



**ombudsman
do leanaí
for children**

**Department of Children, Equality, Disability, Integration and Youth:
Consultation on the Review of the Equality Acts**

**Submission by the Ombudsman for Children's Office
December 2021**

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1. Introduction

The Ombudsman for Children's Office (OCO) is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002, as amended (2002 Act).¹ One of the OCO's core statutory functions under the 2002 Act is to promote the rights and welfare of children up to the age of 18 years. The OCO has prepared this submission pursuant to the following sections of the 2002 Act:

- Section 7(1)(a) provides for the Ombudsman for Children to advise any Minister of the Government on the development and coordination of policy relating to children.
- Section (1)(g) provides for the Ombudsman for Children to monitor and review generally the operation of legislation concerning matters that relate to the rights and welfare of children.
- Section 7(4) provides for the Ombudsman for Children to advise any Minister of the Government on any matter relating to the rights and welfare of children.

The OCO welcomes the review by the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) of the Equality Acts along with the stated aim of the review, namely to examine the functioning of the Acts and their effectiveness in combatting discrimination and promoting equality. The OCO also welcomes that the review will examine the operation of the Equality Acts from the perspective of the person taking a claim under its redress mechanisms and the degree to which those experiencing discrimination are aware of the legislation and whether there are practical or other obstacles that preclude or deter them from taking an action.

In preparing this submission, the OCO has been mindful of the wide-ranging experience and expertise of the many stakeholders who may contribute to this consultation. Correspondingly, the purpose of our submission is to highlight a number of issues, which we believe should be considered in the context of the review so as to ensure that the rights of children and young people are more fully protected in this area. While this submission does focus on the Equal Status Acts 2000 – 2018 (the Acts), its content may also be relevant to other laws, policies and processes being considered as part of the review.

This submission has been framed in light of Ireland's children's rights obligations, in particular under the UN Convention on the Rights of the Child (UNCRC). It also has regard to relevant research in this area as well as a number of issues affecting children that have been brought to the OCO's attention through our work. As the DCEDIY will be aware, through the different functions of the OCO we engage with children protected under some of the grounds under the Acts and are conscious of different examples of discrimination that these children can face.²

In light of children's right to express their views in all matters affecting them and to have due weight given to their views in accordance with their age and maturity, the OCO encourages the DCEDIY to support children and young people to contribute their views to the current review. In this regard, a

¹ Ombudsman for Children Act 2002.

² For example: Ombudsman for Children's Office, *No End in Site; An investigation into the living conditions of children living on a local authority site* (2021). Available at: <https://www.oco.ie/library/no-end-in-site-an-investigation-into-the-living-conditions-of-children-on-a-local-authority-halting-site/> and Direct Division, *Children's views and experiences of living in Direct Provision* (2000), Available at: <https://www.oco.ie/directdivision/direct-division-report/>.

2015 study found that children living in vulnerable situations have very little experience of being listened to as they face discrimination on two counts as they are under 18 years old and face particular vulnerabilities such as disability, ethnic background or social disadvantage.³ Accordingly, we suggest that the DCEDIY should seek to hear the views of children as part of this review.

2. Children's rights

Through ratifying the UNCRC in 1992, Ireland has an obligation under international law to respect, protect and fulfil the rights of all children living in Ireland. These rights include four general principles, which are integral to the realisation of all children's rights under the UNCRC:

- Article 2 provides that all children must be able to enjoy their rights without discrimination of any kind, irrespective of their circumstances or those of their parents/guardians.
- Article 3 requires children's best interests be treated as a primary consideration in all actions concerning them.
- Article 6 recognises children's right to life, survival and development. In this regard, States are expected to interpret 'development' as a holistic concept encompassing all aspects of children's development and are obliged to provide optimal conditions for childhood.⁴
- Article 12 provides for children's right to express their views freely in all matters affecting them and for due weight to be given to children's views, in accordance with their age and maturity.

It has been argued that the development of the UNCRC was necessary because the principle of non-discrimination was insufficiently developed in international and regional human rights instruments to effectively counter child discrimination and this was due partly to their inadequacy to protect children against child-specific discrimination.⁵

While the UNCRC does not define discrimination, some useful guidance can be found in the work of international and European bodies. Referring to the International Covenant on Civil and Political Rights, the Human Rights Committee⁶ have stated that "*non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights*". It is noted that "*the term discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*". It is recognised that the principle of equality sometimes requires States Parties "*to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination*" and that not every differentiation of treatment will

³ Brunberg, E., & Visser-Schuurman, M. (2015). Speak Up! Voices of European Children in Vulnerable Situations, *The International Journal of Children's Rights*, 23(3), 569-601.

⁴ UN Committee on the Rights of the Child, General Comment No.5: General measures of implementation of the Convention on the Rights of the Child (2003). CRC/CGC/2003/5. p.4.

⁵ Besson, S. (2005). The Principle of Non-Discrimination in the Convention on the Rights of the Child, *The International Journal of Children's Rights*, 13(4), 433-461.

⁶ Human Rights Committee, General Comment No. 18, (1989), HRI/GEN/1/Rev.8, paras. 7 to 13, pp. 187 – 188.

constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

The European Court of Human Rights (ECHR) has found that *“a difference in treatment will be discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised”*.⁷ It has been noted that children are more vulnerable to discrimination than adults are as they are often disadvantaged in terms of social power and children can experience discrimination both as a group and as individuals on various grounds, such as their ethnic origin, gender, religion, disability, sexual orientation or other status.⁸ While it is accepted that special measures may be needed on occasion to promote the rights of certain groups of children, a distinction must be made between discriminatory and differential treatment.⁹ From a children’s rights perspective, children have a right to be protected from discrimination and harm and should only experience differential treatment if there is a reasonable or objective basis for this and if it is consistent with children’s rights and best interests.

The Acts prohibit discrimination in the provision of goods and services, accommodation and education. They cover the nine grounds of gender, civil status, family status, age (apart from one exception¹⁰ this ground does not apply to children), disability, sexual orientation, race, religion, and membership of the Traveller community. However, while eight of the nine grounds provided for under the Acts apply to children, there are only two references to children in the Acts. The Acts contain no recognition of any additional vulnerabilities children may face because of their age, either on its own or in conjunction with any of the other grounds protected under the Acts. In order to ensure that the particular rights and vulnerabilities of children are taken into account, the OCO suggests that **consideration should be given to children’s rights and to children as rights holders in the review of the Equality Acts to ensure that the law, policy and practice in this area is in line with and does not adversely affect children’s rights and best interests.**

3. Exemption of children from age ground

Section 3(3) of the Equal Status Act 2000 (the 2000 Act) provides that treating a child under the age of 18 years less favourably or more favourably than another person, whatever that person’s age, shall not be regarded as discrimination under the age ground. This section allows less favourable or more favourable treatment for those under 18, when compared to those over 18, and for discrimination between children of different ages.

The UNCRC does not prescribe a minimum age at which children should enjoy their right to non-discrimination under Article 2 of the UNCRC. From a children’s rights perspective, the practice of setting minimum ages for children must have a purpose and that purpose should be consistent with

⁷ European Court of Human Rights, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention Prohibition of discrimination (Updated on 31 August 2021) at p.18, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

⁸ Council of Europe, Children’s Rights, Anti-Discrimination. Available at: <https://www.coe.int/en/web/children/anti-discrimination>.

⁹ Childs Rights International Network, Discrimination and the CRC. Available at: <https://archive.crin.org/en/guides/introduction/discrimination-and-crc.html#top>.

¹⁰ Section 3(3)(b) of the Equal Status Act 2000.

children’s rights under the UNCRC, including by avoiding arbitrary discrimination against children on the grounds of age. Minimum ages can be and are prescribed for a variety of legitimate reasons – for example, to protect children from exploitation and abuses of power and to support children’s development. When considering whether to prescribe or recommend a minimum age, it is important not only to identify a specific purpose for doing so that is consistent with children’s rights and best interests, but also to assess whether an age-based approach is the most effective way of achieving that specific purpose.

While the following may not be widespread issues, they indicate how the lack of protection of children under the age ground can lead to discrimination against children that may adversely affect them. A recent Growing Up in Ireland report states that 49% of the 17 and 18 year olds questioned reported being discriminated against because of their age.¹¹ While many of the causes of this discrimination would not fall under the protections of the Acts, some of the young people involved felt that they received poorer service than others in restaurants and stores. Another example of discrimination against children on the basis of their age include the use of so called “mosquito devices” to keep them out of or away from shops.¹²

A recent article has discussed how children faced discrimination in some of the measures taken to deal with the Covid 19 pandemic.¹³ In March 2020, children were banned from entering some shops as they were incorrectly considered “vectors” of Covid 19.¹⁴ As children are not protected under the age ground, this discrimination could not be challenged under the Acts.

In circumstances where the purposes of discriminating against children on the ground of age is not directed towards upholding their rights and best interests, it appears both illogical and problematical that a person aged 18 or over can avail of the protection offered by the age ground when accessing a good or service, but a child under 18 cannot. It also appears illogical that children may experience discriminatory treatment, which would otherwise constitute discrimination under the Acts, but for the exemption under Section 3(3). **The OCO is of the view that consideration should be given to reviewing the exemption contained in Section 3(3) of the 2000 Act to ensure that it complies with Ireland’s obligation to protect, respect and fulfil children’s rights.**

¹¹ McNamara, E., et al, Growing Up in Ireland National Longitudinal Study of Children - The Lives of 17/18 Year Olds (2020), at pp. 147 – 150. Available at: <https://www.growingup.ie/pubs/GUI-lives-of-17-18-year-olds-web-ready.pdf>.

¹² Gallagher, C., Anti-teenager alarms a form of assault, says Minister (5 May 2018), The Irish Times. Available at: <https://www.irishtimes.com/news/social-affairs/anti-teenager-alarms-a-form-of-assault-says-minister-1.3484649>.

¹³ Adami, R. & Dineen, K. (2021) Discourses of Childism: How covid-19 Has Unveiled Prejudice, Discrimination and Social Injustice against Children in the Everyday, *The International Journal of Children's Rights*, 29(2), 353-370.

¹⁴ Pope, C., & Cosgrave, J. Coronavirus: Single parents concerned at treatment in supermarkets (18 April 2020), The Irish Times. Available at: <https://www.irishtimes.com/news/ireland/irish-news/coronavirus-single-parents-concerned-at-treatment-in-supermarkets-1.4231719> and Barry, A., Some supermarkets are banning children - but does the science back up their reasons? (19 March 2020), The Journal. Available at: <https://www.thejournal.ie/supervalu-irish-stores-children-ban-coronavirus-5051078-Mar2020/>.

4. Exemption of actions provided for under legislation

Section 14(1)(a) of the 2000 Act provides that nothing in the Act shall be construed as prohibiting the taking of any action that is required by or under any enactment. This means that children can be discriminated against vis a vis adults, and that different groups of children can be treated differently to each other, on any of the nine grounds provided for under the Act, if this is provided for in law. In requiring States to ensure the rights in the UNCRC to all children without discrimination, Article 2 of the UNCRC places a positive obligation on the State to take all measures necessary to enable children to enjoy and exercise their rights. In this regard, the Committee has highlighted the importance of ensuring that domestic legislation is fully compatible with the UNCRC and, in particular, reflects the general principles of the UNCRC, including the non-discrimination principle set out in Article 2.¹⁵ Therefore, **the OCO suggests that the DCEDIY might usefully consider the inclusion of an express obligation to ensure that draft legislation complies with the State's non-discrimination obligations, including in respect of children.**

The broad nature of the exemption under Section 14(1)(a) is of concern, including in light of issues that have come to the OCO's attention where children may experience less favourable treatment, which would otherwise constitute discrimination under the Acts, but for this exemption. As the DCEDIY will be aware, legislation exempt from the scope of the Acts includes legislation prescribing the statutory criteria used to determine eligibility for social protection measures.¹⁶

An example that has come to the OCO's attention in this regard concerns the Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension, which is paid to a surviving spouse or civil partner following the death of their spouse or civil partner. This payment includes payments in respect of a qualified child of the spouse or civil partner.¹⁷ As a surviving unmarried partner is not eligible for this payment, their children, who may otherwise have benefitted from financial support if their parents had been married or in a civil partnership, are treated less favourably than children of married parents. However, as the legislation determining eligibility for this payment is exempt from the Acts by virtue of Section 14(1)(a), such children and their families are not afforded protection under the Acts.

Section 14(1)(a) also precludes a consideration by the Workplace Relations Commission (WRC) of legislative provisions for their discriminatory impact under the Acts and therefore for compliance with the State's non-discrimination obligations. In a case concerning a complainant by a Traveller family that certain criteria set out in the regulations governing social housing assessments indirectly discriminated against them on the Traveller community ground, the WRC highlighted that Section 14(1)(a) precluded it from determining whether a legislative provision is discriminatory or not.¹⁸ **The OCO suggests that consideration be given to reviewing the exemption contained in Section 14(1)(a) of the Equal Status Acts for the purposes of ensuring that legislation requiring or permitting an action that has an adverse impact on the equal enjoyment by all persons, including children, of their rights, is not exempt from the scope of the Acts.**

¹⁵ UN Committee on the Rights of the Child, General Comment No.5: General measures of implementation of the Convention on the Rights of the Child (2003). CRC/CGC/2003/5, para. 1.

¹⁶ Walsh, J. (2019) 'Primacy of national law over EU law? The application of the Irish Equal Status Act', *European Equality Law Review*, No. 2, pp. 35-48, p. 44.

¹⁷ Social Welfare (Consolidation) Act 2005, as amended, Chapter 18.

¹⁸ *A member of the Travelling Community v A County council*, ADJ-00008030, available at <https://www.workplacerelements.ie/en/cases/2018/april/adj-00008030.html>.

5. Definition of Disability

The review of the Equality Acts includes a review of current definitions, including in relation to disability. Research commissioned by the OCO on barriers to the realisation of the rights of children with disabilities in Ireland¹⁹ was published in March 2021. This research noted that:

- The definition of disability varies across Irish legislation, which is confusing and out of step with international human rights concepts of disability.
- The definition of disability under the Disability Act 2005 (2005 Act) is adult-centred and is not in line with the broad concept of disability under the UN Convention on the Rights of Persons with Disabilities (UNCRPD).
- The definition of disability under the Acts, while broader than that under the 2005 Act, is based on medical deficit and results in diagnosis led systems which are not compliant with the human rights based understanding of disability under the UNCRPD.²⁰

While not referring to the Equality Acts in particular, a report published by the OCO in October 2020 about the difficulties facing children trying to access an Assessment of Need²¹ identified a number of issues with the definition of disability contained in the 2005 Act. A corresponding recommendation that we made in this regard is that **“a consistent, rights-based, child-centred and inclusive definition of disability needs to be adopted by all Government departments and agencies responsible for meeting the needs of children.”**²² The OCO encourages the DCEDIY to give attention to these matters when considering the definition of disability in the context of the current review.

The requirement for providers of goods and services to do all that is reasonable to accommodate people with disabilities, and the recognition that refusal or failure to reasonably accommodate constitutes a form of discrimination, were identified as positive measures in the March 2021 research. However, the research also identifies a number of limitations in the protections offered by the Acts, including:²³

- There is no obligation around reasonable accommodation where the person with the disability finds it only moderately difficult to obtain the service.
- There is no obligation to provide the special treatment if the provision of the facility or treatment would give rise to more than a nominal cost. This exemption applies even to the State’s provision of essential services.
- The case law demonstrates that the interpretation of what constitutes a ‘nominal cost’ can vary significantly.

In light of the above, **the OCO suggests that consideration be given to amending the law on reasonable accommodation to bring it into line with the standard of the UNCRPD.**

¹⁹ Dr Moloney, C., et al. Mind the Gap Barriers to the realisation of the rights of children with disabilities in Ireland, Centre for Disability Law and Policy, NUI Galway (March 2021). Available at: https://www.oco.ie/app/uploads/2021/03/15533_OCO_NUIG_Disability_Report_Eng_V1c-002.pdf.

²⁰ Ibid. p.22.

²¹ Ombudsman for Children’s Office, Unmet Needs (October 2020). Available at: https://www.oco.ie/app/uploads/2020/10/15438_OCO_Assessmnet_of_Need_Report_Interactive.pdf.

²² Ibid. p.28

²³ Supra note 19, pp. 20 – 21.

6. Access to Justice

According to the Child Rights International Network (CRIN), “*all forms of discrimination against children are exacerbated by virtue of their age and vulnerability which mean they have fewer opportunities for challenging discrimination because, for example, they do not have access to courts and complaints mechanisms on an equal basis with adults.*”²⁴ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice look at issues around the place of children, their rights, needs and views in justice proceedings that impact upon them.²⁵ These Guidelines provide detailed material around the information and advice that should be provided to children from their first involvement with the justice system, and throughout their time in the process, in order that they understand the systems and processes involved.²⁶ According to these Guidelines:

- Children and their parents should be promptly and adequately informed of their rights, in particular the specific rights children have with regard to the justice system.
- Information and advice should be given in a manner suited to the child’s age and maturity.
- Children and their parents should both receive the information (i.e. parents should not receive the information instead of their child).²⁷

Children’s rights can be violated in accessing justice systems as a result of indirect discrimination, which comes about because of unequal access when compared with adults and because the procedures are complex and not child-friendly.²⁸ The Council of Europe’s Guidelines have recommend that “*Child-friendly materials containing relevant legal information should be made available and widely distributed, and special information services for children such as specialised websites and helplines established*”.²⁹ In order to ensure that children are fully aware of their rights in relation to the Equality Acts as well as the process involved in making a complaint under the Acts, **the OCO suggests that consideration be given to making child friendly information materials easily available and accessible to children and their parents/ guardians.** In order to assist child complainants who may have difficulty navigating the existing complaints process, **consideration should also be given to the development of a separate child-friendly complaints process for child complainants.**

WRC hearings are not court hearings and are not held in a formal manner. The adjudication officer “*will decide what is appropriate, taking into account fair procedures, arrangements which will best support the effective and accurate giving of evidence and the orderly conduct of the hearing*”.³⁰

²⁴ Childs Rights International Network, Discrimination and the CRC. Available at:

<https://archive.crin.org/en/guides/introduction/discrimination-and-crc.html#top>.

²⁵ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010), at p.16. Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3.

²⁶ Ibid, pp.20-21 and pp.58-59.

²⁷ Ibid, pp.20-21.

²⁸ Childs Rights International Network, Discrimination and the CRC. Available at:

<https://archive.crin.org/en/guides/introduction/discrimination-and-crc.html#top>.

²⁹ Supra note 25, p.21.

³⁰ Work Place Relations Commission, Procedures in the Investigation and Adjudication of Employment and Equality Complaints, at pp. 6-7. Available at

https://www.workplacerelements.ie/en/publications/forms/procedures_employment_and_equality_complaint_s.pdf

While an informal process may be more suitable for child complainants than a formal court hearing, it is worth taking into account that any type of hearing such as this may be considered formal by a child. Consideration should be given to the following measures which could help make the process more child friendly for children involved in the process.

As noted above, Article 12 of the UNCRC provides for a child who is capable of forming his or her own views the right to express those views freely in all matters affecting them, with their views being given due weight in accordance with their age and maturity. Children can be discriminated against because they are not listened to and because less weight is attached to the views that they express.³¹ The Council of Europe has encouraged Member States to consider the establishment of a system of specialised judges and lawyers for children.³² While the WRC is not a formal court, the OCO suggests that **adjudicating officers should receive training in children's rights as well as training in how to effectively engage with children at hearings in order to gather all the relevant information regarding their case and to give the child's evidence due weight in accordance with their age and maturity.**

The Council of Europe has made a number of recommendations on how justice proceedings could be made more child-friendly.³³ This includes the provision of child-friendly interview and waiting rooms as well as familiarisation for children with the court layout and the officials involved. While WRC hearings are not held in a court and are not held in a formal manner, **consideration should be given to these recommendations to determine how improvements can be made to enable cases involving children to be conducted in a more child-sensitive way.**

The Council of Europe³⁴ further states that cases involving children should be dealt with as quickly as possible, while allowing for legal safeguards to be fully respected. In light of this, **the OCO suggests that consideration be given to prioritising cases involving children.**

³¹ Childs Rights International Network, Discrimination and the CRC. Available at: <https://archive.crin.org/en/guides/introduction/discrimination-and-crc.html#top>.

³² Supra note 25, p.30.

³³ Supra note 25, pp.29-30 and pp.84-85.

³⁴ Supra note 25, pp.28-29, p.32 and p.83.