



Advice of the Ombudsman for Children

on the

Education (Admission to Schools) Bill 2016

April 2017

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1. Introduction

The Minister for Education and Skills published the Education (Admission to Schools) Bill 2016 on 6 July 2016. The aim of the legislation and associated regulations is to provide a new framework to govern school admissions policies for all primary and post-primary schools.

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 Bill has been prepared in accordance with this statutory function.

The Ombudsman for Children's Office (OCO) previously submitted advices on the General Scheme of the Education (Admission to Schools) Bill 2013 in November 2013.

The Office broadly welcomes the fact that the Bill addresses:

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

The OCO also welcomes the fact that some of its concerns with the 2013 Heads of Bill have been addressed. However, the Office has some key concerns with regard to the Bill, namely in relation to preferential admission on the grounds of religion or previous connection to a school, religious instruction in schools, absence of consultation with children and young people, and oversight in relation to the application of admissions criteria.

The OCO is mindful of the recent consultation on the role of denominational religion in the schools admissions process. However, as the issue of religion and school admissions remains in this Bill as it stands, we will reiterate the relevant aspects of our submission in these advices.

The comments below have been informed by the investigatory work of the OCO, the existing legislative framework underpinning the enrolment process and by Ireland's international human rights obligations.

2. The International and European Human Rights Framework

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

A number of principles of the UNCRC have particular relevance with regard to the rights of the child in the context of education.

Article 2 requires State 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 their 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.

Article 3 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.

Article 4 requires States to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention.

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.

Article 14 provides that:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. 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.
3. 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.

It must be noted that the terms religion and beliefs also protect the right not to profess any religion or belief.

Article 28 of the UNCRC calls on State Parties to recognize the right of the child to education, while Article 29 states that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential; the development of respect for human rights and fundamental freedoms,

and for the principles enshrined in the Charter of the United Nations; the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; and the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin. Article 29 also states that no part of Article 28 or 29 “shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State”.

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

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.¹

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.² 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).³ However the Committee has highlighted that States

¹ 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.

² *Ibid.* at para. 31.

³ *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 1 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

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.⁴

2.3 International Covenant on Civil and Political Rights (ICCPR)

Article 18 of the ICCPR provides that everyone shall have the right to freedom of thought, conscience and religion. It 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.

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. 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.⁵

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

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.

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.⁶ The Committee expressed its regret that the provisions of the Equal Status Act 2000 give the power to denominational schools to refuse to admit students on the grounds of religion, if it is deemed necessary to protect the ethos of the school.⁷ The Committee reiterated its previous recommendations to accelerate 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."

⁴ 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.

⁵ 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.

⁶ 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.

⁷ 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.

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.⁸ The Committee also recommended the monitoring of incidents of discrimination on the basis of belief.⁹

2.5 UN Convention on the Rights of Persons with Disabilities (CRPD)

Ireland has signed but not yet ratified the CRPD.¹⁰ 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.

2.6 United Nations Human Rights Council

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 school types and indicated that issues of access were being considered as part of the review of the school admissions system.¹¹

The Working Group of the Human Rights Council held its second review of Ireland on the 11 May 2016 and their report was adopted on the 13 May 2016. Recommendations made to establish a system providing children and their parents with the opportunity to choose from religious, multi-denominational or non-denominational types of schooling and curricula were supported by the Government.¹²

Recommendations to accede to the Convention against Discrimination in Education¹³, to abolish religious discrimination in schools¹⁴ and to review and amend laws, as appropriate, to ensure that publicly-funded schools provide equal access to education for all, irrespective

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Ireland signed the CRPD on 30 March 2007.

¹¹ 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 para. 107.48.

¹² Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Ireland* (2016) UN Doc. A/HR/C/33/17 at para 136.2.

¹³ *Ibid*

¹⁴ *Ibid* at para. 136.29.

of one's faith or religious affiliation¹⁵ were to be examined by Ireland. Responses were given to these recommendations in an Addendum to the Report of the Working Group in September 2016.¹⁶

2.7 European Convention on Human Rights (ECHR)

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 2003.¹⁷

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."

¹⁵ *Ibid* at para. 136.80.

¹⁶ The Government stated there "are no plans for Ireland to ratify the UNESCO Convention. Ireland is committed to the principles of equality of educational opportunity contained in the Convention" and that "Article 44 of the Constitution specifically protects religious freedom. The Constitution also protects the right to freedom of expression of convictions and opinions. The Equal Status Act 2000 which outlaws discrimination in relation to the admission of a student, makes provision for exemptions to apply in the case of single sex schools and in the case of schools where the objective is to provide education in an environment that promotes certain religious values. All religious denominations and groups are free to establish their own social, cultural and educational institutions, including schools". The Government also stated "the Education (Admission to Schools) Bill 2016, which was published in July 2016, proposes to introduce a number of important changes to make enrolment policies fairer and more transparent".

See 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* (2016) UN Doc. A/HRC/33/17/Add.1 at paras. 136.2, 136.29 and 136.80.

¹⁷ 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.

- 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 obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

A full analysis of the case-law that has developed under these provisions of the Convention is beyond the scope of this advice. However, the 2014 case of *O’Keeffe v Ireland* is of particular relevance in the Irish context.¹⁸ The judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in this case clearly underlines that the State has an inherent positive obligation to regulate the provision of education, including by protecting children from abuse and putting in place a legal framework to prevent violations of their human rights more generally.¹⁹ As emphasised by the Court, “*a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals*”.²⁰ The Government’s argument that the State was released from its Convention obligations as the applicant had chosen to go to the particular school in question was also dismissed as she had no “*realistic and acceptable alternative*”.²¹

A number of principles have also emerged in other cases of direct relevance to the Bill, 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.²²
- 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

¹⁸ *O’Keeffe v. Ireland*, 35810/09, 11 July 2012.

¹⁹ See Irish Human Rights and Equality Commission, *Observations on the Education (Admission to Schools) Bill 2015* (2015) at p. 8.

²⁰ *Ibid.* at para 150.

²¹ *Ibid.* at para 151.

²² *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.

vindicate the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.²³

- 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.²⁴
- 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.²⁵
- 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.²⁶
- 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.²⁷
- The 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.²⁸

²³ 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.

²⁴ 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.

²⁵ 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.

²⁶ *Folgerø v. Norway*, 15472/02, 29 June 2007 at para. 84.

²⁷ *D.H. and Others v. The Czech Republic*, 57325/00, 13 November, 2007 at para. 206.

²⁸ 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.

- 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 14.²⁹
- 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.³⁰
- 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.³¹
- 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.³²
- The procedural safeguards provided for in Article 6 of the ECHR are applicable to accessing educational places.³³

2.8 European Commission Against Racism and Intolerance (ECRI)

ECRI is a human rights body of the Council of Europe, composed of independent experts, which monitors problems of racism, xenophobia, anti-Semitism, 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.

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 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

²⁹ *D.H. and Others v. The Czech Republic*, 57325/00, 13 November, 2007 at para. 175.

³⁰ *Ibid.*

³¹ *Ibid.* at para. 12.

³² *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.

³³ 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.

background, or from other disadvantaged groups like Travellers, whether they are Catholic or not”.³⁴

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 to ratify the Convention.³⁵

³⁴ 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.

³⁵ *Ibid* at para. 10.

3. Religion and Schools

As stated above in Section 1, the OCO recently submitted observations on the Department of Education and Skills consultation on the role of denominational religion in the school admissions process. However, as the issue of religion and school admissions remains in this Bill as it stands, we will reiterate the relevant aspects of our submission in these advices.

3.1 Implementing Irelands Children's Rights Obligations

The principles of the UNCRC which have particular relevance with regard to the role of religion in education are outlined above in Section 2. Most importantly, Article 2 requires State Parties to respect and ensure the rights set out in the Convention to each child within their jurisdiction without discrimination of any kind and Article 14 provides for a child's right to freedom of thought, conscience and religion.

The UN Committee on the Rights of the Child (the Committee) published General Comment No.1 on Article 29 of the Convention in 2001. In this General Comment, the Committee states: *"Children do not lose their human rights by virtue of passing through the school gates. Thus, for example, education must be provided in a way that respects the inherent dignity of the child and enables the child to express his or her views freely in accordance with article 12 (1) and to participate in school life"*³⁶ and *"the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities"*.³⁷ The Committee also states that discrimination on any basis, *"whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities"*.³⁸

Regarding a child's right to freedom of thought, conscience and religion, the Implementation Handbook for the Convention on the Right of the Child notes that *"the Committee has expressed particular concern at arrangements for religious education in schools which do not respect children's freedom of religion"*³⁹ and *"the Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) [of the International Covenant on Civil and Political Rights] unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the*

³⁶ United Nations, Convention on the Right of the Child, General Comment no.1 Article 29 (1): The Aims of Education, CRC/GC/2001/1, (2001), at para. 8.

³⁷ *Ibid*, at para. 2.

³⁸ *Ibid*, at para. 10.

³⁹ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, September 2007, at p. 185.
https://www.unicef.org/publications/index_43110.html

*wishes of parents and guardians”.*⁴⁰ It is also stated that *“the Committee expresses concern if the compulsory school curriculum does not provide for children’s freedom of religion”.*⁴¹

In its General Comment No. 13 on the Right to Education, the Committee charged with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights stated that while Article 13(3) of the Covenant allows for the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions, and for public school instruction in subjects such as the general history of religions and ethics if given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression, *“public education that includes instruction in a particular religion or belief is inconsistent with article 13 (3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians”.*⁴²

UNESCO defines inclusion *“as a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children”.*⁴³ The Human Rights Committee, in its General Comment on Article 18 of the International Covenant on Civil and Political Rights, states that *“The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant... nor in any discrimination against adherents to other religions or non-believers”.*⁴⁴

Therefore, under the international human rights instruments that Ireland has signed up to, and most importantly from a child’s rights based perspective the UNCRC, children have a right to freedom of thought, conscience and religion, as well as the right to non-discriminatory access to education directed to the development of their personalities, talents and mental and physical abilities and the development of respect for their cultural identity, language and values.

⁴⁰ *Ibid.*, at p. 190.

⁴¹ *Ibid.*

⁴² Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, the Right to Education, 1999, E/C.12/1999/10, 8 December 1999, at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10 at para. 28

⁴³ UNESCO, Guidelines for Inclusion, Ensuring Access for All, 2005, at <http://unesdoc.unesco.org/images/0014/001402/140224e.pdf> at p. 13.

⁴⁴ Human Rights Committee, General Comment No. 22, 1993, HRI/GEN/1/ Rev.8 , at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en at p. 196.

The United Nations Committee on the Rights of the Child examined Ireland's compliance with its obligations under the UNCRC in January 2016. In its Concluding Observations, the Committee expressed concern at the continuing practice of discriminatory admissions policies on the basis of the child's religion and recommended that the state undertake concrete measures to significantly increase the availability of non-denominational or multi-denominational schools and to amend the existing legislative framework to eliminate discrimination in school admissions, including the Equal Status Act.⁴⁵ The Committee also noted that children are not ensured the right to effectively opt out of religious classes and access appropriate alternatives to such classes. It recommended that accessible options for children to opt out of religion classes as well as appropriate alternatives should be put in place for children of minority faith, or non-faith, backgrounds.⁴⁶

3.2 The Irish Constitution and Educational Provision

A striking feature of Irish law in relation to education has been the undue emphasis placed on the rights of parents,⁴⁷ and the rights of religious institutions, rather than on the rights of the child. While Article 42 of the Constitution has been interpreted to provide for a child's right to education, constitutional barriers have long been relied upon for the failure of the State to remove discrimination in accessing education in Ireland on the grounds of religion.

Unlike the European norm, where education is perceived as a social right which falls to the State to vindicate as a national obligation, the Irish Constitution has been described as having '*a mere State-aiding role in education*'.⁴⁸ It was envisaged at the time of drafting that enshrining an indirect duty of educational provision on the State would protect the State from the full expense of provision. In the past, the under-resourced State relied heavily on church participation and funding in education.⁴⁹

Thus, while the Education Act 1998 represented a major shift of control from Church to State, school ownership and employment within schools has remained largely within the domain of churches and religious denominations. Most denominational schools are owned and managed by the Roman Catholic Church.⁵⁰ Despite the broad nature of Article 42 of the Constitution, public education is almost entirely provided by privately owned, publicly-funded

⁴⁵ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, 1 March 2016, at paras. 63 & 64.

⁴⁶ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, 1 March 2016, at paras. 35 & 36.

⁴⁷ Conor O'Mahony, *Education Rights in Irish Law*, Thomson Round Hall, Dublin 2006, at p.59.

⁴⁸ Dympna Glendenning, *Education and the Law*, Bloomsbury, 2012 at p.18.

⁴⁹ Dympna Glendenning, *Education and the Law*, Bloomsbury, 2012 at p.104.

⁵⁰ 90% of primary schools are controlled by the Catholic Church. The secondary school system is a little more diverse with (in 2007) 372 Catholic secondary schools, 25 Church of Ireland and 334 "Inter-denominational" (mixed Catholic & Protestant) later redesignated multi-denominational (but effectively Christian), 1 Jewish and 1 Quaker.
<http://www.teachdontpreach.ie/education-religion-school/>

schools which are recognised by the Education Act 1998.⁵¹ This basic fact has had implications for the role and power of religious institutions in the management of schools in Ireland.

Difficulties arise due to the historic fact that control in education has been ceded away from the people and the State and given to the Church, which does not seek its mandate from the public.⁵² In *O'Keefe v Hickey*⁵³, Hardiman J stated: '*...the State involvement in the governance of national schools, for historical reasons, is indirect not to say oblique and general rather than particular. The role which the State might otherwise have occupied is, by their own urgent desire, occupied by the Churches and other voluntary bodies, in this case the Catholic Church.*' He pointed out in the Supreme Court that the Minister for Education is deprived of control over education by the interposing of the patron and the manager between him and the children.

Both international law and the interpretation of the Irish Constitution have frequently been excessively parent orientated.⁵⁴ According to Kilkelly Article 42 of the Constitution "*views the child's education from the parent's perspective and does not explicitly identify the child's right as one that they hold independently from their parents*".⁵⁵ O'Mahony states that "*Irish law does not go far enough in the protection of the educational rights of children in the manner in which the educational rights and interests of parents are allowed to prevail in the event of any conflict with the rights of children, even where this is not necessarily in the best interests of the child. While the law undoubtedly owes respect to parents, it should be remembered that it is the child who is the principle beneficiary of education*".⁵⁶

The tripartite nature of the right to education which involves the respective rights of the child, the parents of the child, and the interests and corresponding duties of the State, has meant that the balancing of the competing rights and needs is necessarily complex. This has been reflected in case law when the Irish courts, and indeed the law, have "*struggled to strike an appropriate balance between the interests of the various parties in cases where they have come into conflict*".⁵⁷ However, as both O'Mahony and Glendenning have noted, education is primarily the right of the child and despite the various interests in the field of education, it is the children who are at the "*heart of the system*".⁵⁸

With regard to the balancing of the various constitutional rights at issue, it is important to ensure that children's rights as individual rights holders are considered and upheld without

⁵¹ In fact, the relatively recent establishment of the community national school are the first public national schools established in the history of the State. *Ibid* at p. 142.

⁵² *Ibid* at p. 80.

⁵³ *O'Keefe v Hickey* [2009] 2 IR 302.

⁵⁴ Conor O'Mahony, *Education Rights in Irish Law*, Thomson Round Hall, Dublin 2006, at p. 104.

⁵⁵ Ursula Kilkelly, Religion and Education: A Children's Rights Perspective. 20 November 2010 at p.13.

⁵⁶ Conor O'Mahony, *Education Rights in Irish Law*, Thomson Round Hall, Dublin 2006, at p. 104.

⁵⁷ Conor O'Mahony, *Education Rights in Irish Law*, Thomson Round Hall, Dublin 2006, at p. 26.

⁵⁸ Dymrna Glendenning, *Education and the Law*, Bloomsbury, 2012 at p.5. See also, Conor O'Mahony, *Education Rights in Irish Law*, Thomson Round Hall, Dublin 2006, at p.58.

discrimination. Section 42A was inserted into the Constitution of Ireland in 2015 following the Thirty-First Amendment of the Constitution (Children) Act 2012. This amendment provides recognition of children's rights at a constitutional level, and clearly establishes the duty of the State to protect and vindicate those rights through its laws. The first paragraph of Article 42A of the Irish Constitution is a strong endorsement of the principle of non-discrimination and represents an important paradigm shift in recognising children as active rights holders. This important commitment should form the basis for the further enhancement of children's rights within Irish law and policy. The balancing of rights required with regard to the various interests in respect of educational provision, along with existing case law, should be re-examined having regard to the Thirty-First Amendment to the Constitution and the commitment by the State to protect and vindicate the natural and imprescriptible rights of all children.

Constitutional rights can be subject to limitations to reconcile them with other constitutional rights. With regard to matters of social policy where there is a balancing of competing constitutional rights, case law has shown that the courts are very reluctant to substitute their view over the Oireachtas and a strong presumption of constitutionality prevails with regard to decisions made by the Oireachtas in this regard.⁵⁹ The Courts have also stated that significant social matters of public policy is an area for the Oireachtas. We concur with the view of the Irish Human Rights and Equality Commission that *"the paramount concern in balancing the rights of individual children and the rights of institutions such as religious patrons must be the rights of the children to an education under reasonable conditions without discrimination"*.⁶⁰

Furthermore, an analysis of the relevant case law shows that that there is no constitutional impediment to the State requiring that all publicly funded schools cease discriminating on the grounds of religion in their admissions policies.⁶¹ The State can reasonably impose a requirement that schools do not discriminate on the grounds of religion in their admissions policy as a pre-condition of public funding.⁶² The reasonableness of such a pre-condition is supported by the fact that 96% of primary schools and 58% of secondary schools in Ireland are under denominational patronage.

3.3 Religion and Admission to Schools

⁵⁹ See judgments of Chief Justice Denham in *Fleming v Ireland* [2013] IESC 19 and in *MR v An tArd Chláraitheoir* [2014] IESC 60.

⁶⁰ Irish Human Rights and Equality Commission, *Observations on the Education (Admissions) Bill 2016*, November 2016, at p.13.

⁶¹ Michael Lynn SC, Opinion, Education Equality, 11 July 2016.

⁶² Dr. Conor O'Mahony, Dr. Eoin Daly and Dr. David Kenny, *Opinion on the Constitutionality of Reforming s. 7(3) (c) of the Equal Status Act 2000* at https://media.wix.com/ugd/08f4c2_079801b03f9b4b9a81dae58d53d85147.pdf, on 19 March 2017

Section 61(2)(b) of the Bill allows a school to which Section 7(3)(c) of the Equal Status Act 2000 applies to refuse to admit a student if it is proven that the refusal is essential to maintain the ethos of the school. The OCO is concerned at the inclusion of this provision which allows for discrimination in access to publicly funded schools.

A summary of results from the 2016 Census states “*while Ireland remains a predominantly Catholic country....., the percentage of the population who identified as Catholic on the census has fallen sharply from 84.2 per cent in 2011 to 78.3 per cent in 2016. There has been a corresponding rise in the number with no religion which grew by 73.6 per cent from 269,800 to 468,400, an increase of 198,600. Those with no religion now account for just under 10 per cent of the population (9.8%)*”.⁶³ The number of Muslims increased by 14,200 over the five years from 2011 to 2016 and the number of Orthodox Christians increased by 17,000, or 37.5 per cent.⁶⁴ A selection from the 2011 census shows that 256,830 people declared themselves as having no religion, 124,445 declared themselves as Church of Ireland, England, Anglican, Episcopalian, 48,130 declared themselves as Muslim and 44,003 declared themselves as Orthodox Christian.⁶⁵ An Oireachtas Library & Research Service Spotlight Report, *Choosing segregation? The implications of school choice*,⁶⁶ states that it is estimated that 10% of students in primary schools and 8% of students in post-primary schools are immigrants.

Ireland is a vastly different country than the one which enacted the Constitution of Ireland in 1937. At that time, the State’s population was overwhelmingly and actively Catholic and a Catholic ethos was reflected in many aspects of public administration.⁶⁷ Three quarters of a century later, the context in which the Constitution operates has changed radically. Ireland now faces the challenge of accommodating and integrating diverse beliefs (both religious and non-religious), cultures and languages in an education system that is almost entirely denominational.

As Glendenning notes, the law has a critical role to play in upholding the constitutional framework, vindicating individual rights which include the right to education, and in advancing equality, justice and the common good: *‘It has fallen to this generation to ensure that its legislative programme for education is capable of accommodating the diverse needs of all the people on this island, including those of different faiths and none within the*

⁶³ CSO Census 2016 Summary Results - Part 1, Chapter 8 Religion at http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Census_2016_Summary_Results_Part_1_Full.pdf at p.72.

⁶⁴ CSO Census 2016 Summary Results - Part 1, Chapter 8 Religion at http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Census_2016_Summary_Results_Part_1_Full.pdf at p. 72.

⁶⁵ CSO, Population Usually Resident and Present in the State by Religion and Nationality, 2011 at <http://www.cso.ie/en/statistics/population/populationclassifiedbyreligionandnationality2011/>.

⁶⁶ Oireachtas Library & Research Service Spotlight Report, *Choosing segregation? The implications of school choice*, No.1 of 2015 (2015).

⁶⁷ Michael Ford and David Leonard, *Constitutional Law of Ireland*, (3rd edition), 2013, at p. 636.

*framework of national law and EU law, where relevant, and in keeping with our international law commitments.*⁶⁸

The issue of religion and admissions to schools is often presented and debated as a balancing of the constitutional rights of parents as the primary and natural educator of the child, and of religious institutions to manage their own affairs. However, it must be emphasised that the balancing of rights required must take full account of the rights of the child in respect of education, freedom from discrimination, freedom of conscience and religion, and the right to privacy. While parents have extensive rights with respect of the religious education of their children under domestic, European and international law, it is important to stress that the right to freedom of thought, conscience and religion, provided for in Article 14 of the UNCRC, also extends to children as individual rights holders.

The majority of primary schools are owned and managed by the Roman Catholic Church and these schools cater for the majority of pupils, while the largest proportion of minority-faith schools are owned and managed by the (Protestant) Church of Ireland. Over the years, other denominational schools have been set up - a small number of Presbyterian schools, one Methodist school, one Jewish school and 2 Muslim schools. There are also an increasing number of primary schools that operate through the medium of Irish, which include schools of Catholic, multidenominational and interdenominational ethos.⁶⁹ Multi-denominational primary schools are one of the fastest growing primary school sectors.⁷⁰ According to Glendenning, *"it was central to the contemporary debate on ownership and control of schools that the denominational school owners would retain, free from State intrusion, the school ethos or characteristic spirit of the school"*.⁷¹

While acknowledging the contribution that the denominations have made to the Irish educational system since its foundation, religious diversity has increased in Ireland over the last number of decades and there is now a mismatch between the increasingly diverse profile of the population and the dominance of religious, particularly Catholic, schools. According to the ESRI Consultation Paper on the proposed Education about Religions and Beliefs (ERB) and Ethics curriculum, *"the role of denominational schools in multicultural societies and the provision of religious education have increasingly become topics of controversy"*.⁷² This leads to a need for a high degree of transparency and democracy in the

⁶⁸ Dympna Glendenning, *Education and the Law*, Bloomsbury, 2012, at p. 11.

⁶⁹ An Foras Pátrúnachta, School Ethos, <http://www.foras.ie/en/our-schools/type-of-school-immersion-education-gaelic-culture/>

⁷⁰ ESRI, *School Sector Variation Among Primary Schools in Ireland* at <http://www.esri.ie/pubs/BKMNEXT221.pdf> at paras. 5 & 6.

⁷¹ Dympna Glendenning, *Education and the Law*, Bloomsbury, 2012 at p. 128.

⁷² Merike Darmody and Emer Smyth, *Consultation Paper: ESRI Education about religions and beliefs (ERB) and ethics, Views of teachers, parents and the general public regarding the proposed curriculum for primary schools* (2017) at <http://www.esri.ie/pubs/bkmnext324.pdf> at p. 4.

manner in which education is legislated for, particularly in matters relating to the relationship between religion and education in Ireland.

In England, it is accepted that Catholic schools differ from secular schools because of the doctrinal mission for which they were established.⁷³ In the case of *Choudhury v Governors of Bishop Challoner Roman Catholic Comprehensive School* in 1992 it was recognised that “in circumstances where the number of parental preferences for application exceeded the number of places available, the school in its admission policy was lawfully entitled to discriminate in favour of Christians and specifically Roman Catholics” which indicated “that religious discrimination, as opposed to racial discrimination, is allowed in certain English denominational schools so that they retain their character and provide the specific type of education for which they were instituted”.⁷⁴ Information from the Department of Education of England and Wales⁷⁵ indicates that 33.78% of state funded schools are religious schools. Compared to Ireland, where 96% of primary schools and 58% of secondary schools are denominational, it is clear that there is a significantly larger choice of school types in England and Wales for parents and children who do not wish to be educated in the ethos of a particular faith.

An ESRI Report on School Sector Variation Among Primary Schools in Ireland states that “access to the different school types is geographically variable; for example, the Muslim and Jewish schools are located in Dublin while multi-denominational schools are available only in 19 counties, mostly in urban areas. The overwhelmingly denominational nature of the primary school system means that many Catholic schools have pupils from minority faith or secular groups among their student body”.⁷⁶ Taking the current predominantly denominational nature of the school system,⁷⁷ as well as the high number of stand-alone schools,⁷⁸ into account, we recognise that it will be a challenge to provide an education in line with the religious preference of each and every parent and child. While the recently announced plans to accelerate provision of multi and non-denominational schools⁷⁹ are welcome, it is recognised that short of implementing a completely secular educational system, it will be difficult for the State to provide the variety of denominational, multi-denominational and non-denominational school types necessary to suit the demands of every parent and child.

⁷³ Dymnna Glendenning, *Education and the Law*, Bloomsbury, 2012 at pp. 128 & 129.

⁷⁴ *Ibid* at p. 129.

⁷⁵ Department of Education, *FOI Release, Maintained Faith Schools*, 20 July 2010 at <https://www.gov.uk/government/publications/maintained-faith-schools/maintained-faith-schools>.

⁷⁶ ESRI School Sector Variation Among Primary Schools in Ireland at <http://www.esri.ie/pubs/BKMNEXT221.pdf> pp. 6 & 7.

⁷⁷ Report on the Forum for Patronage and Pluralism in the Primary Sector (2012) http://www.education.ie/en/Publications/Policy-Reports/fpp_report_advisory_group.pdf at p. 1.

⁷⁸ *Ibid* at p. 2.

⁷⁹ Department of Education and Skills, *Press Release - Minister Bruton announces new plans to accelerate provision of multi- and non-denominational schools*, 30 January, 2017 at <http://www.education.ie/en/Press-Events/Press-Releases/2017-Press-Releases/PR17-01-30.html#sthash.9NDnoLy4.dpuf>.

In a system of mixed school patrons, with a significant majority from one particular religious patron, it is incumbent on the State to ensure that equal rights are granted to all students, regardless of the patron of the school they wish to attend. Therefore, all children across the country, whether living in urban or rural areas, whether having access to a selection of school types or not, should have equal access to all schools, regardless of their religion, or none, or the denominational nature of their preferred school.

Under the international human rights instruments that Ireland has signed up to, most importantly from a child's rights based perspective the UNCRC, a child has a right to non-discriminatory access to education. As it currently stands a child of no religion, or a different religion to a school patron, faces discrimination when seeking enrolment in denominationally controlled schools. All children, regardless of their belief, faith, or lack thereof, should be entitled to equal access to state funded schools.

Recommendation: The OCO is of the view that Section 61(2)(b) of the Bill should be amended (along with section 7(3)(c) of the Equal Status Act) in order to ensure that no child is denied access to a publicly funded school on the basis of their religion.

3.4 Religious Instruction

Section 62(6)(h) of the Bill states that an admission policy shall provide details of the school's policy in relation to its arrangements for any students who do not wish to attend religious instruction. While welcoming this provision, the OCO is concerned by the issue of religious instruction permeating the school day.

The majority of primary schools are owned and managed by the Roman Catholic Church and these schools cater for the majority of pupils.⁸⁰ As stated in the Primary School Curriculum 1999, *"the development of curriculum for religious education remains the responsibility of the different church authorities"*.⁸¹ Distinction must be drawn at this point between religious instruction, the teaching of the doctrine and worship pertaining to one religion, and religious education, the teaching of the broad comparative programme about religions generally and the history of religions.⁸² As it currently stands, the State has no role to play in the religious instruction provided to children in religious state funded primary schools.

In 1971 an integrated curriculum was introduced when the State agreed with Catholic denominational interests and sanctioned the integration of religious teaching throughout the school day.⁸³ This meant that *"in primary schools, which are largely denominational,*

⁸⁰ ESRI School Sector Variation Among Primary Schools in Ireland at <http://www.esri.ie/pubs/BKMNEXT221.pdf> at pp. 5 & 6

⁸¹ Primary School Curriculum 1999, at http://www.ncca.ie/uploadedfiles/Curriculum/Intro_Eng.pdf at p. 40.

⁸² Dymrna Glendenning, *Education and the Law*, Bloomsbury, 2012 at p. 294.

⁸³ Dymrna Glendenning, *Education and the Law*, Bloomsbury, 2012 at p. 132.

Catholic educators have asserted their right to have their religious values and attitudes permeate the full school day. They do not draw a rigid separation between religious and secular subjects in the curriculum, as was the practice traditionally, but rather integrate all subjects including religious instruction. This concept is generally referred to as the 'integrated curriculum' and it was officially adopted as an upholding principle of the 1971 curriculum in primary schools. It has been cogently argued that, if the integrated curriculum is implemented in primary schools, it permits a religious ethos to permeate other subject-areas thus depriving numbers of children of other religious faiths, or none, of their constitutional right and human right to attend schools receiving public money without attending religious instruction at that school".⁸⁴

S.30(2)(e) of the Education Act 1998 states that the Minister "*shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student*". This provision, also known as 'the conscience clause', allows parents to opt their children out of religious instruction classes if they so wish. However, it must be noted that the Education Act "*gives no guidance, nor is it prescriptive as to how this exemption is to be adhered to*".⁸⁵

In 1992, the Government published a Green Paper – Education for a Changing World - which envisaged a more responsible role for schools' Boards of Management.⁸⁶ A National Education Convention which took place in October 1993 considered the many issues raised by the Green Paper and the education partners' reactions to them. The Convention examined "*problems of providing multi-denominational and secular education in response to changing patterns of religious belief and practice in Irish society. In its presentation to the Convention the Department of Education acknowledged the emergence of a more pluralist society and the demand of different groups of parents for other than denominational schools*".⁸⁷ The Secretariat of the 1993 Education Convention stated "*the main issue here is that, in many cases, parents not only do not want their children to attend religious instruction classes, but they also object to their children being educated within schools whose dominant ethos is not of their faith/beliefs. These parents have the right, of course, to withdraw their children from religious instruction. But, besides the possible peer-stigmatising effects that such withdrawal may bring, the point has been made strongly that an issue of civil liberties may be involved for such pupils/parents attending schools where religion is fully integrated with the rest of the curriculum and where the ethos and "hidden curriculum" fully reflect the religious ideals of the school*".⁸⁸

⁸⁴ Dymna Glendenning, Education and the Law, Bloomsbury, 2012.at pp. 128 & 129.

⁸⁵ Irish Human Rights Commission, Religion & Education: A Human Rights Perspective, May 2011 at p.71.

⁸⁶ Education in a Changing World, 1992 at <http://www.education.ie/en/Publications/Policy-Reports/Education-for-a-Changing-World-Green-Paper.pdf>

⁸⁷ Report on the Forum for Patronage and Pluralism in the Primary Sector, 2012, at http://www.education.ie/en/Publications/Policy-Reports/fpp_report_advisory_group.pdf at p. 17.

⁸⁸ John Coolahan, Report on the National Education Convention, 1994, at p. 29.

While provisions may be made for children to not participate in religious instruction classes, the integrated curriculum which operates in denominational schools means that religious instruction is still present throughout the school day. Therefore, it is not possible for a child of a different religion to that of the school ethos, or a child of no religion, to avoid faith formation during their time in school. Having regard to Ireland's international children's rights obligations, it is the view of the Ombudsman for Children that, as it currently stands, the right of a child of no religion, or of a religion different to the patron of the school they attend, to freedom of thought, conscience and religion is being violated through their exposure to religious influence and teaching throughout the school day.

In its May 2011 report on Religion and Education: A Human Rights Perspective, the Irish Human Rights Commission recommended that modifications be made to the integrated curriculum to ensure that the rights of minority faith, or non-faith, children are recognised. They stated that in certain circumstances, consideration should be given to holding religion classes at the start or end of the school day to accommodate parents of children seeking exemption. They also recommended that children of minority religions or no faith should be guarded against any inadvertent indoctrination or proselytism.⁸⁹ The Advisory Group to the Report on Patronage and Pluralism in the Primary Sector recommended *"that the introduction to the Primary Curriculum should be revised to ensure that, while the general curriculum remains integrated, provision is made for denominational religious education/faith formation to be taught as a discrete subject"*.⁹⁰ This report also made a number of suggestions regarding the timetabling of religion classes in order to ensure that children could easily opt-out which include:

- Flexible timetabling with religion classes held at different times for different class groups. This would allow those opting out of religion to participate in another class.
- More flexible timetabling by interpreting the 30 minutes religion per day as two and a half hours per week,
- Timetable denominational religious education at the beginning or end of the day,
- Schools could also explore with parents of minority belief groups and their leaders how they might assist the 'opt-out' children,
- Opportunities for community and parent association assistance in supporting minority groups in the school should be explored,
- The use of ICT could be of assistance in providing belief specific education for minority groups, either during or outside school hours or in the home.⁹¹

⁸⁹ Irish Human Rights Commission, Religion & Education: A Human Rights Perspective, May 2011 at p.130-132.

⁹⁰ Report on the Forum for Patronage and Pluralism in the Primary Sector, 2012, at http://www.education.ie/en/Publications/Policy-Reports/fpp_report_advisory_group.pdf at p. 81.

⁹¹ *ibid*, pp. 84 & 85.

It is stated in the ESRI Consultation Paper on the proposed Education about Religions and Beliefs (ERB) and Ethics curriculum,⁹² that *“in education systems where schools do not focus on religious formation but promote ‘learning about religion’, minority faith groups and the non-religious are less likely to face explicit tension over religious issues. Intrinsic to the goal of educating students about religions and beliefs are the instruments of civic and peace education, tolerance and ethics education, as well as global and cross-cultural education”*.⁹³ While accepting that students of a particular religion have a right to receive education on their faith and beliefs, there is no requirement in international human rights law for this religious education to be provided in a state funded school system. It is considered that the rights of denominational students to receive religious instruction during the school day do not trump the rights of freedom of thought, conscience and religion of students of no, or a different, religion who are attending a denominational state funded school.

In order for Ireland to comply with its international human right’s obligations with regard to the freedom of thought, conscience and religion of all children, it is the view of this Office that a long term goal should be the removal of denominational religious classes from state funded schools. While it is accepted that such a change will take time to be accepted and implemented, at both societal and legislative levels, it is considered that this is not a sufficient reason to continue the deferral of this issue. Therefore, the OCO is of the view that as an interim measure, provisions should be made for the removal of religion from the integrated curriculum and the religious teaching of the school patron should be confined to a specific religion class. This would ensure that children who opt-out of these set religion classes would not be exposed to unwanted religious influence in other parts of the school day. This Office also believes that religion classes should be scheduled at a time which would allow parents to make alternative arrangements for their children, as outlined in the Report on Patronage and Pluralism mentioned above. This would allow children of no religion, or a different religion, to easily opt out of religious classes if desired.

Recommendations: The Ombudsman for Children recommends that Section 62(6)(h) of the Bill should be expanded to confine denominational religious teaching to a specific class which should be scheduled in such a way to make it practical for children to opt-out if so required.

The Ombudsman for Children also recommends that in order to respect the right of freedom of thought, conscience and belief of all children, a long term goal should be the removal of religion from the integrated curriculum.

⁹² ESRI Education about religions and beliefs (ERB) and ethics, Views of teachers, parents and the general public regarding the proposed curriculum for primary schools — Consultation Paper Merike Darmody, Emer Smyth, January 2017, at [Http://www.esri.ie/pubs/bkmnext324.pdf](http://www.esri.ie/pubs/bkmnext324.pdf)

⁹³ ESRI Education about religions and beliefs (ERB) and ethics, Views of teachers, parents and the general public regarding the proposed curriculum for primary schools — Consultation Paper Merike Darmody, Emer Smyth, January 2017, at [Http://www.esri.ie/pubs/bkmnext324.pdf](http://www.esri.ie/pubs/bkmnext324.pdf) at pp.3 & 4.

3.5 Right to privacy

As stated above, the right to opt out of denominational religious education classes is contained in Section S.30(2)(e) of the Education Act 1998. Article 16(1) of the UNCRC states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. The Committee on the Rights of the Child has found that issues affecting the child's privacy may arise in relation to religion in schools as the requirement for a formal request to abstain from religious instruction exposing the faith of children may be felt to be an infringement of their right to privacy.⁹⁴

The delivery of religious instruction in line with the religious ethos of the school creates the requirement of the opt-out clause as provided for in the Education Act 1998. While this opt-out is necessary to protect a child's right to freedom of thought, conscience and belief, it then creates an issue with a child's right to privacy as a child has to identify themselves as having a different belief or faith to that of the school ethos in order to opt out of religious instruction classes.

Recommendation: While accepting this may take time to implement, the OCO is of the view that removal of denominational religious instruction from state funded schools is necessary in order to protect the privacy rights of children of no, or a different, religion or belief to that of the school patron.

3.6 A child's right to choose religious instruction in line with their evolving capacities

Article 5 of the UNCRC provides for States Parties to respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. Under Article 12(1) of the UNCRC, States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, with the views of the child being given due weight in accordance with the age and maturity of the child.

S.30(2)(e) of the Education Act 1998 states that a student shall not be required to attend instruction in any subject which is contrary to the conscience of their parents or their own conscience if they have turned 18 years. As stated in the Implementation Handbook for the

⁹⁴ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, September 2007, at https://www.unicef.org/publications/index_43110.html at pp.192 & 204

Convention on the Rights of the Child, the International Covenant on Civil and Political Rights “requires respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions, but the emphasis in the Convention on the Rights of the Child is on the freedom of religion of the child, with parental direction consistent with the evolving capacities of the child”.⁹⁵ The rights of parents to ensure the religious and moral education for their children in conformity with their own convictions is a well highlighted feature in the debates about the denominational control of schools. However, the emphasis of the UNCRC is on the freedom of religion of the child, with parental direction consistent with the child’s evolving capacities.

Section 42A of the Constitution provides recognition of children’s rights at a constitutional level, and establishes the duty of the State to protect and vindicate those rights through its laws. In line with Article 12 of the CRC, the amendment does not limit the right of children to be heard on the grounds of age but places a constitutional imperative on the decision-makers to ascertain and consider the views of all children, having regard to the principle that expressing views is a choice for each child and not an obligation. Although it is limited to specific judicial proceedings, the OCO considers it reasonable to more broadly interpret the protections afforded by Section 42.2A of the Constitution in light of Articles 3 and 12 of the CRC, which provide children with the right to have their best interests taken as a primary consideration, and to express views and be heard, in all judicial and administrative decisions affecting them.⁹⁶

A child will spend 13 to 14 years of their lives progressing through the Irish primary and secondary school system. A child will attend, or opt out, of religion classes as directed by their parents throughout this time. However, this Office is concerned that there are no provisions to support children and young people who develop their own views on religion and belief systems, different to that of their parents, as they mature and become exposed to the many influences surrounding them. This Office is of the view that in order to maintain a child rights based approach, as well as protecting a child’s constitutionally protected rights, mechanisms should be put in place to accommodate children and young people who have a different religious belief to that of their parents and who do not agree with the direction of their parents regarding attendance at religious instruction classes. The OCO also notes that the Irish Human Rights Commission previously recommended that the views of children should be sought in relation to religious exemption.⁹⁷

⁹⁵ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, September 2007, at https://www.unicef.org/publications/index_43110.html at p. 185.

⁹⁶ The Irish courts have held that laws passed after the ratification of Ireland’s international law commitments fall to be interpreted in light of those commitments. See *Dos Santos v. Minister for Justice* [2013] IEHC 237 and B. Barrington, “Child Care Law” in Children’s Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law* (Dublin: 2015) at p. 189.

⁹⁷ Irish Human Rights Commission, Religion & Education: A Human Rights Perspective, May 2011 at p.132 – In ensuring the rights of school children in accordance with maturity, the views of most second-level students and arguably some older primary school students in relation to the exemption procedures or any perceived encroachment on their personal religious or philosophical convictions, should be taken into consideration, in addition to the views of their parents.

Recommendation: The OCO is of the view that provisions should be included in the Bill to allow a child to decide whether or not they want to attend religion classes in a manner consistent with their age, maturity and evolving capacities.

4. Past Pupil Criterion

The Bill does not contain any provision relating to preferential admission criteria for children or siblings of former pupils of a school and makes no reference to any power of the Minister

to determine a limitation on priority for children, or siblings, of past pupils where a school is oversubscribed either by setting a percentage or otherwise.

The Minister for Education and Skills has acknowledged that the Bill is “silent in relation to any power to determine a limitation on priority for children of past pupils where a school is oversubscribed either by setting a percentage or otherwise”⁹⁸ and has stated that while it was proposed to deal with this issue by way of regulation, on advice of the Attorney General this will now be done by way of primary legislation which will be included as an amendment at Committee Stage.⁹⁹ The OCO suggests that these amendments should be published as soon as possible to inform the debate on the legislation and allow greater precision in the analysis of its impact.

As stated above in Section 2, Article 2 of the UNCRC requires States to respect and ensure the rights of each child within their jurisdiction without discrimination of any kind and requires States to take all appropriate measures to ensure that the child is protected against all forms of discrimination on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members. According to the Committee on the Rights of the Child: “Particular groups within populations are also liable to suffer discrimination in educational opportunities, such as children of minority cultures, indigenous peoples, gypsies, immigrants, refugees and children caught up in armed conflict”.¹⁰⁰

When examining Ireland’s compliance with its obligations under the UNCRC in January 2016, the United Nations Committee on the Rights of the Child expressed concern at the continuing practice of discriminatory admissions policies based on whether a child’s parent(s) are former students of the school. The Committee recommended that the State party amend the existing legislative framework to eliminate discrimination in school admissions, including the Equal Status Act”.¹⁰¹

The European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (The Race Equality

⁹⁸ Minister for Education and Skills, Written response to Parliamentary Question, Q81, 16 July 2016 at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016071400049?opendocument#WRG01350>

⁹⁹ Minister for Education and Skills, Questions on Proposed Legislation, 7 July 2016 at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016070700012?opendocument>

¹⁰⁰ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, September 2007, https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_2_of_3.pdf at p. 416.

¹⁰¹ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, 1 March 2016, at paras. 35 & 36.

Directive),¹⁰² has been transposed into Irish law in part by the Equal Status Act 2000. This Directive prohibits discrimination on the grounds of racial or ethnic origin, including in the area of education. Article 2(2)(b) of this Directive defines indirect discrimination as “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

The retention of the past pupil criterion, either solely or partially, is problematic because it can give rise to instances of indirect discrimination against particular groups of children. The European Commission Against Racism and Intolerance expressed its concern at the impact this criterion can have on Travellers and children of immigrant background.¹⁰³ The number of Travellers recorded in the 2016 census was 30,987 and “the age group where the greatest percentage population growth took place in the Traveller community was between 5 and 9. There were 413 (10.6%) more children in this category than in 2011”.¹⁰⁴ According to Eurostat 11.8% of the Irish population are immigrants.¹⁰⁵ An Oireachtas Library & Research Service Spotlight Report, *Choosing segregation? The implications of school choice*,¹⁰⁶ also states that it is estimated that 10% of students in primary schools and 8% of students in post-primary schools are immigrants. These significant groups of children may face indirect discrimination if the past pupil criterion is part of their chosen school’s admission policy. Another group of children who may face indirect discrimination on the basis of application of the past pupil criterion are children of parents with disabilities who may not have attended a mainstream school. It must also be noted that children of Irish families who have moved within Ireland, or who have returned from abroad, and are now living in an area where their parents did not attend school may also face problems accessing a school place as a result of this criterion.

The matter of discrimination faced by children from the Travelling Community on the basis of operation of the past pupil criterion has also arisen before the courts in this jurisdiction. In this case, a member of the Traveller community did not secure a place in his chosen secondary school as his father had not attended that school. His mother argued that as a member of the Traveller community, her son had less of a chance of having a father who

¹⁰² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>

¹⁰³ 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.

¹⁰⁴ CSO Census 2016 Summary Results - Part 1, Chapter 6 Ethnicity and Irish Travellers at http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Census_2016_Summary_Results_Part_1_Full.pdf at p.60-63

¹⁰⁵ Eurostat, Foreign Citizens Living in the EU Member States, 18 December 2015, at <http://ec.europa.eu/eurostat/documents/2995521/7113991/3-18122015-BP-EN.pdf/d682df12-8a77-46a5-aaa9-58a00a8ee73e>

¹⁰⁶ Oireachtas Library & Research Service Spotlight Report, *Choosing segregation? The implications of school choice*, No.1 of 2015 (2015).

went to the school as many Travellers have not attended second level over the past few decades. Therefore, the parental rule was indirectly discriminatory against members of the Traveller community and in breach of the provisions of the Equal Status Act 2000. In its decision, the Equality Tribunal found that the admissions policy of the school was indirectly discriminatory in so far as it accorded preference to boys whose fathers had been pupils of the school.¹⁰⁷

In the Supreme Court judgement of Mr Justice Clarke, it was found that there was insufficient evidence to show that the child involved had experienced a particular disadvantage in securing admission to the school on the basis of his membership of the Traveller community. It was also found that some degree of statistical analysis, which was absent in this case, is required when analysing a claim of indirect discrimination and that the onus of proof lay with Mr Stokes to establish that he had suffered particular disadvantage as a result of indirect discrimination.¹⁰⁸

While Recital 15 of the Race Equality Directive does allow for indirect discrimination to be established by any means including on the basis of statistical evidence, this is not mandatory as was stated by Mr Justice Clarke. It is also noted that Article 8(1) of the Race Equality Directive establishing that it is the respondent who must to prove that there has been no breach of the principle of equal treatment when a person who believes they have suffered indirect discrimination establishes a case. Therefore, the OCO is in agreement with the finding of the Irish Human Rights and Equality Commission that the question of indirect discrimination in admission to schools in respect of groups protected by the 'race' ground in EU law, including Travellers, is unlikely to have been finally determined by the Supreme Court in the Stokes case.¹⁰⁹

The Committee on the Rights of the Child has stated that "Discrimination is learned, observed, experienced, suffered and acquired through life. Therefore, education can play an essential role not only in combating discrimination, but also in preventing it. Education is a process that takes place within the family and the community as well as in schools. If education deliberately aims to prevent and combat racism and intolerance instead of condoning them or contributing to their development, it will make the greatest possible contribution to improving respect for human rights".¹¹⁰ The OCO believes that schools

¹⁰⁷ Legal Submissions of the Equality Authority in the case of Christian Brothers High School Clonmel and Mary Stokes (on behalf of John Stokes a Minor)

¹⁰⁸ Judgment of Mr. Justice Clarke delivered the 24th February, 2015 Christian Brothers High School Clonmel and Mary Stokes (on behalf of John Stokes a minor) <http://www.courts.ie/Judgments.nsf/0/A09897A48211897980257DF6005A3C31>

¹⁰⁹ Irish Human Rights and Equality Commission, Observations on the Education (Admission to Schools) Bill 2016, November 2016, at <https://www.ihrec.ie/documents/observations-education-admission-schools-bill-2016/>

¹¹⁰ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, September 2007, at https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_2_of_3.pdf at p. 448.

should be fully inclusive and promote equality. Therefore, by allowing preferential access to schools for one group of children over others, either partially or exclusively, the State is failing in its obligation to provide an education system which promotes acceptance.

It is the view of the OCO that 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. In light of this and the very real potential for indirect discrimination against particular groups of children, the Ombudsman for Children believes that the past pupil criterion should not be included as a permissible oversubscription criteria in the Bill.

Recommendation: The Ombudsman for Children recommends that the past pupil criterion should not be included as a permissible oversubscription criterion in the Bill.

5. Designation of School Places

Section 66 of the Bill makes provision to allow the National Council for Special Education (the Council) or the Child and Family Agency (the Agency) to designate a school for a child

whose parents have failed to obtain a school place for that child. The Ombudsman for Children welcomes the inclusion of this provision in the Bill, although the Office is of the view that the requirements contained in Section 66 could be strengthened to ensure a more robust child right's based approach for designating a school place for a child.

5.1 Best Interests of the Child and Respect for the Views of the Child

Sections 66(2)(c) and 66(4)(b) allow for the views of the child, in line with their age and maturity, to be taken into account and Sections 66(2)(d) and 66(4)(d) state that the best interests of the child must be taken into account by the Council or Agency when designating a school place. The principles of the best interests of the child and of hearing and giving due weight to a child's views are core values of the UNCRC and their inclusion in this Section of the Bill is welcome. However, these principles are just two of a number of factors that need to be considered by the Council and the Agency so care must be taken to ensure that these principles are given the due weight they deserve.

Recommendation: The OCO is of the view that the provisions contained in Section 66 could be strengthened by ensuring that the best interests of the child and hearing and affording due weight to the views of the child, in line with their age and maturity, should be primary concerns when designating a school place.

5.2 Children in care

Article 20 of the UNCRC states that "a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State". The Ombudsman for Children believes that children in care are a particularly vulnerable group of children and that their unique circumstances would be best served by creating a separate provision in the Bill to deal with the designation of a school place for a child in care.

Sections 96 and 97 of the School Standards and Framework Act 1998 for England and Wales give a local authority power to direct the admission of a child to a school.¹¹¹ A School Admissions Code was published in December 2014.¹¹² This report makes detailed provisions for the provision of school places for children in care, known as "*looked after children*".¹¹³

¹¹¹ School Standards and Framework Act 1998, at <http://www.legislation.gov.uk/ukpga/1998/31/contents>

¹¹² Department of Education of England, School Admissions Code - Statutory guidance for admission authorities, governing bodies, local authorities, schools adjudicators and admission appeals panels, December 2014 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389388/School_Admissions_Code_2014_-_19_Dec.pdf

¹¹³ *Ibid*

This Code goes into some detail on local authority powers of direction in relation to looked after children and states that *“a local authority also has the power to direct the admission authority for any maintained school in England (other than a school for which they are the admission authority) to admit a child who is looked after by the local authority, even when the school is full. The local authority must not choose a school from which the child is permanently excluded but may choose a school whose infant classes are already at the maximum size”*.¹¹⁴ The Code outlines the process that must be followed by a local authority when directing a school to admit a looked after child,¹¹⁵ and details the powers of an adjudicator if the admission authority appeals the direction.¹¹⁶ This Code states that looked after children, and previously looked after children, must take priority in terms of oversubscription criteria,¹¹⁷ random allocation,¹¹⁸ and waiting lists.¹¹⁹

The Code also deals with faith based oversubscription criteria in schools designated with a religious character and states *“Admission authorities must ensure that parents can easily understand how any faith-based criteria will be reasonably satisfied. Admission authorities for schools designated with a religious character may give priority to all looked after children and previously looked after children whether or not of the faith, but they must give priority to looked after children and previously looked after children of the faith before other children of the faith. Where any element of priority is given in relation to children not of the faith they must give priority to looked after children and previously looked after children not of the faith above other children not of the faith”*.¹²⁰

The Ombudsman for Children is of the opinion that special provision for designating a school place, similar to that in the UK, should be put in place for children in care. This Office considers that the availability of a school place is not the only factor that should be taken into account when designating a school place to a child in care; other factors such as subjects studied and extracurricular activities participated in should all be taken into account. While it may be undesirable to designate a place for a child in a school which is full, it is the view of the OCO that flexibility is required when dealing with this small number of particularly vulnerable children who may have to change school at short notice and during term time while also dealing with disruption in their family and personal lives.

Recommendation: The Ombudsman for Children recommends that a separate provision should be included in the Bill to take account of the particular circumstances of children in care.

¹¹⁴ *Ibid*, at p. 32, Para.3.19

¹¹⁵ *Ibid*, at p. 32, Para. 3.20

¹¹⁶ *Ibid*, at p. 32, Para 3.21

¹¹⁷ *Ibid*, at p. 10, Para. 1.7

¹¹⁸ *Ibid*, at p. 15, Para. 1.34

¹¹⁹ *Ibid*, at p. 23, Para. 2.14

¹²⁰ *Ibid*, at p. 16, Para. 1.37

5.3 Appeals

Section 10(1) of the Education for Persons with Special Educational Needs Act 2004 makes provision for the Council to designate a school place for a child with special educational needs of its own volition or at the request of the parents. Sections 10(7) and 10(8) outline the appeals process involved if the Council fails to designate a school as requested by the parents. Section 10(9) states that the Appeals Board shall hear and determine appeals made under subsections (3) and (6) within 2 months of the appeal being made. However, it is important to note that Section 10 of the Education for Persons with Special Educational Needs Act 2004 has not been commenced.

Section 66(5) of the Education (Admission to Schools) Bill 2016 allows for a school which has been designated to accept a pupil to appeal this decision. Section 66(8) allows for parents to make an appeal if the Council or Agency fail, or refuse, to designate a place within the prescribed period. However, there is no provision made for a child, or their parent, to make an appeal if they believe that the child's best interests have not been adequately taken into account or if child's views have not been heard or given due weight in the designation of a particular school. Although not commenced, Section 10(6) of the Education for Persons with Special Educational Needs Act 2004 made provision for a parent to make an appeal if the Council had failed to designate a particular school they had specified in their request, which indicates that the provision for an appeal by a parent was considered necessary when drafting the 2004 Act.

Recommendation: The Ombudsman for Children is concerned at the absence of a provision which allows for an appeal by a child, or their parent, against a designated school place and believes that such a provision should be included in the Bill.

This Office notes that the Bill is silent on whether or not a child would commence their attendance at a school that has been designated for them while an appeal against this designation is on-going. Sections 66(5), 66(6), 66(8) and 66(9) state that appeals must be heard, and decisions issued, within prescribed periods. However, the Bill does not define these prescribed periods. In the absence of set timeframes and clarity on whether or not a child attends the designated school while an appeal is on-going, the OCO is concerned that a child could be left without a school place for a significant period of time.

Recommendation: The OCO recommends that the Bill should include timeframes in which an appeal must be decided upon and should clarify whether or not the child should be enrolled in the designated school while awaiting the outcome of the appeal.

Section 66(7) of the Bill allows a designation to be cancelled if section 7(3)(c) of the Equal Status Act 2000 applies to the school and if the school can prove that a refusal to admit the child is essential to maintain the ethos of the school. As stated above in Section 3.3, this Office is of the view that Section 61(2)(b) of the Bill should be amended (along with section 7(3)(c) of the Equal Status Act) in order to ensure that no child is denied access to a publicly funded school on the basis of their religion.

The Ombudsman for Children is of the view that the core principle of the best interests of the child should be the primary consideration when balancing the rights of the child to an education and the right to a school to maintain their ethos. The OCO considers it difficult to comprehend how the admission of an individual student, under the designation of the Council or Agency, would have such a serious impact on the school that it would damage or undermine their ethos.

Recommendation: The OCO recommends that the provision which allows a school to use Section 7(3)(c) of the Equal Status Act to appeal the designation of a school place should be removed from the Bill.

6. Respect for Children's Views

Section 64(1) of the Bill states that the Minister shall consult with bodies representative of patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers prior to the making of regulations for the purpose of the preparation and publication of school admission policies. However, it is noted that there is no provision made for consultation with children and young people in relation to the development of school admission policies.

Article 12(1), of the CRC provides that *“State parties shall assure to the child who is capable of forming his or her own views the right to express those views in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”*

6.1 Better Outcomes, Brighter Futures

From a national policy perspective Better Outcomes, Brighter Futures (BOBF)¹²¹ sets the Government's key commitments to children and young people up to the age of 24 from 2014 to 2020. The Policy (Goal 3) articulates the importance of listening to and involving children and young people as a fundamental social inclusion process through which they are empowered to become actors in the decisions that affect their lives and to be socially included, active citizens in their own right. As part of this, Goal 3 states that the Government recognises the right of children and young people to have a voice in decisions that affect them, both individually and collectively. It particularly stresses the importance of having a voice in decisions made in their local communities, schools and in the wider formal and non-formal education system. The Strategy acknowledges the evolving capacity of children and young

¹²¹ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf.

people to participate in the decisions that affect them and highlights that adults have a key role in enabling and facilitating their views to be heard.¹²²

As highlighted in the Strategy, “failure to listen to children and young people in the past has resulted in a failure to protect them from abuse and neglect”. The Strategy acknowledges the importance of supporting children to express themselves in order to develop and, from an early age, the child’s capacity to be reflective, critical citizens. It also notes that participation is a process, both collectively and individually. This process should be respectful of the dignity of children and young people and the contribution they have to make, based on their unique experiences and perspectives. It involves taking their views and opinions seriously and acknowledging and responding to them appropriately. The Strategy also stresses that accommodations and supports are required to ensure that the voices of ‘seldom-heard’ children are heard (e.g. children with disabilities, stressing that while their voices may be harder to reach and hear, they are no less important).¹²³

It is worth highlighting the commitments made by Government in this National Strategy in the context of the Bill as this piece of legislation presents a crucial opportunity to ensure that many of the core commitments made are implemented.

The Government has committed to a number of consultative initiatives with children in order to realise the goals set out in the Strategy. Relevant to the area of education are commitments to consult with children and young people on policies and issues that affect their lives, and in particular, to create mechanisms to provide children and young people with the opportunity to be heard in primary and post-primary schools and centres for education through Student Councils or other age-appropriate mechanisms.¹²⁴

In relation to the participation of children and young people in political and policy making processes, Government committed to developing and implementing a National Policy on Children and Young People’s Participation in Decision-making. They also committed to establish a Children and Young People’s Participation Hub to support Government departments and agencies in the implementation of this policy framework.¹²⁵

6.2 National Strategy on Children and Young People’s Participation in Decision-making

The National Strategy on Children and Young People’s Participation in Decision-making was published in June 2015 with a goal of ensuring “that children and young people will have a voice in their individual and collective everyday lives across the five national outcome

¹²² *Ibid* at p. 31.

¹²³ *Ibid*.

¹²⁴ *Ibid* at p. 32.

¹²⁵ *Ibid*.

areas”.¹²⁶ Education and schools are identified as one of four objectives and priority areas for action.

According to this Strategy, “effective and meaningful participation of children and young people [in education] has been shown to be beneficial to children and young people, and to schools. Students’ participation generally, and student councils more particularly, can improve academic standards, reduce rates of early school-leaving, improve discipline and facilitate students in acquiring communication, planning and organisational skills”.¹²⁷

Objective 2 of the Strategy refers to children and young people having a voice in decision-making in early education, schools and the wider formal and non-formal education systems. It highlights “the importance of children and young people’s involvement in decision-making in education policy, in the running of schools and services, in school inspections, in schools’ self-evaluations, in the curriculum, in behaviour and bullying policies, in support services and other areas, as outlined in the Action Plan”.¹²⁸

6.3 Taking Children’s Views into Account

As stated in the 2015 Strategy, “the duty to take account of what children say applies in a variety of contexts. For example, at macro level, children’s views should be taken into account in the development of national policies and in the design of services. At micro level, children’s views should be taken into account in the individual decision-making that affects their daily lives. The UN Committee has highlighted the relevance of children’s involvement in decision-making in schools and local communities, given that these are the spaces where many important decisions are taken that directly affect their lives. These are two of the priorities of the present strategy”.¹²⁹

While the subject of school admissions is often framed as a right of a parent to choose a school for their child, it is the view of this Office that access to education, and admission to schools, is primarily a child’s rights issue. Therefore, the OCO is concerned at the lack of reference to any consultation with children and young people in relation to the preparation of the regulations which will govern school admission policies. In view of children’s right to be heard and to have due weight given to their views in all matters affecting them, we believe that the Department should take steps to consult with children so that their views can be taken into account in the development and implementation of this legislative framework.

¹²⁶ Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at <http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at p. 3.

¹²⁷ *Ibid* at p. 7.

¹²⁸ *Ibid* at pp. 13-14.

¹²⁹ *Ibid* at p. 20.

Recommendation: The Ombudsman for Children recommends that in order to ensure a child's rights based approach to school admissions policies, as well as compliance with national obligations with regard to consulting children and young people in educational matters that affect them, the Minister should include children and young people in the consultation prior to the making of regulations for the purpose of the preparation and publication of school admission policies.

7. Oversight and Monitoring

Section 70 of the Education (Admission to Schools) Bill 2015 provided for the Minister to be able to appoint a person independent of the school to carry out the operation of the admissions policy where the patron is of the opinion that the operation of the admission policy is contrary to the requirements of the legislation. The OCO had welcomed this provision which was also included in the General Scheme. However, these provisions are not included in the Education (Admission to Schools) Bill 2016.

The purpose of these provisions was to expand the range of options available within and outside the governance structure of schools to respond to situations in which a school is failing to implement its admissions policy in accordance with the legislation and regulations. It is the view of this Office that the inclusion of the power of the Minister under Section 70 of the 2015 Bill represented a substantial and much needed set of tools for the effective oversight of school admissions policies.

The Bill as it stands does not make provision for who will decide a final appeal on enrolment applications. This Office is concerned that the absence of any external oversight of individual school admissions policies increases the potential for inconsistency and a missed opportunity to promote a positive culture in the implementation of admission policies in an appropriate manner.

The usefulness of the powers originally provided to the Minister under Section 70 of the 2015 Bill 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 was 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. The OCO is therefore concerned that this provision has been removed from the current Bill.

Recommendation: The Ombudsman for Children's Office recommends that the provisions included in Section 70 of the 2015 Bill should be reintroduced into the Education (Admission to Schools) Bill 2016.

8. Other Education Legislative Developments

The Department of Education and Skills recently held a consultation on the role of religion in school admissions. The deadline for submissions on this consultation was 20th March 2017. The Education (Admission to Schools) Bill 2016 does not contain any amendments to address the impact of the Equal Status Act on admissions to denominational schools. While the fact that this issue will now be dealt with following the consultation is to be welcomed, this Office is concerned that different aspects of school admissions are being dealt with at a legislative level in a fragmented manner.

Recommendation: This Office is of the view that all provisions dealing with school admissions should be dealt with in the same Bill so that they can move through the proper procedures and safeguards laid out in the legislative process at the same time.

9. Recommendations:

The OCO is of the view that Section 61(2)(b) of the Bill should be amended (along with section 7(3)(c) of the Equal Status Act) in order to ensure that no child is denied access to a publicly funded school on the basis of their religion.

The Ombudsman for Children recommends that Section 62(6)(h) of the Bill should be expanded to confine denominational religious teaching to a specific class which should be scheduled in such a way to make it practical for children to opt-out if so required.

The Ombudsman for Children also recommends that in order to respect the right of freedom of thought, conscience and belief of all children, a long term goal should be the removal of religion from the integrated curriculum.

While accepting this may take time to implement, the OCO is of the view that removal of denominational religious instruction from state funded schools is necessary in order to protect the privacy rights of children of no, or a different, religion or belief to that of the school patron.

The OCO is of the view that provisions should be included in the Bill to allow a child to decide whether or not they want to attend religion classes in a manner consistent with their age, maturity and evolving capacities.

The Ombudsman for Children recommends that the past pupil criterion should not be included as a permissible oversubscription criterion in the Bill.

The OCO is of the view that the provisions contained in Section 66 could be strengthened by ensuring that the best interests of the child and hearing and affording due weight to the views of the child, in line with their age and maturity, should be primary concerns when designating a school place.

The Ombudsman for Children recommends that a separate provision should be included in the Bill to take account of the particular circumstances of children in care.

The Ombudsman for Children is concerned at the absence of a provision which allows for an appeal by a child, or their parent, against a designated school place and believes that such a provision should be included in the Bill.

The OCO recommends that the Bill should include timeframes in which an appeal must be decided upon and should clarify whether or not the child should be enrolled in the designated school while awaiting the outcome of the appeal.

The OCO recommends that the provision which allows a school to use Section 7(3)(c) of the Equal Status Act to appeal the designation of a school place should be removed from the Bill.

The Ombudsman for Children recommends that in order to ensure a child's rights based approach to school admissions policies, as well as compliance with national obligations with regard to consulting children and young people in educational matters that affect them, the Minister should include children and young people in the consultation prior to the making of regulations for the purpose of the preparation and publication of school admission policies.

The Ombudsman for Children's Office recommends that the provisions included in Section 70 of the 2015 Bill should be reintroduced into the Education (Admission to Schools) Bill 2016.

This Office is of the view that all provisions dealing with school admissions should be dealt with in the same Bill so that they can move through the proper procedures and safeguards laid out in the legislative process at the same time.