires States to respect the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

2.15. The Committee charged with monitoring the implementation of the Covenant expressed concerns in relation to the application of Article 18 in the area of education in Ireland.

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[20] UN Committee on Economic, Social and Cultural Rights (CESCR*), General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (1999) UN doc. E/C.12/1999/10 at para 6.

[21] *Ibid*. at para 31.

[22] *Ibid*. at para 33. Article 2 of the UNESCO provides as follows:

"When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article I of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level."

[23] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (1999) UN doc. E/C.12/1999/10 at para 37.

Specifically, the Committee noted that the vast majority of Ireland's primary schools are privately run denominational schools and recommended that the State increase its efforts to ensure that non-denominational primary education is widely available in all regions of the State party, in view of the increasingly diverse and multi-ethnic composition of the population of the State party.[24]

UN Convention on the Elimination of All Forms of Racial Discrimination (CERD)

2.16. Article 5 of CERD requires States to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. The Convention identifies the right to education as one to which Article 5 of the Convention applies specifically.

2.17. In its 2011 concluding observations on Ireland's report under CERD, the UN Committee for the Elimination of Racial Discrimination recalled its previous concerns regarding the lack of diversity of school types in Ireland[25] and expressed its regret that the provisions of the Equal Status Act 2000 give the power to schools to refuse to admit students to denominational schools on grounds of religion, if it is deemed necessary to protect the ethos of the school.[26] The Committee reiterated its previous recommendations to accelerate the establishment of alternative non-denominational or multi-denominational schools and to amend the existing legislation that inhibits students from enrolling into a school because of their faith or belief.[27]The Committee also recommended the monitoring of incidents of discrimination on the basis of belief.[28]

UN Convention on the Rights of People with Disabilities (CRPD)

2.18. Ireland has signed but not yet ratified the CRPD.[29] Article 24 of the Convention requires States to recognise the right of persons with disabilities to education and ensure an inclusive education at all levels. States are further required to ensure that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability and that persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.

United Nations Human Rights Council

2.19. In 2011, Ireland underwent its first examination by the UN Human Rights Council as part of the Council's universal periodic review process (UPR). One of the recommendations made to Ireland was to eliminate religious discrimination in access to education. The State did not accept the recommendation and in doing so, it drew attention to the growing diversity in

[24] UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Ireland* (2008) UN doc. CCPR/C/IRL/CO/3 at para 22.
[25] See UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations: Ireland* (2005) UN doc. CERD/C/IRL/CO/2.
[26] UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations*: *Ireland* (2011) UN doc. CERD/C/IRL/CO/3-4 at para 26.
[27] *Ibid.*
[28] *Ibid*.
[29] Ireland signed the CRPD on 30 March 2007.

school types and indicated that issues of access were being considered as part of the review of the school admission system.[30]

2.20. A further recommendation made during the UPR process was to ratify the 1960 UNESCO Convention against Discrimination in Education. The State indicated that it had no immediate plans to ratify the Convention but that it was fully committed to the principles of equality of educational opportunity contained in the Convention.[31]

European Convention on Human Rights (ECHR)

2.21. The ECHR has particular relevance in the Irish context because, in addition to being ratified by Ireland in 1953, it was indirectly incorporated into Irish law by the European Convention on Human Rights Act 2003.[32]

2.22. There are a number of provisions of the Convention and its Protocols relevant to education:

- Article 2 of Protocol 1 provides that: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions."
- Article 9 provides that: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
  2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."
- Article 14 provides that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
- Article 8 provides that everyone has the right to respect for his or her private and family life and that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for the protection of health or morals, or for the protection of the rights and freedoms of others.
- Article 6 provides that in the determination of civil rights and obligation, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[30] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Ireland, Addendum Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies presented by the State under Review* (2012) UN doc. A/HRC/19/9/Add.1 at p. 9, para 107.48.
[31] *Ibid.* at p. 3, para 107.6.
[32] Section 2 of the 2003 Act provides that in interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. Section 3 further provides that, subject to any statutory provision (other than the 2003 Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

2.23. A full analysis of the case-law that has developed under these provisions of the Convention is beyond the scope of this advice. However, there are a number of principles that have emerged of direct relevance to the General Scheme, which are summarised below:

- The provisions of the ECHR and its Protocol must be read as a whole. Therefore, the right to education under Article 2 of Protocol 1 is to be read in light of Article 9, Article 14 and Article 8 of the Convention.[33]
- The term "respect" in the first sentence of Article 2 of Protocol 1 means more than "acknowledge or "take into account". It denotes not only a negative undertaking not to interfere with the right to education but also places a positive obligation on the State to vindicate the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.[34]
- The first sentence of Article 2 of Protocol 1 guarantees, in the first place, a right of access to educational institutions existing at any given time.[35]
- The right to education in Article 2 of Protocol 1 calls for regulation by the State which may vary according to the needs and resources of the community and of individuals. However, this regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the ECHR.
- States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the ECHR. In the context of Article 2 of Protocol 1, this concept implies that parents cannot require the State to provide a particular form of teaching. However, the State must achieve a just balance between the protection of the general interest of the community and the respect due to fundamental rights, with particular importance attached to the latter.[36]
- In order to determine whether legislation is compatible with the ECHR regard must be had to the material situation it sought to meet. Abuses could occur as to the manner in which the provisions in force were applied by a school or teacher and the authorities have to take utmost care to see that parents' religious and philosophical convictions were not disregarded by carelessness, lack of judgment or misplaced proselytism.[37]
- Whenever discretion capable of interfering with an ECHR right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation.[38]

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[33] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, 1474/62, 23 July 1968 at para 1. The Applicants alleged that Articles 8 and 14 of the Convention and Article 2 of the Protocol had been violated as the Belgian State did not provide for any French-language education in the municipalities where they lived or such provision was inadequate. See also; *FolgerØ v Norway*, 15472/02, 29 June 2007. Relying upon Article 9 and Article 14 of the ECHR, and Article 2 of Protocol 1, the applicants complained about the authorities' refusal to grant their children full exemption from a school subject which covered Christianity, religion and philosophy. The ECtHR held that there had been a violation of Article 2 of Protocol 1.

[34] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, 1474/62, 23 July 1968 at para 3, *Lautsi v. Italy,* 30814/06, 18 March 2011 at para 4 and *FolgerØ v Norway*, 15472/02, 29 June 2007 at para 84.

[35] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, 1474/62, 23 July 1968 at para 4 and *FolgerØ v Norway*, 15472/02, 29 June 2007 at para 84.

[36] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, 1474/62, 23 July 1968 at paras 5-7,10 and *Lautsi v. Italy,* 30814/06, 18 March 2011 at para 61.

[37] *FolgerØ v Norway*, 15472/02, 29 June 2007 at para 84.

[38] *D.H. and Others v. The Czech Republic,* 57325/00, 13 November, 2007 at para 206.

- The European Court of Human Rights (ECtHR) has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. The difference in treatment must also have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[39]
- In certain circumstances, if there are factual inequalities between groups, a failure to attempt to correct this inequality through different treatment may in itself give rise to a breach of Article 14.[40]
- A general policy or measure, that has disproportionately prejudicial effects on a particular group, may be considered discriminatory even if it is not specifically aimed at that group.[41]
- Within the educational sphere, the ECtHR has held that where legislation produces a discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authorities.[42]
- Measures taken in the field of education may affect the right to respect for private or family life if their aim or result were to disturb private or family life in an unjustifiable manner, including by separating children from their parents in an arbitrary way.[43]
- The procedural safeguards provided for in Article 6 of the ECHR are applicable to accessing educational places.[44]

European Commission Against Racism and Intolerance (ECRI)

2.24. ECRI is a human rights body of the Council of Europe, composed of independent experts, which monitors problems of racism, xenophobia, antisemitism, intolerance and discrimination on a range of grounds. The Commission prepares reports on its analysis of these matters in member States and issues recommendations to member States.

2.25. In its most recent report on Ireland, ECRI noted the preponderance of denominational schools in the Irish education system, particularly under the patronage of the Catholic Church, and commented that:

> "Whereas it is commendable that the vast majority of such schools accept children of all faiths, or lack thereof, without the obligation for such children to participate in Catholic religious instruction and rites, ECRI finds that in some cases where the

[39] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, 1474/62, 23 July 1968 at para 10 and *D.H. and Others v. The Czech Republic,* 57325/00, 13 November, 2007 at para 11. In the latter case, the applicants, who were of Roma origin, alleged that they had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin. They maintained that they had been treated less favourably than other children in a comparable situation without any objective or reasonable justification.

[40] *D.H. and Others v. The Czech Republic,* 57325/00, 13 November, 2007 at para 175.

[41] *Ibid.*

[42] *Ibid.* at para 12.

[43] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, 1474/62, 23 July 1968 at para 7.

[44] In *Emine Arac v Turkey*, 9907/02, 28 September 2008, the ECtHR held that the right of access to higher education fell within the scope of the applicant's personal rights and was therefore civil in character (see paras 24-2). As a result Article 6(1) was deemed to be applicable in this case and the Court abandoned the case-law of the Commission in *Simpson v The United Kingdom*. In *Orsus and Others v Croatia*, 15766/03, 16 March 2010, the Grand Chamber upheld the judgment in *Emine Arac v Turkey* at para 104 and confirmed that the right of access to primary education is also a right of a civil nature.

demand exceeds the availability of places, schools may introduce admission schemes based not only on academic performance, but also on filiation links with the school based on siblings attendance, which is understandable, and parents' attendance, which is difficult to comprehend. A preferential admission policy favouring children whose parents attended the particular school can have indirect discriminatory effects on children of immigrant background, or from other disadvantaged groups like Travellers, whether they are Catholic or not."[45]

2.26. ECRI also raised Ireland's decision not to ratify the UNESCO Convention Against Discrimination in Education. As was the case with the UN Human Rights Council, the Government indicated that it has no plans at present to ratify the Convention.[46]

[45] Council of Europe: European Commission Against Racism and Intolerance (ECRI), *ECRI report on Ireland (fourth monitoring cycle): Adopted on 5th December 2012* (2013) UN doc. CRI(2013)1 at para. 102.
[46] *Ibid* at para.10.

3. Admission and oversubscription criteria

3.1. Head 4 of the General Scheme provides for an amendment to section 33 of the Education Act 1998 that sets out the powers of the Minister to make regulations for the admission of students to schools.

3.2. In prescribing the matters the Minister may provide for in regulations, the General Scheme is clear that the Minister may require admissions policies to state that schools shall provide an offer of enrolment to all students seeking admission, save in four particular situations:

- Where the number of students seeking admission is greater than the number of places being made available by the school;
- In accordance with section 7 of the Equal Status Act 2000;
- Where the student or his or her parents do not agree to confirm in writing that the school's Code of Behaviour is acceptable to them and that they shall make all reasonable efforts to ensure compliance with such a code; or
- Where An Garda Síochána or the Health Service Executive has provided in writing to the school its opinion that the admission of the student could have a seriously detrimental effect on the safety of other students and or staff of the school.[47]

3.3. When read in conjunction with the proposed regulation on the content of admission policies, it is clear that Head 4 provides that schools will generally have to provide an offer of enrolment where the school has places.

3.4. This statement of principle, along with the clarity and consistency provided for in the regulations, will represent a substantial advance on the current regulatory framework for admission to schools. It will also address a number of problems identified by the Ombudsman for Children's Office in the course of its investigations into complaints regarding schools.

3.5. There are, however, a number of difficulties that arise from a number of the exceptions provided for in Head 4.

Oversubscription criteria

3.6. The first exception to the rule that schools must provide an offer of enrolment to all students seeking admission is where the number of students seeking admission is greater than the number of places being made available in the school. When this situation arises, the school may apply certain oversubscription criteria in accordance with regulation 14 of the draft regulations on the content of admission policies.[48]

3.7. Regulation 14 clarifies that it will be impermissible for oversubscription criteria to include a number of factors, including:

[47] See the new section 33(m)(vi) proposed in Head 4 of the General Scheme.
[48] Draft Education Acts 1998 and 2013 Admission Policies of Schools and Related Matters Regulations 2013, Regulation 14.

- Whether a student is a relative of a member of the board, a former student at the school, or a benefactor of the school;
- Giving priority to a student on the basis of a financial or other contribution to the school, subject to certain exceptions;
- Giving priority to a student according to the occupation or financial status of the student's parents;
- Giving priority to a student on the basis of his or her academic ability, skills or aptitude; or
- A mandatory requirement that a student or the student's parents attend any meeting, open day or interview as a condition for the allocation of a place.

3.8. Taken together, these measures enhance the fairness of the procedure and provide clarity to parents on what criteria can be applied by schools.

3.9. Regulations 15 and 16 provide for derogations in respect of the past pupil criterion and waiting list criterion respectively. Regulation 15 sets out how the past pupil criterion will operate: this will enable the Minister to grant a derogation permitting a school to give priority to a student on the basis that the student is the son or daughter of a past pupil of the school, if the school complies with certain conditions. The derogation will operate for such periods as may be determined by the Minister and the maximum number of places that may be filled by the application of the past pupil criterion cannot exceed a quarter of available places.

3.10. The retention of the past pupil criterion is problematic because it can give rise to instances of indirect discrimination against particular groups of children. As noted above, the European Commission Against Racism and Intolerance expressed its concern at the impact this can have on Travellers and children of immigrant background.[49] This matter has also arisen before the courts in this jurisdiction.[50]

3.11. The derogation set out in Regulation 15 is not envisaged as a transitional measure. Although the Minister retains the discretion to limit the period of time for which the derogation will apply, it is potentially open-ended, unlike the derogation relating to waiting lists which can persist for a maximum of five years. Indeed, the Ombudsman for Children understands that the rationale for retaining the possibility of applying the past pupil criterion is to allow certain schools with a tradition of admitting children of former pupils to continue to give priority to this category of applicant; if a derogation is granted to such a school in the first instance, there is no reason to believe that it would not be of indefinite duration.

3.12. The Ombudsman for Children appreciates that the proposals contained in regulation 15 represent a far more circumscribed application of the past pupil criterion than exists at present, as there is currently no limit to the proportion of places that may be filled by the application of this criterion. However, it should be borne in mind that this is an oversubscription criterion, meaning that it may only be applied where the number of applications exceeds the number of places available. Putting children without an intergenerational connection with a school at a disadvantage vis-à-vis those with such a connection when there is high demand on limited spaces is not justifiable.

[49] Council of Europe: European Commission Against Racism and Intolerance (ECRI), *ECRI Report on Ireland (fourth monitoring cycle): Adopted on 5 December 2012*, 19 February 2013, CRI (2013)1.
[50] See *Stokes v Christian Brothers High School*, unreported, High Court, McCarthy J., February 3, 2012.

3.13. In light of this and the very real potential for indirect discrimination against particular groups of children, the Ombudsman for Children believes that the derogation contained in Regulation 15 should be removed.

Recommendation

The possibility of obtaining a derogation with respect to the past pupil criterion should be removed.

Section 7 of the Equal Status Act 2000

3.14. The second exception to the rule that schools must provide an offer of enrolment to all students seeking admission is provided for in section 7 of the Equal Status Act 2000.

3.15. The relevant provision of the 2000 Act states that an educational establishment does not discriminate by reason that:

- where the establishment is not a third-level institution and admits students of one gender only, it refuses to admit as a student a person who is not of that gender; or
- where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school.

3.16. Head 3 of the General Scheme reaffirms the exemptions contained in section 7 of the 2000 Act.

3.17. As noted above, the second of these exemptions – relating to admission to schools established to provide education in an environment which promotes certain religious values - has been the subject of criticism by international human rights monitoring mechanisms.[51] It is clear that publicly funded denominational education per se is compatible with Ireland's international human rights obligations; this fundamental aspect of Ireland's approach has never been criticised by the relevant bodies. It also follows logically that where a State establishes such a system, it entails some form of alignment between schools of a particular religious ethos and the denominational composition of their student bodies. The concern expressed by international monitoring mechanisms with respect to this component of Ireland's equality legislation essentially arises from its practical implications in the Irish context. Specifically, it relates to what an alignment between a school's ethos and the composition of its student body actually means and requires in practice, and how this interacts with children's right to access publicly funded education generally.

3.18. The application of this exemption in the Equal Status Act must be viewed against the background of the jurisprudence developed under Article 42 and Article 44 of the Constitution. This jurisprudence discloses two different lines of reasoning with respect to

[51] See in particular comments by the UN Committee on the Rights of the Child and the UN Committee on the Elimination of Racial Discrimination outlined above.

public funding for denominational education and the more general question of access to such publicly funded educational establishments.[52]

3.19. The first clearly establishes that public funding for denominational education does not constitute an endowment of religion.[53] In addition, it frames the State's support for denominational schools as an aspect of parental choice and the State's duty to assist parents with the religious and moral formation of their children.[54] The implication of this strand of jurisprudence is that schools that are denominational should be able to give preferential access to children of the same denomination because, in the absence of such a possibility, it would be impossible to guarantee that the student body would correspond to the denomination of the school, thus defeating the aim of the relevant provisions of the Constitution.[55]

3.20. The second strand of jurisprudence suggests a different approach. Supported by the principle set out in Article 44.2.3° that the State must not impose any disabilities or make any discrimination on the ground of religion, belief or status, this line of reasoning supports the notion that if a school is in receipt of public funds, any child should be entitled to attend without discrimination arising from a child's or parents' beliefs.[56] This suggests a particular reading of Article 44.2.4° of the Constitution, which provides that legislation providing state aid for schools shall not discriminate between schools under the management of different

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[52] For a general discussion of this matter, see G. Hogan and G. Whyte, *JM Kelly: the Irish Constitution*, 3rd ed., (Dublin: LexisNexis Butterworths, 2003) 7.8.100 – 7.8.106, pp. 2069-2071.

[53] *In Campaign to Separate Church and State v the Minister for Education* [1998] 3 IR 321, [1998] 2 ILRM 81, the Supreme Court endorsed the view that public funding for denomination education did not constitute endowment of religion. As Keane J put it: '[Article 44.2.4º] makes it clear beyond argument, not merely that the State is entitled to provide aid to schools under the management of different religious denominations, but that such schools may also include religious instruction as a subject in their curricula. It is subject to two qualifications; first, the legislation must not discriminate between schools under the management of different religious denominations and, secondly, it must respect the right of a child not to attend religious instruction in a school in receipt of public funds.'

[54] G. Hogan and G. Whyte, *JM Kelly: the Irish Constitution*, 3rd ed., (Dublin: LexisNexis Butterworths, 2003) 7.8.59. p. 2054.

[55] This view is buttressed by the ruling of the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321. In that case, the Supreme Court upheld legislative provisions which permitted religious bodies operating religious, educational or medical institutions to discriminate on religious grounds between employees and prospective employees for the purpose of maintaining the religious ethos of the institution, stating that: "It is constitutionally permissible to make distinctions or discriminations on grounds of religious profession, belief or status insofar – but only insofar – as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion in the Constitution".

[56] In *Campaign to Separate Church and State*, Barrington J addressed the ruling of the Court in *Re Article 26 and the Employment Equality Bill 1996* and its relevance to the *Campaign* case by stating :
"[T]he court's decision on the reference of the Employment Equality Bill has a wider significance for the resolution of the problem presented in this case. As was pointed out in the court's judgment on the reference the system of denominational education was well known to the framers of the Constitution. We know this because they refer to it. Article 44.2.4° prescribes that legislation providing state aid for schools shall not discriminate between schools under the management of different religious denominations nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. These references appear to me to establish two facts. First the Constitution does not contemplate that the payment of monies to a denominational school for educational purposes is an 'endowment' of religion within the meaning of Article 44.2.2° of the Constitution. Secondly, the Constitution contemplated that if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it. But such a child was to have the right not to attend any course of religious instruction at the school."

religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school: legislation providing state aid for schools must not operate to affect prejudicially the right of any child to attend a school receiving public money and a child so admitted to a publicly funded school shall not be required to attend religious instruction. This reading may be contrasted with another, which would maintain that Article 44.2.4° rather requires that legislation providing state aid for schools not affect prejudicially the right of any child to attend a publicly funded school without attending religious instruction, without implying a prior right to access the school place to begin with.

3.21. The two broad approaches outlined above cannot be applied generally in an unqualified manner at the same time: children cannot simultaneously have equal access to all publicly funded schools and also be given priority in admission to schools of their denomination, especially if most publicly funded schools are denominational.

3.22. The tension between these two principles has never been addressed explicitly by either the Courts or by the Oireachtas. In light of the criticism of section 7 of the Equal Status Act made by international human rights monitoring mechanisms, the Ombudsman for Children believes that the passage of the Education (Admission to Schools) Bill 2013 through the Houses of the Oireachtas provides a useful opportunity to do so.

3.23. The need for such a different balance to be struck arises from the difficulty posed by the operation of section 7 of the Equal Status Act, principally in areas where schools are oversubscribed. The Ombudsman for Children understands that most schools in Ireland do not experience oversubscription; all children who apply to these schools are admitted.[57] In situations of oversubscription, it is the application of section 7 of the Equal Status Act 2000 against the background of a particular configuration of school types that can create an anomaly. If, for example, a majority of schools in a given catchment area are of a particular denomination, a child of that denomination can be admitted to all of those schools in preference to another child in the area who is not of that denomination. While this preferential access constitutes a manifestation of parental choice and a logical consequence of establishing a system of denominational education, it also has another effect: it means that the child of the same denomination as the majority of schools in the catchment area has preferential access to most publicly funded education in the area. Moreover, there is no reason in principle why the schools in this situation would have to accord a greater priority to location rather than denomination, which implies that they could give greater priority to a child of the same denomination from outside the catchment area than that given to a child living in the catchment area who was not of that denomination.

3.24. In practice, oversubscription currently arises most often in urban areas where there are a number of schools in a particular community. However, this problem could in principle arise in a stand-alone school i.e. the only school in a given geographical area. According priority to children of that school's denomination would mean affording them priority access to the only publicly funded education in the relevant catchment area. Indeed, it was for that reason that the Advisory Group to the Forum on Pluralism and Patronage in the Primary Sector commented that, particularly in some stand-alone schools, the derogation in the Equal Status Act 2000 may impede the Department of Education and Skills' duty to provide

[57] Department of Education and Skills*, Discussion Paper on a Regulatory Framework for School Enrolment (June 2011)* at p. 31.

for education for all children, and recommended further consideration might need to be given to the amendment of this derogation.[58]

3.25. Providing for *de jure* priority to be accorded to children applying to a school of their denomination was never intended to accord the same children *de facto* priority in accessing publicly funded education generally. It can, however, be a consequence of the current system in Ireland in areas where schools are oversubscribed. It is situations such as these that underscore the tension between the two constitutional principles set out above. Under different factual circumstances relating to the diversity of school types available, this difficulty would not present itself, or at least not to the same degree. The recently initiated process of altering the patronage of schools in line with local parental demand, along with the importance accorded to diversity in the process of setting up new schools, will of course alter the practical application of section 7 of the Equal Status Act. However, as matters stand at present, the difficulty outlined above persists.

3.26. The Ombudsman for Children believes that section 7 of the Equal Status Act should therefore be amended. In this context, the Ombudsman for Children recalls the comments made by the Constitution Review Group that if a school under the control of a religious denomination accepts State funding, it must be prepared to accept that this aid is not given unconditionally and that it is not unreasonable or unfair to require a state-funded denominational school to be prepared in principle to accept pupils from denominations other than its own.[59]

3.27. The Ombudsman for Children is of the view that children should not have preferential access to publicly funded education on the basis of their religion and that the Equal Status Act should reflect that principle. This would address one of the concerns expressed by international monitoring mechanisms in the area of education; it would also give expression to the second strand of jurisprudence under Article 44 of the Constitution outlined above.

3.28. The Ombudsman for Children is, however, mindful of the protection afforded to denominational education by the Constitution as an expression of parental choice and the State's duty to respect and support that choice. This principle could be incorporated by means of derogation that could be sought from the Minister for Education and Skills where the operation of the principle of equal access to publicly funded education gives rise to a situation in which a school's student body may no longer reflect the school's denominational character. Although this derogation could apply to any denominational school, it would be of particular importance to geographically dispersed religious minorities.

Recommendation

Section 7 of the Equal Status Act 2000 should be amended to provide that no child should in general be given preferential access to publicly-funded education on the basis of their religion, subject to a derogation that may be granted to a denominational school where the operation of this principle gives rise to a situation in which a school's student body may no longer reflect the school's denominational character.

[58] Coolahan et al, *The Forum on Patronage and Pluralism in the Primary Sector: Report of the Forum's Advisory Group* (April, 2012) at p. 77.
[59] The Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996) at pp. 385-386.

Notification from HSE/Gardaí that a child should not be admitted to school

3.29. The final exception to the general rule that schools must provide an offer of enrolment to all students seeking admission is where An Garda Síochána or the Health Service Executive has provided in writing to the school its opinion that the admission of the student could have a seriously detrimental effect on the safety of other students and/or staff of the school.

3.30. The proposed power of a school to refuse admission to a child on the basis of a communication from the HSE or An Garda Síochána is of concern to the Ombudsman for Children. Invoking this power clearly involves a significant interference with a child's right to access education; this is placed in stark relief by the fact that there is no explicit provision made for how a child's rights to education will otherwise be vindicated where the child has been refused admission to school on the basis of a communication from the HSE or An Garda Síochána.

3.31. Broadly speaking, there are two situations in which this power could be invoked. The first is where wider difficulties in the community – for example, conflict between particular families - may be manifesting themselves in schools and the relevant authorities believe it would be in the interests of the other students in the school not to admit a particular child. The second situation is where the previous behaviour of the pupil in question leads either the HSE or the Gardaí to believe that the student should not be admitted in the interests of guaranteeing the safety of other students or staff.

3.32. In the first situation, refusing admission to a child on foot of a communication from the HSE or An Garda Síochána amounts to pre-empting a problem. A child in this situation would have done nothing to indicate that he or she would personally present any "threat" to other students or to staff members. Such a decision would also be predicated on the assumption that the school in question would not be in a position to manage any difficulties following the admission of the child in question to the school.

3.33. With respect to the second situation – where an applicant's previous behaviour leads to a notification from the HSE or An Garda Síochána to the school – it is unclear why existing mechanisms for addressing challenging behaviour would be insufficient to address difficulties presented by particular students as they arise.

3.34. The General Scheme does not set out the reasons for the inclusion of this provision, nor does it demonstrate its necessity. Given the impact of this power's use on a child's access to education, compelling evidence would have to be adduced to justify its inclusion in the legislation. In the absence of such evidence, the Ombudsman for Children believes this provision should be removed.

<u>Recommendation</u>

The power of schools to refuse admission on the basis of the opinion of the HSE or An Garda Síochána in relation to the effect of admitting particular children on the safety of other students or staff should be removed.

4. Appeals mechanisms

4.1. Head 5 of the General Scheme provides for the repeal of section 29(1)(c) of the Education Act 1998. The effect of this will be to remove the right of appeal to the Secretary General of the Department of Education and Skills against a decision by a school to refuse admission. Head 7 provides that appeals regarding initial decisions on admission will instead be considered by Boards of Management in accordance with procedures prescribed by the Minister; it provides further that their decisions shall be final. The explanatory note to Head 5 indicates that the reasons for repealing section 29(1)(c) are that the new framework will be less burdensome, less adversarial and more cost-effective.

4.2. The proposed reorganisation of the appeals mechanism for admission must be considered in the context of the other changes that will be effected by the legislation. The enhanced requirements on schools to communicate reasons for refusing admission to schools, combined with the consistency in the content of admission policies brought about the relevant regulations, should have the effect of reducing the number of appeals overall. This would, of itself, be a welcome development.

4.3. However, it is not clear why it would also be preferable to remove the section 29 appeal process rather than retain it in a situation where the number of appeals is likely to decrease in any event.

4.4. The section 29 appeal process has a number of distinct advantages. The first is that an Appeals Committee established under section 29 of the 1998 Act is entirely independent of the school in respect of which an appeal is lodged. In determining an important matter such as admission to school, it is axiomatic that determination by an independent body is preferable to that of a body (in this case the Board of Management) that works very closely with the initial decision-maker (the Principal).[60] Submitting the matter to an institutionally independent body such as a section 29 Appeals Committee removes the possibility of parents encountering biased decision-making or indeed perceiving the process to lack independence. Moreover, it is not clear that either parents or Boards of Management would generally favour the removal - as distinct from reform - of the section 29 appeals process. In considering whether to proceed with the proposed repeal of section 29(1)(c) of the Education Act 1998, the views of representative organisations for parents and school management should therefore be thoroughly canvassed.

4.5. A further advantage of retaining the current mechanism is the capacity to appoint a facilitator to engage with the parties to an appeal concerning admission. This facility is underpinned by section 29(4) of the Education Act 1998, which provides that procedures for dealing with appeals shall ensure that the parties to the appeal are assisted to reach agreement on the matters the subject of the appeal where the Appeals Committee is of the opinion that reaching such agreement is practicable in the circumstances. Where the section 29 appeals committee considers that such agreement may be reached, notwithstanding any failure to reach agreement at local level within the school, a facilitator will be appointed by the Section 29 Appeals Administration Unit of the Department of Education and Skills to contact, or arrange to meet, the parties at the earliest opportunity. The facilitator's role is to attempt to broker an agreement between the parties to the appeal.

[60] See comments above in relation to Article 4 of the UNCRC and Article 6 of the ECHR.

4.6. The Ombudsman for Children is of the view that the facilitators, as independent third parties, can have an important function in achieving local resolution of a complaint. If section 29(1)(c) of the 1998 Act is repealed, it is unclear whether the facilitators would still be available to support the appeals process when appeals are heard by Boards of Management at local level. It would be regrettable if such support were no longer available.

4.7. Another aspect of the proposed repeal of section 29(1)(c) of the Education Act 1998 is that it will have the effect of placing the appeals process in relation to admissions within the investigatory remit of the Ombudsman for Children's Office, as the actions of Boards of Management are generally in remit. However, there are important differences between the nature of the examination undertaken by this Office and a section 29 Appeals Committee. In examining a complaint brought by or on behalf of a young person regarding a school, the Ombudsman for Children's Office must consider whether the actions of the school constitute maladministration under section 9 of the Ombudsman for Children Act 2002. The Ombudsman for Children believes that the particular mechanism provided for in section 29 of the Education Act 1998 is a more appropriate avenue for parents to pursue redress. In addition, providing for the Ombudsman for Children's Office to consider complaints regarding the decisions of a school in relation to enrolment could lead to an immediate increase in the volume of complaints received by this Office and, in light of the short timeframes within which such cases have to be examined, this change could present challenges for this Office from a resource point of view.

4.8. A final point is that schools are not required to have a Board of Management as such, in that it is possible for there to be an individual school manager in place rather than a Board. The absence of a strict requirement to have a Board of Management has come to the attention of this Office in the course of its investigatory work, specifically in the context of serious concerns regarding the operation of a school's admissions policy. When the governance structure of a school does not require a Board, it is not reasonable to limit the possibility of appealing an enrolment decision to the Board because this could in effect amount to an appeal to an individual school manager.

4.9. This is manifestly unsatisfactory. Notwithstanding the fact that such a situation is unlikely to arise in practice, for as long as it remains permissible, it would not be appropriate to provide that the only appeal lies to the Board of a school, whose decision is final.

Recommendation

The competence of section 29 appeals committees to consider appeals relating to enrolment should be retained.

Role of the NCSE and NEWB

4.10. Head 9 provides for the National Council for Special Education (NCSE) to designate a school which a child with special educational needs will attend; a school so designated must admit that child. Designation can be at the discretion of the NCSE or at the request of the parents of a child with special educational needs where, for reasons related to that child's special educational needs, no school place can be found. Head 8 repeals a similar provision currently contained in section 10 of the Education for Persons with Special Educational Needs Act 2004, which was never commenced.

4.11. Head 9 also provides that the National Education Welfare Board may designate a school for a child who does not have a special educational need and for whom no school place can be found. Finally, Head 9 provides for the establishment of an appeal mechanism to consider and determine appeals in relation to designation by the NCSE and the NEWB.

4.12. These provisions are most welcome. One of the consequences of every school managing admissions on an individual basis is that there is currently no authority that can intervene to mitigate the cumulative effect of a number of negative enrolment decisions. As noted above, this Office investigated a case in which a child in care was refused admission to over twenty schools. Although a place was ultimately obtained for the young person in question, it was only after a significant period of time during which he had to avail of home tuition as an interim measure. The Ombudsman for Children recommended that this deficiency in the regulatory framework be addressed in the context of the proposed legislation. In addition, this Office has frequently had occasion to examine the difficulties faced by the parents of children with special educational needs in accessing appropriate school places for their children.

4.13. The powers conferred on the NEWB and NCSE by the General Scheme represent a positive development with the potential to remedy some of the serious difficulties relating to enrolment that have been the subject of examination and investigation by this Office. However, the Ombudsman for Children believes that these provisions could be further enhanced in a number of ways.

4.14. In relation to the considerations to which the NCSE and NEWB have regard in reaching a decision regarding designation, this Office notes that the principle of acting in the best interests of children is explicitly included for the NEWB but not the NCSE. The principle should be equally applicable to both.[61] In addition, the General Scheme should include a requirement to have regard to the views of children affected by the decisions in addition to those of their parents, with due weight given to the children's views in accordance with their age and maturity.[62] In the experience of this Office, engaging with children in these situations where it is appropriate to do so can add significantly to understanding the complexity of a case.

4.15. A further matter that has arisen in complaints to this Office is that of school transport available for children with special educational needs. In considering whether to make a designation in accordance with Head 9 of the General Scheme, the NCSE should have regard to this element as well. In response to two recent full investigations, by this Office, the Department have outlined that they are working on a Protocol/Code of Practice for how the NCSE determines which schools to designate. We would urge that such a document be prioritised in line with the conclusion of this Bill.

4.16. The legislation does not specify whether in exercising their designations functions under Head 9, the NCSE and NEWB will be in a position to find places in classes that have ceased to admit students. By definition, the situations in which the NEWB and NCSE will be called upon to make such designations will arise in areas where there is a high demand for places.

[61] See comments above in relation to Article 3 of the UNCRC.
[62] See comments above in relation to Article 12 of the UNCRC.

4.17. It would clearly be undesirable to augment the maximum number of children in a particular class as a routine measure. However, the Ombudsman for Children is of the view that retaining a certain amount of flexibility in this regard is essential. If, for example, a child in the care of the State needs to move school during the course of an academic year into an area in which the appropriate classes have ceased admitting pupils, allowing the NEWB to make a designation to a full class as an exceptional measure is important. The Ombudsman for Children appreciates that clarity and transparency around class size are core principles underpinning the enrolment process; in general terms, it is not fair to those who have been refused places in oversubscribed schools for the maximum class size to increase after the enrolment process has been complete. However, the situations in which the NCSE and the NEWB are making designations would in practice involve children who would otherwise be unable to access a school, have special educational needs or who are potentially from a vulnerable background. In these circumstances, allowing for a more flexible approach does not offend the principle of fairness in the Ombudsman for Children's view.

Recommendations

Both the NCSE and the NEWB should be required to consider the best interests of children in considering a designation under Head 9, as well the views of young people affected by decision, with due weight given to those views in accordance with the age and maturity of the children.

The legislation should clarify the capacity of the NEWB and NCSE to make designations where a school has ceased to admit pupils to a particular class; this flexibility would avoid the situation where an overly-rigid approach to class size could leave young people at a serious disadvantage and having to rely on home tuition.

5. Oversight and monitoring

Power of Patrons and the Minister to appoint persons to operate the admissions policy

5.1. Head 12 provides for the Patron of a school to be able to appoint a person independent of the school to carry out the operation of the admission policy where the patron is of the opinion that the operation of the admission policy is contrary to the requirements of the legislation. The Head also provides that the Minister may require a Patron to appoint a person independent of the school to carry out the operation of the admission policy where the Minister is of the opinion that the operation of the admission policy is contrary to the requirements of the legislation.

5.2. Head 13 provides further that the Minister may appoint a person independent of the school to carry out functions relating to school admission when the Patron of a school has refused to carry out a direction of the Minister under Head 12 or where the Patron's attempt to comply with the direction fails to rectify the matters that were the subject of the direction. The Minister's powers under Head 13 are intended to be limited and a measure of last resort, given that exercising this power effectively removes the operation of a school's admissions policy from the control of the Patron and the Board of Management.

5.3. The purpose of these provisions is to expand the range of options available within and outside the governance structure of schools to respond to situations in which the school is failing to implement its admissions policy in accordance with the legislation and regulations.

5.4. The inclusion of such powers – particularly those of the Minister under both Heads 12 and 13 – represent a substantial and much-needed set of tool for the effective oversight of schools' admission policies. These powers will take on particular significance if the final appeal on enrolment applications rests with Boards of Management, as currently envisaged by the General Scheme. In the absence of oversight by section 29 Appeals Committees, the potential for a poor culture of implementing admission policies in an appropriate manner is higher than it would otherwise be, due to an absence of external oversight.

5.5. The usefulness of the powers provided to the Minister under Head 13 are also highlighted by an investigation carried out by this Office into a school that refused admission to a young person on the basis that she was pregnant, and later on the basis that the young person was a single mother. Even though the lawfulness of this approach could be formally challenged, there is currently no statutory power available to the Minister to intervene in the operation of a school's admissions policy where such grave irregularities become apparent. This implies that even if a decision in respect of an individual enrolment application were being contested or examined by a relevant statutory body or the Courts, it would not be possible to compel the school to alter its general approach. Closing this gap will enhance the protections afforded to children and their parents under the legislation.

5.6. The Ombudsman for Children notes that the General Scheme includes timeframes for the Minister to allow the Patron of a school to make representations in respect of appointing the independent person to operate the school's admissions policy; however, there are no timeframes specified for the period of time in which the Patron's failure to discharge his/her functions will give rise to a Ministerial direction to appoint an independent person in accordance with Head 13. This provision would benefit from greater precision in this regard.

Recommendation

The legislation should specify a timeframe within which the Patron must comply with the direction of the Minister, failing which an independent person will be appointed in accordance with Head 13.

Data collection

5.7. The Irish system of education devolves significant responsibility and autonomy to school level. There are definite strengths evident in this approach. However, the Ombudsman for Children believes that there should be a greater level of oversight exercised by the Department of Education and Skills, and that this should be underpinned by a more robust and systematic approach to gathering data on the operation of legislation relating to admissions throughout the country.

5.8. There are three principal reasons for proposing this approach. The first is that Ireland's international human rights obligations require the State to ensure that rights guaranteed by law are realised in practice. States are generally free to organise their education systems in the manner most suitable to their particular contexts; however, the system cannot be organised in such a way that the autonomous actions of schools escape monitoring and oversight to the point where their actions can impede the effective enjoyment of the right to education. The State's responsibility is always engaged.[63] It follows that appropriate oversight must be exercised by an appropriate authority and this in turn must be based on appropriate data collection. It is impossible to exercise an effective monitoring role when there is a dearth of information or when its collection is sporadic. Therefore, information on broad trends in the operation of schools' admission policies must be gathered systematically so that the State is aware of matters such as the number of applications, the number of refusals, and the main reasons for children being refused throughout the country. Indeed, the UN Committee on the Rights of the Child previously recommended that Ireland develop a systematic and comprehensive collection of disaggregated data in compliance with the Convention, which should be used for the creation, implementation and monitoring of policies and programmes for children.[64] The area of education – and specifically legislation relating to admission - is clearly relevant in this regard.

5.9. Secondly, the gathering of such data is essential to underpin the Government's commitment to evidence-based policy and law making. Given the significant changes being proposed in the legislation, the operation of the legislation must be evaluated at an appropriate time to ensure that it is achieving its objectives and, in particular, to establish whether any further legislative changes may be required.[65] The Ombudsman for Children notes in this regard that the process of reforming the regulatory framework for school admission was informed by two reports, a 2007 audit of enrolment policies undertaken by the Department of Education and Skills and a 2009 report by the Economic and Social Research Institute;[66] this research has been very important but the Ombudsman for

[63] See comments above in relation to Article 4 of the UNCRC and the general measures of implementation.
[64] UN Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations, Ireland* (2006) UN doc. CRC/C/IRL/CO/2 at www.ohchr.org (date accessed: 6 October 2013) at para 17.
[65] See comments above in relation to Article 3 of the UNCRC and the importance of child impact analysis and evaluation in the legislative process.
[66] Department of Education and Skills, *Audit of School Enrolment Policies* (DES, November 2007); Economic and Social Research Institute, *Adapting to Diversity: Irish Schools and Newcomer Students*, Research Series, Number 8 (Dublin: ESRI, June 2009).

Children believes that more up-to-date information is required on an ongoing basis to monitor the operation of the admissions legislation. The Ombudsman for Children does not believe that reliance on informal channels of communication will be sufficient, as this will not furnish a comprehensive view at a national level of how the regulatory framework is operating.

5.10. Finally, the proposed new powers of the Minister for Education and Skills to require schools to cooperate in administering their policies and to intervene directly in the operation of a school's admissions policy would also be buttressed by enhanced data collection. Where anomalies with the operation of a given school's admission policy present, they can already come to the attention of the Department of Education and Skills by a variety of means, including direct representations by parents, the work of the Inspectorate, investigations by this Office and information obtained from other statutory bodies. However, these channels would not necessarily be activated in all instances. Moreover, they would not necessarily give an indication of any anomalous trends – as opposed to individual decisions – that may require the Minister to invoke the new powers contemplated in the General Scheme. The systematic gathering of data on admissions would therefore support the Department's role in targeting the use of the new powers provided for in Heads 11, 12 and 13 of the General Scheme.

5.11. The process of gathering data on school admissions at a national level could be explored by the Department of Education and Skills with the education partners. These discussions could examine the nature of the information provided by schools to the Department and identify the elements that would be most useful to examine in order to understand how the legislation is operating in practice.

Recommendation

The Department of Education and Skills should systematically gather data on the operation of schools' enrolment policies in order to allow it to evaluate fully the impact of the proposed legislation.