

**Irish Human Rights and
Equality Commission**

**Observations on the
Education (Admission to
Schools) Bill 2016**

November 2016



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

Schedule of Recommendations

- The Commission recommends that the Equal Status Act be amended to give effect to the principle that no child should be given preferential access to a publicly funded school on the basis of their religion. [paragraph 49]
- The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that, in setting out the characteristic spirit and general objectives of the school, outside the specific context of faith formation and religious instruction which parents wish to avail of and where exemptions apply, regard shall be had to providing information in relation to religion in an objective, critical and pluralistic manner that avoids indoctrination, in accordance with the jurisprudence of the European Court of Human Rights. [paragraph 83]
- The Commission recommends that the Bill set down minimum standards in relation to the nature of exemptions for students who do not want to attend religious instruction or provide that the Minister for Education and Skills may regulate how schools shall provide for such students. [paragraph 84]
- The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that in setting out the characteristic spirit and general objectives of the school, the school shall ensure that the values of an inclusive school that respects and accommodates diversity across all nine grounds in the equality legislation are respected. [paragraph 85]
- The Commission recommends that the forthcoming amendment should prohibit the use of a connection with a former student of the school as a criterion in the admission of a student. [paragraph 94]
- The Commission recommends that the wording of the new sections 66(2) and 66(4) that are to be inserted into the Education Act be amended to ensure that the best interest of the child is the *primary* standard to which the National Council for Special Education or Child and Family Agency, as the case may be, shall have regard in both making a designation and making a decision not to designate a school. [paragraph 98]
- The Commission recommends that the new Section 66 be amended to permit a parent to make an appeal when a school has been designated by the Child and Family Agency or NCSE when the parent believes that the designation is not in the best interest of the child or that the Agency or NCSE failed to take account of the wishes of the child. [paragraph 99]
- The Commission recommends that the Bill be amended to provide that Appeals Committees provided for in the new section 66 be required to apply the best interest of the child as the *primary* consideration in assessing an appeal, and that they be required to take account of the wishes of the child. [paragraph 100]

1 Introduction

1. The Irish Human Rights and Equality Commission was established by the Irish Human Rights and Equality Commission Act 2014. Among the Commission's functions under that Act are:
 - protecting and promoting human rights and equality;
 - encouraging good practice in intercultural relations and promoting acceptance of diversity; and
 - working towards the elimination of human rights abuses and discrimination.¹In particular, the Act provides that one of the ways in which the Commission may implement its functions is by examining any legislative proposal and reporting its views on any implications for human rights or equality.² The Commission may also make recommendations to the Government in relation to measures that the Commission considers should be taken to protect and uphold human rights and equality in the State.³
2. The Commission was formed through the merger of the former Equality Authority and the former Human Rights Commission, both of which undertook significant work on education and, respectively, equality and human rights. These observations draw on the insights gained from that work, including knowledge of the practical barriers that students have faced in securing admission to school in ways that have undermined their right to not be discriminated against or that limit the full realisation of their human rights, and knowledge of the practices of some schools after admission that affect the full realisation of the students' rights.
3. The Commission welcomes the publication of the Education (Admission to Schools) Bill 2016. The Commission believes that the Bill, if enacted, can make a significant contribution to more fully achieving the stated aims of the legislation governing schools in relation to equality and the inclusion of all children.⁴
4. The Commission notes that the current wording of the Bill is to a large extent identical to a previous Bill that fell when the Dáil was dissolved at the general election in 2016.⁵ The Minister has indicated that there are two questions on which the current wording of the Bill will not or may not be the final position.

1 Section 10(1).

2 Section 10(2)(c).

3 Section 10(2)(d).

4 For example, section 6(g) of the Education Act 1998 provides that every person concerned in the implementation of that Act shall have regard to the object of promoting equality of access to and participation in education, and section 2 of the Education for Persons with Special Educational Needs Act 2004 establishes in law the important principle of inclusive education for students with special educational needs.

5 In November 2015, the Commission published observations on that Bill (available at: https://www.ihrec.ie/download/pdf/ihrec_observations_on_education_admission_to_schools_bill_2015.pdf).

5. One of those matters is the question of schools being allowed to prioritise children of past pupils. The previous bill on school admission contained a proposal to allow the Minister to make regulations prohibiting the prioritisation of a student who is the child of a past pupil; the current Bill omits that.⁶ The Minister for Education and Skills, Richard Bruton TD, announced in the Dáil that he intends to deal with this question by way of amendment at committee stage, and that the advice of the Attorney General is that the question of prioritising children of past pupils should be dealt with by way of substantive primary legislation rather than by way of regulation.⁷
6. The second question for which the wording of the current Bill may not become the final position concerns religion. The two main issues that have arisen on this question are (i) the use of religion as an admission criterion and (ii) arrangements during the teaching of religion for students in a religious school who are not of the school's religion. Both of these (and related) matters are dealt with in the Bill, but both matters are also dealt with in different ways in two private members Bills currently before the Dáil: the Equal Status (Admission to Schools) Bill 2016 (introduced by the Labour Party) and the Equal Participation in Schools Bill 2016 (introduced by the Anti-Austerity Alliance – People Before Profit). The first of these Bills has been the subject of a second stage debate in the Dáil, but – unusually – the standard motion that the Bill be read a second time was neither passed nor rejected, but was amended to state that the Bill will be deemed to have been read in 12 months' time (which translates to the end of June 2017) in order to allow the Oireachtas Committee on Education and Skills to consider submissions and hold hearings on a number of matters contained in the Bill and on matters which the Minister believes arise on foot of it.⁸ Nevertheless, the current government Bill contains

6 The key provision in the 2015 Bill was what would have become a new section 64(3)(d)(i) of the Education Act; that provision would have permitted the Minister to make regulations that would prohibit schools from applying as a criterion in selecting a student 'a student's connection to the school by virtue of his or her relationship with a specified category or categories of person'. (It was accompanied by two further provisions that allowed for derogations, and these are also absent from the current Bill – see section 64(3)(f) and 64(3)(g) of the Education (Admission to Schools) Bill 2015.)

7 See:

- Minister for Education and Skills, Richard Bruton TD, 'Questions on Proposed Legislation', *Parliamentary Debates: Dáil Éireann*, 7 July 2016, p. 11;
- Minister for Education and Skills, Richard Bruton TD, 'Written Answers: Proposed Legislation' (question no. 81), *Parliamentary Debates: Dáil Éireann*, 14 July 2016, pp. 129–130.

8 The matters are:

- (a) the proposed Bill strikes a balanced and measured approach in relation to competing rights;
- (b) the proposed Bill does not give rise to any unintended consequences that create any adverse impact on the schools of minority denominations;
- (c) the issue of catchment areas for schools will be examined, with due respect to the importance of established geographic boundaries and organisation, as well as having taken into regard experience in other jurisdictions and the views of stakeholders;
- (d) the proposed Bill takes account of any impacts and distortion on school transport policy and provision; and
- (e) the proposed Bill does not give rise to Constitutional difficulties;

provisions on religion that give rise to concerns from an equality and human rights perspective, and the Commission therefore includes views on those provisions in these observations.

7. The Commission identifies three aspects of the government's Bill that give rise to concern: religion, previous connection to the school, and the principle of the best interest of the child. These are addressed in the remaining sections of these observations.

2 Religion

8. Two issues arise in respect of religion: the use of religion as an admission criterion, and the rights of students after admission.

2.1 Admission

2.1.1 *The content of the Bill*

9. The Bill makes no change to the underlying substantive law on how a school may select students for admission in respect of admission. It would, however, require a school to 'provide' in its admission policy that unless it receives more applicants than it has places, then all applicants will be admitted.⁹ (There does not appear to be any other corresponding legal obligation on a school to admit students when those circumstances occur.) This provision would also provide that a school's admission policy could contain three other criteria under which an applicant will not be admitted, one of which is a restatement of the 'refusal' arm of the current exemption on the religion ground in the Equal Status Act, outlined below.¹⁰
10. A second provision in the Bill concerns students for whom a school is designated by either the National Council for Special Education or the Child and Family Agency.¹¹ This provision is intended to ensure that children who do not secure a school placement are given a place in a school that is designated by the Council or Agency.¹² A school that is

and to fully discuss and explore other practical issues and consequences that may arise as a result of the proposals'.

See: Minister for Education and Skill, Richard Bruton TD, 'Equal Status (Admission to Schools) Bill 2016; Second Stage [Private Members]', *Parliamentary Debates: Dáil Éireann*, 28 June 2016, pp. 89–90.

- 9 This is in the new section 62(6)(c) to be inserted into the Education Act.
- 10 The other two criteria for a school's policy stating that the school may refuse to admit a student are (i) where the parents of the student fail to confirm that they school's code of behaviour is acceptable to them and (ii) that the school is a single-sex school and the applicant is not of that sex. Section 7 of the Equal Status Acts provides, among other things, that a school which has the aim of providing education in an environment which promotes certain religious values may refuse to admit a student not of that denomination if it is proved that refusal is essential to maintain the ethos of the school.
- 11 This is provided for in the new section 66 to be inserted into the Education Act.
- 12 In the case of a student with special educational needs, the relevant provision is that the student has not been able to secure a placement in a school that can accommodate their special educational needs.

designated for a student by the Council or the Agency may appeal that designation.¹³ One of the criteria that the appeals committee is required to apply in cancelling a designation is the ‘refusal’ arm of the current exemption on the religion ground in the Equal Status Act.

2.1.2 Current law

11. The Equal Status Act 2000 prohibits discrimination on nine grounds, with a number of exemptions, in ‘the admission or the terms or conditions of admission of a person as a student’ to a school.¹⁴ One of the exemptions provides that a primary or second-level school which has an objective of providing education in an environment which promotes certain religious values may *give preference* to student of a particular religious denomination; furthermore, the ‘second arm’ of that exemption provides that such a school may *refuse* to admit a student not of that denomination if it is proved that refusal is essential to maintain the ethos of the school.¹⁵

2.1.3 School provision in Ireland

12. Of the 3,124 mainstream primary schools recognised by the Department of Education and Skills a total of 3,003 (that is, 96 percent) are under the patronage of a named religion¹⁶, as are approximately 53 percent of the 702 second-level schools.¹⁷ The faiths that are patrons of schools are:
 - Roman Catholic
 - Church of Ireland
 - Presbyterian
 - Muslim
 - Jewish
 - Methodist
 - Quaker

13 The subsections (5) to (7) of the new section 66 to be inserted into the Education Act.

14 Section 7(2)(a) of the Equal Status Act 2000.

15 Section 7(3)(c) of the Equal Status Act 2000.

16 That is, not counting schools under the patronage of a number of more than one faith and designated an inter-denominational in the database of the Department of Education and Skills.

17 These figures are calculated by the Commission from the databases for primary and post-primary schools for the 2015–2016 school year published by the Department of Education and Skills on the Internet at <http://www.education.ie/en/Publications/Statistics/Data-on-Individual-Schools/Data-on-Individual-Schools.html>. The use of an approximate figure for second-level schools arises because the department’s database includes in the category of ‘post-primary schools’ a number of institutions that are colleges of further education which provide education only to adults. The Commission has excluded from its calculations those institutions that it has been able to identify as colleges of further education.

In addition, the Department of Education and Skills states that inter-denominational schools at primary level are under the patronage or trusteeship of more than one religious faith community.¹⁸

13. A geographical analysis for the advisory group to the Forum on Patronage and Pluralism in the Primary Sector in 2012 established that at primary level there were approximately 1,700 'stand-alone' schools where the nearest primary school is over 3 kilometres away. (If the distance is extended to 5 kilometres, the number is reduced to approximately 310.)¹⁹ An equivalent analysis for the spatial distribution of second-level schools does not appear to be available.
14. A study conducted by the ESRI, which was published in 2012 using data gathered in 2007 and 2008, found that 18 percent of primary schools were oversubscribed.²⁰
15. An earlier study by the same team at the ESRI for the Department of Education and Skills in 2009 reported that 19 percent of primary principals reported that not all students who applied to their school were accepted, and of these 31 percent used religion as one of a number of criteria in selecting which students were admitted.²¹
16. Other research by the ESRI published in 2013, using data gathered in the 2012–2013 school year, found that 34 percent of secondary schools are over-subscribed.²² The proportion of schools that were over-subscribed differed across the three sectors at second level, as follows:
 - voluntary²³ secondary schools – 43 percent;
 - vocational sector²⁴ – 24 percent; and
 - community and comprehensive²⁵ schools – 23 percent.

18 However, it is not clear that the term 'inter-denominational' is used in a consistent way in the Department's database. At second level, a school that describes itself as non-denominational on its website is classified as inter-denominational in the database.

19 John Coolahan et al. (2012) *The Forum on Patronage and Pluralism in the Primary Sector: Report of the Forum's Advisory Group*. Dublin: Department of Education and Skills, at page 73 (available at: <https://www.education.ie/en/Press-Events/Events/Patronage-and-Pluralism-in-the-Primary-Sector/The-Forum-on-Patronage-and-Pluralism-in-the-Primary-Sector-Report-of-the-Forums-Advisory-Group.pdf>).

20 Merike Darmody et al. (2012) *School Sector Variation Among Primary Schools in Ireland*, Dublin: Economic and Social Research Institute and Educate Together, at page 30 (available at: <https://www.esri.ie/publications/school-sector-variation-among-primary-schools-in-ireland/>).

21 Emer Smyth et al. (2009) *Adapting to Diversity: Irish Schools and Newcomer Students*. Dublin: Economic and Social Research Institute, at page 63 (available at: <https://www.esri.ie/publications/adapting-to-diversity-irish-schools-and-newcomer-students/>).

22 Merike Darmody and Emer Smyth (2013) *Governance and Funding of Voluntary Secondary Schools in Ireland*, Research Series Number 34. Dublin: Economic and Social Research Institute, pages 83 and 84 (available at: <http://www.esri.ie/publications/governance-and-funding-of-voluntary-secondary-schools-in-ireland/>).

23 Within the second-level sector, the 'voluntary schools' are those under religious patronage.

24 At the time of the research, these schools were under the management of the vocational education committees (VECs); since then the sector has been restructured, and the former VECs are now named 'education and training boards'.

Significantly, 52 percent of large schools (600+) reported having more applicants than places, compared with only 12 percent of small schools. This means that the proportion of students affected by over-subscription at second level must be higher than 34 percent – the proportion of schools that are over-subscribed – and it may be significantly higher.

17. An earlier study by the same team at the ESRI for the Department of Education and Skills in 2009 reported that 20 percent of second-level principals reported that not all students who applied to their school were accepted, and of these 23 percent used religion as one of a number of criteria in selecting which students were admitted.²⁶
18. The government has a target of 400 additional multi-denominational and inter-denominational schools by the end of the next decade, in 2030.²⁷ (It is not specified whether these will be primary or second-level.)
19. The provision of special classes is also relevant to the question of religion and school admissions because special classes are provided in a significant number of mainstream schools across the State. At primary level, 841 special classes are provided in 428 schools; at second level, 310 special classes are provided in 194 schools.²⁸ For a number of disabilities, such as autistic spectrum disorder or mild general learning disability, the special classes are widely distributed. However, for other disabilities fewer schools provide those special classes. For example, all of the primary classes for primary pupils with hearing impairment are in six schools under religious patronage, distributed at different locations around the country (five Roman Catholic, and one Church of Ireland). This means that children in a particular region with a specific disability could be required to attend a school not of their belief in order to access the support they need; a corollary is that a religious-run school that has been assigned additional resources and expertise for a particular disability could refuse to admit a student with that disability if it could prove that such a refusal was essential to maintain the school's ethos.

25 The community and comprehensive sector emerged in the late 1960s and early 1970s when the curriculums followed in the vocational and voluntary sectors differed, and the community schools in that sector are under the joint patronage of an education and training board and a religious patron. (A possible point of confusion that the two terms 'community school' and 'community college' are used in the names of second-level schools in Ireland. Community schools are in the community and comprehensive sector and community colleges are in the ETB (previously vocational) sector.)

26 Emer Smyth et al. (2009) *Adapting to Diversity: Irish Schools and Newcomer Students*. Dublin: Economic and Social Research Institute, at page 59 (available at: <https://www.esri.ie/publications/adapting-to-diversity-irish-schools-and-newcomer-students/>).

27 Government of Ireland (2016) *A Programme for Partnership Government*, at page 89 (available at: http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/A_Programme_for_a_Partnership_Government.pdf).

28 These figures are calculated by the Commission from a database published by the National Council for Special Education: National Council for Special Education (2016) *NCSE List of Special Classes Mainstream Schools for September 2016/17*. Trim: NCSE (available at: <http://ncse.ie/special-classes>).

2.1.4 International human rights standards

20. The exemption in the Equal Status Act for religious schools has been assessed four times in recent years against human rights standards that are provided for in global human rights treaties that the State has agreed to be bound by, namely:
- the International Convention on the Elimination of All forms of Racial Discrimination, which Ireland ratified in 2000,
 - the International Covenant on Civil and Political Rights, which Ireland ratified in 1989,
 - the International Covenant on Economic, Social and Cultural Rights, which Ireland ratified in 1989, and
 - UN Convention on the Rights of the Child, which Ireland ratified in 1992.

International Convention on the Elimination of All forms of Racial Discrimination

21. In 2011, the Committee on the Elimination of Racial Discrimination examined Ireland under the International Convention on the Elimination of All forms of Racial Discrimination. Three provisions of the Convention were considered by the Committee in relation to religion and school admissions:
- article 2,
 - article 5(d)(vii), and
 - article 5(e)(v).
22. Article 2 is a wide-ranging commitment by states to eliminate racial discrimination, whether committed by the state or others. The first commitment set out in the article is that the state will ‘condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms’.
23. Importantly, Article 2(1)(c) commits the state to ‘take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists’.
24. Furthermore, under article 2(1)(d), the state has committed itself to ‘prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization’.
25. Article 5 of the Convention builds on the broad commitment contained in article 2 by identifying specific rights in which racial discrimination in all its forms will be prohibited and eliminated. Article 5(d)(vii) names the right to freedom of thought, conscience and religion and article 5(e)(v) names the right to education and training.
26. In its examination of Ireland in respect of these three articles, the Committee expressed regret ‘that the provisions of the Equal Status Act give the power to schools to refuse to admit students to denominational schools on grounds of religion, if it is deemed necessary to protect the ethos of the school’ and recommended that Ireland ‘amend

the existing legislation that inhibits students from enrolling into a school because of their faith or belief'.²⁹

International Covenant on Civil and Political Rights

27. In 2014, the UN Human Rights Committee examined Ireland under the International Covenant on Civil and Political Rights. Four provisions of the Covenant were considered by the Committee in its examination of Ireland in relation to religion and school admissions:
- article 2,
 - article 18,
 - article 25, and
 - article 27.
28. In ratifying the Covenant, under article 2 Ireland committed to 'adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.
29. Article 4 of the Covenant provides, in paragraph 1, that 'everyone shall have the right to freedom of thought, conscience and religion'. In ratifying the Covenant, Ireland committed to honouring the obligation in paragraph 4 of article 14 'to have respect for 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'.
30. The state has also committed to ensuring that citizens have the right 'to have access, on general terms of equality, to public service in his country', contained in article 25.
31. Finally, article 27 provides that people belonging to religious minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion'.
32. On foot of the obligations under those four articles and in light of the information presented to the Human Rights Committee about the situation in Ireland, the Committee recommended that Ireland 'introduce legislation to prohibit discrimination in access to schools on the grounds of religion, belief or other status'.³⁰

International Covenant on Economic, Social and Cultural Rights

33. In 2015, the Committee on Economic, Social and Cultural Rights examined Ireland under the International Covenant on Economic, Social and Cultural Rights.

29 Committee on the Elimination of Racial Discrimination (2011) *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ireland*, CERD/C/IRL/CO/3-4, at paragraph 26 (available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/IRL/CO/3-4&Lang=En).

30 Human Rights Committee (2014) *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4, at paragraph 21 (available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IRL/CO/4&Lang=En).

34. Two provisions of the Covenant were considered by the Committee in its examination of Ireland in relation to religion and school admissions: article 13 and article 14, which are wide-ranging and comprehensive articles that establish and set a range of detail on the right to education in international human rights law.
35. The Committee expressed concern at the discrimination faced by children belonging to a religious minority including ‘Legal provisions, such as section 7 of the Equal Status Act 2000, which allow schools to give preference to admission of students based on religion’. The Committee recommended that Ireland ‘Take all the measures necessary to bring all relevant laws, including the Equal Status Act 2000 and the Education (Admission to Schools) Bill 2015 in line with international human rights standards’.³¹

Convention on the Rights of the Child

36. In 2016, the Committee on the Rights of the Child examined Ireland under the UN Convention on the Rights of the Child. Four provisions of the Covenant were considered by the Committee in its examination of Ireland in relation to religion and school admissions: articles 28–31. These set out a range of details concerning the right to education.
37. The Committee expressed concern about ‘schools continuing to practise discriminatory admissions policies on the basis of the child’s religion’. The Committee recommended that Ireland ‘amend the existing legislative framework to eliminate discrimination in school admissions, including the Equal Status Act’.³²

2.1.5 European Union ‘Race’ Equality Directive

38. The EU ‘Race’ Equality Directive³³ prohibits discrimination in the provision of education on the ground of racial or ethnic origin³⁴. The term ‘racial or ethnic origin’ is used extensively in the Directive, although it is not defined in it.³⁵

31 Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, E/C.12/IRL/CO/3, at paragraph 31 (available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FIRL%2FCO%2F3).

32 Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4, at paragraphs 63 and 64 (available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IRL/CO/3-4&Lang=En).

33 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Communities*, L 180, 19 July 2000, pages 22–26 (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>).

34 Article 3(1)(g) of Council Directive 2000/43/EC

35 Indeed, recital 6 of the Directive explicitly refuses to accept the concept of ‘race’ as being a scientifically valid one: ‘The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term “racial origin” in this Directive does not imply an acceptance of such theories.’

39. The question of discrimination under the 'Race' Equality Directive as applied to an ethnic group that shares a religion has not yet arisen in the case law of the Court of Justice of the European Union. However, this question has arisen in the United Kingdom. In the case of *R (on the application of E) v JFS Governing Body*, the UK Supreme Court found that a school had directly discriminated because the definition of 'Jewish' that the school relied on in its admission policy was descent in the matrilineal line from a woman recognised as Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth.³⁶
40. It is clear, therefore, that for some groups where religion and ethnicity are closely intertwined, such as Jews and Sikhs, the application of the exemption provided for in section 7(3)(c) would amount to a breach of the EU 'Race' Equality Directive.³⁷

2.1.6 Constitution of Ireland

41. The Constitution contains a number of provisions that are relevant, in particular article 42, on education, and article 44, on religion. However, the Constitution Review Group in 1996 noted:
- 'There appears to be something of an internal tension between the provisions of the Constitution dealing with denominational education. Article 42.3.1° envisages that parents can elect to choose denominational education: the opening words of Article 44.2.4° sanction (under certain conditions) State funding for denominational education. Yet it seems implicit in Article 44.2.4° that a school in receipt of public moneys cannot insist on a policy such as admitting only co-religionists as pupils, and the practice of an integrated curriculum would appear to be at variance with this guarantee. But if a school cannot at least insist on giving preference to children of a particular religious persuasion, the 'religious ethos' of the school might be undermined. However, if the school gives preference to children of a particular religion, this might be seen as a form of indirect discrimination by the State because the school is publicly funded, especially if this meant that a child was thereby deprived of the opportunity of attending the nearest and most convenient school or even (to take a more extreme case) if he or she were denied any effective opportunity of attending school.'
42. The Ombudsman for Children, in its advice on the general scheme of an earlier version of the Bill, notes that the jurisprudence under article 42 and under article 44 of the Constitution 'discloses two different lines of reasoning with respect to public funding

36 *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2009] UKSC 15 (United Kingdom Supreme Court). (The judgements are available at: <https://www.supremecourt.uk/cases/docs/uksc-2009-0105-judgment.pdf>; a press summary is available at: <https://www.supremecourt.uk/cases/docs/uksc-2009-0105-press-summary.pdf>).

37 See also: Judy Walsh (2012) *Equal Status Acts 2000–2011: Discrimination in the Provision of Goods and Services*, Dublin: Blackhall Publishing, at page 131; Eilís Barry (2015) 'Non-discrimination and equality', chapter 1 in: *Making Rights Real for Children: A Children's Rights Audit of Irish Law*, Dublin: Children's Rights Alliance, at page 19.

for denominational education and the more general question of access to such publicly funded educational establishments'.³⁸

43. One line of reasoning frames the State's support for denominational schools as an aspect of parental choice and the State's duty to assist parents with the religious and moral formation of their children.³⁹ The implication of this line of reasoning is that denominational schools should be able to give preferential access to children of the school's denomination.⁴⁰ For example, as Hogan and Whyte note, one could argue that State financial support for a discriminatory admissions policy is analogous to the legislative authorisation of religious discrimination by schools in employment policies,⁴¹ which was upheld by the Supreme Court when the Employment Equality Bill 1996 was referred to it by the President for an assessment of its constitutionality before promulgation in *Re Article 26 and the Employment Equality Bill 1996*.⁴²
44. The second line of reasoning draws on the principle in Article 44.2.3^o that the State must not discriminate on the ground of religion or belief, and supports the claim that if a school is in receipt of public funds, any child should be entitled to attend without discrimination arising from the child's or parents' beliefs. For example, in *Campaign to Separate Church and State Ltd v Minister for Education*, Mr Justice Barrington observed that 'if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it. But such a child was to have the right not to attend any course of religious instruction at the school'.⁴³ The tension between the two principles outlined above has never been explicitly addressed by either the Courts or the Houses of the Oireachtas.⁴⁴

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- 38 Ombudsman for Children (2013) *Advice of the Ombudsman for Children on the General Scheme of the Education (Admission to Schools) Bill 2013*, at paragraph 3.18 (available at: <http://www.oco.ie/wp-content/uploads/2014/03/AdviceoftheOmbudsmanforChildrenontheGeneralSchemeoftheEducationBill.pdf>).
- 39 See the reference to *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 *Irish Reports*, 321 in Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution*, 4th edn, Dublin: Tottel, at paragraph 7.8.59 (page 2054).
- 40 See, for example, Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution*, 4th edn, Dublin: Tottel, at pages 2070–2071.
- 41 Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution*, 4th edn, Dublin: Tottel, at paragraph 7.8.104 (page 2071).
- 42 *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 *Irish Reports*, 321. In that case, the Supreme Court upheld legislative provisions which permitted religious bodies operating religious, educational or medical institutions to discriminate on religious grounds between different categories of employees or prospective employees for the purpose of maintaining the religious ethos of the institution, stating that: 'It is constitutionally permissible to make distinction or discriminations on grounds of religious profession, belief or status insofar – but only insofar – as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion in the Constitution'.
- 43 *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 *Irish Reports*, 321 at page 356.
- 44 As the Office of the Ombudsman for Children noted in its advice: 'The two broad approaches outlined above cannot be applied generally in an unqualified manner at the same time: children cannot simultaneously have equal access to all publicly funded schools and also be given priority in admission to

45. It is clear, therefore, that in the context of the data on the provision of schools and levels of oversubscription that are outlined above, a balancing of constitutional rights arises in respect of admission to schools. The courts have held that a strong presumption of constitutionality exists where the Oireachtas has legislated on matters of competing and complex social issues⁴⁵ and have also stated that a significant social matter of public policy is clearly an area for the Oireachtas⁴⁶.

2.1.7 View of the Commission

46. The Commission notes

- the pattern of very high levels of denominational school provision and the patterns of over-subscription,
- the recommendations on foot of the State's obligations under human rights law to prohibit discrimination in school admissions,
- the requirements of the EU 'Race' Equality Directive,
- the constitutional provisions and jurisprudence combined with the pattern of provision of schools, and
- the jurisprudence of the Supreme Court on the responsibility of the Oireachtas in deciding on social policy where there is a balance of rights to be decided.

The Commission believes 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 children to an education under reasonable conditions and without discrimination.

47. The Commission also notes that the designation of schools under religious patronage as providers of special classes for a number of specific disabilities could give rise to situations in which a child not of that religion may be required to attend a school not of their faith in order to receive the specialist educational support the child needs. A school that is under religious patronage and that has been provided with additional resources to provide specialist support for students with a disability could, under the Equal Status Act, refuse to admit that student.

48. Further, the Commission notes that the religious exemption in the Equal Status Act is re-stated in the Bill in respect to (a) an appeal against the designation by the National Council for Special Education of a school in the case of a student with special educational

schools of their denomination, especially if most publicly funded schools are denominational'. See: *Advice of the Ombudsman for Children on the General Scheme of the Education (Admissions to Schools) Bill 2013*, at page 18 (available at: <http://www.oco.ie/wp-content/uploads/2014/03/AdviceoftheOmbudsmanforChildrenontheGeneralSchemeoftheEducationBill.pdf>).

45 See, for example, *Fleming v Ireland* [2013] IESC 19, at paragraph 95 (Chief Justice Denham for the Supreme Court) (available at: <http://courts.ie/Judgments.nsf/0/94FF4EFE25BA9B4280257B5C003EEA73>).

46 A point made by Chief Justice Denham in *MR v An tArd Chláraitheoir* [2014] IESC 60, at paragraph 96 (available at: <http://courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/1ef9e77e549c328a80257d8c0050ebbd>).

needs and (b) an appeal against the designation by the Child and Family Agency of a school in the case of other students where the student has not been able to secure a place in a school. The Commission is of the view that as the designation of a school arises only where there are particular vulnerabilities, it is inappropriate for the law to provide the possibility that the fundamental right to access to education could be outweighed by the right of an institution.

- 49. The Commission recommends that the Equal Status Act be amended to give effect to the principle that no child should be given preferential access to a publicly funded school on the basis of their religion.**

2.2 Religious instruction

2.2.1 The content of the Bill

50. The Bill provides that a school's 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.⁴⁷ The Bill also provides that a school's admission policy shall set out the characteristic spirit and general objectives of the school.⁴⁸

2.2.2 Current law and regulation

51. In the context of the Minister for Education's powers to prescribe the curriculum, the Education Act provides 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.⁴⁹ However, the Act does not contain a corresponding obligation on schools or school patrons.⁵⁰

47 This is in the new section 62(6)(h) to be inserted into the Education Act.

48 This is in the new section 62(6)(a) to be inserted into the Education Act.

49 Section 30(2)(e) of the Education Act 1998. (The section provides that in the case of student who has reached the age of 18, it is the conscience of the student rather than of the parent which applies.)

50 A further potential source of confusion about what exactly is required and by whom arises from the progress report of the Department of Education and Skills on the implementation of the recommendations of the Forum on Patronage and Pluralism in Primary Schools. That progress report states 'Under Section 30 of the Education Act 1998, a student cannot be required 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 is 18 or more, the student him/herself.' In fact, section 30 of the Act provides, on this matter, only that *the Minister* shall not require a student to attend instruction in any subject that is contrary to their conscience, and is silent on schools seeking to require students to attend such instruction.

Department of Education and Skills (2014) *Forum on Patronage and Pluralism in the Primary Sector: Progress to Date and Future Directions*, Dublin: Department of Education and Skills, at page 8 (available at: <https://www.education.ie/en/Press-Events/Events/Patronage-and-Pluralism-in-the-Primary-Sector/Progress-to-Date-and-Future-Directions-Forum-on-Patronage-and-Pluralism-in-the-Primary-Sector.pdf>).

52. The Rules for National Schools, in the preface, state: ‘the State provides for free primary education for children in national schools, and gives explicit recognition to the denominational character of these schools’.⁵¹
53. The Primary School Curriculum sets out seven ‘curriculum areas’ (some of which are further subdivided into subjects, such as English, History, etc.). Religious education is one of the seven curriculum areas specified, although the development of the content is the responsibility of ‘the different church authorities’.⁵²
54. One of the three pedagogical principles underpinning the Primary School Curriculum is that it is ‘an integrated curriculum’, a point repeated at a number of different places in the Curriculum.⁵³
55. The Advisory Group to the Forum on Patronage and Pluralism in the Primary Sector recommended in 2012 that ‘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’.⁵⁴
56. Although the Primary School Curriculum envisages that different religions will be accommodated in the religious education curriculum area, the description of that area does not envisage philosophies or beliefs that are not theist: ‘Religious education specifically enables the child to develop spiritual and moral values and to come to a knowledge of God’.⁵⁵ The Primary School Curriculum states that it is the responsibility of the school to provide a religious education that is consonant with its ethos and at the same time to be flexible in making alternative organisational arrangements for those who do not wish to avail of the particular religious education it offers.⁵⁶ However, there does not appear to be any direction or guidance from the Department of Education and Skills on how schools should make alternative arrangements.

51 An Roinn Oideachas (1965) *Rules for National Schools under the Department of Education*. Dublin: Stationery Office, at page 8 (a scanned version, with an updated title page, is available at <https://www.education.ie/en/Schools-Colleges/Information/Rules-and-Programmes-for-Schools/Information.html>).

52 Government of Ireland (1999) *Primary School Curriculum: Introduction*, Dublin: Stationery Office, at page 40 (available at: <http://www.curriculumonline.ie/Primary/Primary-Guidelines>). In addition, Educate Together has developed a curriculum on ethical education for use in its primary schools.

53 Government of Ireland (1999) *Primary School Curriculum: Introduction*, Dublin: Stationery Office, at pages 8, 9, 11, and 16 (available at: <http://www.curriculumonline.ie/Primary/Primary-Guidelines>).

54 John Coolahan, Caroline Hussey and Fionnuala Kilfeather (2012) *The Forum on Patronage and Pluralism in the Primary Sector: Report of the Forum’s Advisory Group*, Dublin: Department of Education and Skills, at page 81 (available at: <http://www.education.ie/en/Press-Events/Events/Patronage-and-Pluralism-in-the-Primary-Sector/The-Forum-on-Patronage-and-Pluralism-in-the-Primary-Sector-Report-of-the-Forums-Advisory-Group.pdf>).

55 Government of Ireland (1999) *Primary School Curriculum: Introduction*, Dublin: Stationery Office, at page 58 (available at: <http://www.curriculumonline.ie/Primary/Primary-Guidelines>).

56 Government of Ireland (1999) *Primary School Curriculum: Introduction*, Dublin: Stationery Office, at page 58 (available at: <http://www.curriculumonline.ie/Primary/Primary-Guidelines>).

57. In January 2016, the Minister for Education and Skills deleted⁵⁷ Rule 68 from the Rules for National Schools, which had provided, among other things, that ‘Of all parts of a school curriculum Religious Instruction is by far the most important’ and ‘a religious spirit should inform and vivify the whole work of the school’⁵⁸.

2.2.3 School practice

58. The question of the conditions of participation after the enrolment of a student who is not of a school’s religion has arisen in the legal case work and in the research work of the former Irish Human Rights Commission and the former Equality Authority.⁵⁹ In one case communicated to the former Equality Authority, the student was required to sit in the corridor outside the religion class as the method for non-participation in religious instruction. The school settled the case following correspondence from the former Equality Authority and arranged for the student to be supervised by other teachers in their classrooms.⁶⁰ In another case, the school required a student to leave the school premises when religion classes were being conducted, and this case too was settled following correspondence with the former Equality Authority.⁶¹

59. In addition, unpublished research commissioned by the former Equality Authority in 2006 examined a sample of admission policies for second-level schools. A small number of schools had admission policies that required attendance at religion classes unless the Department of Education, parents or others provided resources for the student to be supervised. One school in the sample stated in its admission policy that daily attendance at religious services was compulsory for all students.⁶²

60. A study that included a survey of all school principals at second level and 1,200 principals at primary level is reported by the researchers to have found that ‘minority/no faith children commonly remain in the classroom during religion class, even if they are not participating in the lesson’.⁶³

57 Department of Education and Skills (2016) *Rescinding of Rule 68 of the Rules for National Schools*, Circular Letter 0009/2016 (available at: <http://www.education.ie/en/The-Department/Announcements/New-Circular-Rescinding-of-Rule-68-of-the-Rules-for-National-Schools.html>).

58 An Roinn Oideachas (1965) *Rules for National Schools under the Department of Education*, Dublin: Stationery Office, at page 38 (a scanned version, with an updated title page, is available at <https://www.education.ie/en/Schools-Colleges/Information/Rules-and-Programmes-for-Schools/Information.html>; Rule 68 is contained in Chapter IX)

59 See: Irish Human Rights Commission (2011) *Religion and Education: A Human Rights Perspective*, at pages 83–85 (available at: <http://www.ihrec.ie/publications/list/religion-and-education-a-human-rights-perspective>).

60 Equality Authority (2008) *Equality Authority Annual Report 2007*, at page 41.

61 Equality Authority (2006) *Equality Authority Annual Report 2005*, at page 43.

62 Anne Lodge and Maria Feeney (2008) *Equality Assessment of Admission Policies in Second-level Schools* (unpublished manuscript).

63 Emer Smyth et al. (2013) ‘Children’s agency and religious identity in Irish primary schools’, chapter 5 in: Emer Smyth, Maureen Lyons and Merike Darmody (eds.) *Religious Education in Multicultural Europe: Children, Parents and Schools*, Basingstoke: Palgrave Macmillan, at page 103, citing: Emer Smyth et al.

2.2.4 International human rights standards

61. In 2008, the UN Human Rights Committee examined Ireland under the International Covenant on Civil and Political Rights. In its concluding observations, the committee stated: 'The Committee notes with concern that the vast majority of Ireland's primary schools are privately run denominational schools that have adopted a religious integrated curriculum, thus depriving many parents and children who so wish to have access to secular primary education'⁶⁴. The Committee examined the State again in 2014, and stated that it is 'concerned about the slow progress in [...] the phasing out of integrated religious curricula in schools accommodating minority faith or non-faith children' and said that the State should ensure that there are diverse curriculum options available throughout the State to meet the needs of minority faith or non-faith children.⁶⁵

2.2.5 European Convention on Human Rights

62. Two provisions of the European Convention on Human Rights are of particular relevance to the question of schools and religion in respect of matters beyond the admission of a student.

Article 2 of Protocol 1 to the Convention provides:

Article 2 – Right to education

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 religious and philosophical convictions.

Article 9 of the Convention provides:

Article 9 – Freedom of thought, conscience and religion

- 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

(2009) *Adapting to Diversity: Irish Schools and Newcomer Students*, Dublin: Economic and Social Research Institute (available at: <https://www.esri.ie/publications/adapting-to-diversity-irish-schools-and-newcomer-students/>). The questionnaire issued to school principals asked 'What arrangements are in place for these students during religious education (RE) classes?' and offered five options for answer: students are withdrawn; students stay in the RE class but do not participate; students stay in the RE class but participate; religion is not taught at the school; and 'other' (with space for the principal to state that that means) (see page 200 of Smyth et al. (2009)). Although the authors in 2013 report that remaining in the classroom is common, details of the statistical data gathered in response to that question does not appear to have been published.

- 64 Human Rights Committee (2008) *Concluding observations of the Human Rights Committee: Ireland*, CCPR/C/IRL/CO/3, at paragraph 26 (available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f3&Lang=en).
- 65 Human Rights Committee (2014) *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/CO/4 (available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en).

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 for the protection of the rights and freedoms of others.

Article 14 of the Convention prohibits discrimination, including on the basis of religion, in the enjoyment of the rights set out in it and is also relevant.⁶⁶

63. The European Court of Human Rights has also held that states have a 'margin of appreciation', that is space for manoeuvre that the Court is willing to grant national authorities in fulfilling their obligations under the Convention.⁶⁷
64. The application of the three articles referred to above has encompassed a range of specific issues in schools, including, for example:
 - the teaching of religion⁶⁸,
 - wearing religious dress in school⁶⁹,
 - the presence of religious symbols in classrooms⁷⁰,
 - sex education⁷¹, and
 - participation in militaristic parades⁷².
65. In applying these provisions of the Convention and of Protocol 1 in the *Kjeldsen* case, the European Court of Human Rights has stated that 'the second sentence of Article 2

66 The text of article 14 is: '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.'

67 The concept of a margin of appreciation is a general principle that the Court applies in cases under a number of articles, and it is not a doctrine that is applied only to cases under Article 9 on religion, Article 2 of Protocol 1 on education, or Article 14 on discrimination. For a discussion of the concept and how it has been applied, see: Steven Greer (2000) *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*. Human Rights Files No. 17, Strasbourg: Council of Europe Publishing (available at: [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf)).

68 *Hasan and Eylem Zengin v Turkey* (App. 1448/04) (available at: <http://hudoc.echr.coe.int/eng?i=001-82580>); *Folgerø and Others v Norway* (App. 15472/02) (available at: <http://hudoc.echr.coe.int/eng?i=001-81356>).

69 *Dogru v France* (App. 27058/05) (available at: <http://hudoc.echr.coe.int/eng?i=001-90039>), *Kervanci v France* (App. 31645/04) (available in French at: <http://hudoc.echr.coe.int/eng?i=001-90047>); *Köse and 93 others v Turkey* (App. 26625/02) (English translation of the operational part of the judgment available at: <http://hudoc.echr.coe.int/eng?i=001-90405>); *Aktas v France* (App. 43563/08) (decision on admissibility available in French at: <http://hudoc.echr.coe.int/eng?i=001-93697>; English language press summary on the decision available at: <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237>).

70 *Lautsi and Others v Italy* (App. 30814/06) (available at: <http://hudoc.echr.coe.int/eng?i=001-104040>)

71 *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Apps. 5095/71; 5920/72; 5926/72) (available at: <http://hudoc.echr.coe.int/eng?i=001-57509>).

72 *Valsamis v Greece* (App. 21787/93) (available at: <http://hudoc.echr.coe.int/eng?i=001-58011>).

(P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the “democratic society” as conceived by the Convention⁷³.

66. The Court went on to say:

‘It is in the discharge of a natural duty towards their children – parents being primarily responsible for the “education and teaching” of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.’⁷⁴

67. In relation to the scope of application, the Court in the *Zengin* case stated that ‘the right of parents to respect for their religious and philosophical convictions is grafted on to [the right set out in Article 2 of Protocol 1], and the first sentence does not distinguish, any more than the second, between the State and private teaching’⁷⁵.

68. The Court went on to state:

‘Article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme’.⁷⁶

69. It also stated that ‘the Court considers that, in a democratic society, only pluralism in education can enable pupils to develop a critical mind with regard to religious matters in the context of freedom of thought, conscience and religion’.⁷⁷

70. In its judgement in the *Valsamis* case, the Court stated that it

‘reiterates that Article 2 of Protocol No. 1 (P1-2) enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the “functions” assumed by the State. The verb “respect” means more than “acknowledge” or “take into account”. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State.

‘The Court has also held that “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a

73 *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Apps. 5095/71; 5920/72; 5926/72) at paragraph 50 (available at: <http://hudoc.echr.coe.int/eng?i=001-57509>).

74 *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Apps. 5095/71; 5920/72; 5926/72) at paragraph 52 (available at: <http://hudoc.echr.coe.int/eng?i=001-57509>).

75 *Hasan and Eylem Zengin v Turkey* (App. 1448/04), at paragraph 48 (available at: <http://hudoc.echr.coe.int/eng?i=001-82580>).

76 *Hasan and Eylem Zengin v Turkey* (App. 1448/04), at paragraph 49 (available at: <http://hudoc.echr.coe.int/eng?i=001-82580>).

77 *Hasan and Eylem Zengin v Turkey* (App. 1448/04), at paragraph 69 (available at: <http://hudoc.echr.coe.int/eng?i=001-82580>).

majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”⁷⁸

71. In the *Kjeldsen* case, the Court also found that ‘the second sentence of Article 2 of the Protocol (P1-2) does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.’⁷⁹ However, the State ‘must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner’⁸⁰.
72. In the *Folgerø* case, the Court had occasion to examine the question of the teaching of religion.⁸¹ The case concerned the refusal of the Norwegian authorities to grant the children in three families full exemption from a compulsory subject in Christianity, religion and philosophy taught during the ten-year compulsory schooling in Norway. The families were members of the Norwegian Humanist Association, and the children were primary school pupils at the time of the events raised in the case. The Court noted that the curriculum in question placed stronger emphasis on Christianity – the aim was to give pupils a ‘thorough insight into Christianity and what the Christian view of life implies’ in contrast to ‘sound knowledge of other world religions and philosophies’⁸². The Court found that the system of obtaining an exemption from participating in the religion classes was a heavy burden and likely to deter them from making such requests, and not ‘consonant with the parents’ right to respect for their convictions for the purposes of Article 2 of Protocol 1, as interpreted in the light of Articles 8 and 9 of the Convention’.⁸³
73. Similarly, in the *Zengin* case, against Turkey, the Court noted that the State’s religion syllabus gave more priority to the teaching of Islam than of other religions and philosophies, but stated that the Court’s view was that ‘this itself cannot be viewed as a departure from the principles of pluralism and objectivity which would amount to indoctrination’.⁸⁴ The court found that the instruction in the school subject ‘religious

78 *Valsamis v Greece* (Appl. 21787/93), at paragraph 27 (available at: <http://hudoc.echr.coe.int/eng?i=001-58011>) [References in the original text of the judgement have not been included in the quotation.]

79 *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Apps. 5095/71; 5920/72; 5926/72) at paragraph 53 (available at: <http://hudoc.echr.coe.int/eng?i=001-57509>).

80 *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Apps. 5095/71; 5920/72; 5926/72) at paragraph 53 (available at: <http://hudoc.echr.coe.int/eng?i=001-57509>).

81 *Folgerø and Others v Norway* (App. 15472/02) (available at: <http://hudoc.echr.coe.int/eng?i=001-81356>).

82 *Folgerø and Others v Norway* (App. 15472/02), at paragraph 92 (available at: <http://hudoc.echr.coe.int/eng?i=001-81356>).

83 *Folgerø and Others v Norway* (App. 15472/02), at paragraph 100 (available at: <http://hudoc.echr.coe.int/eng?i=001-81356>). Article 8, referred to in the quoted material, protects the right to respect for private and family life.

84 *Hasan and Eylem Zengin v Turkey* (App. 1448/04), at paragraph 63 (available at: <http://hudoc.echr.coe.int/eng?i=001-82580>).

culture and ethics' could not be considered to meet the criteria of objectivity and pluralism or be considered to respect the religious and philosophical conventions of Mr Zengin, a follower of the Alevi faith, on the subject of which the syllabus was found to be clearly lacking.⁸⁵

74. The *Kjeldsen* case concerned compulsory sex education and its integration with the teaching of other subjects. The parents in the case objected to this on the basis that they felt this infringed their right to ensure education in accordance with their religious beliefs. However, the Court found the legislation providing for the compulsory sex education did not breach Article 2 of Protocol 1 of the Convention.
75. The Court has considered a number of cases concerning religious dress of students in school, for both Muslim women and Sikh men.⁸⁶
76. In the *Dogru*⁸⁷ and *Kervanci*⁸⁸ cases, the applicants were Muslims in a state secondary school who had worn headscarves to physical education classes and had refused to take them off. After a number of repetitions, they were expelled from the school, and this decision was upheld by the French courts. In reaching its conclusion, the European Court of Human Rights afforded particular significance to the fact in France (as in Turkey and Switzerland), secularism is a constitutional principle. The Court invoked the doctrine of the margin of appreciation and held that, taking it into account, there had been no breach of Article 9 of the Convention.
77. A number of cases against France that were dealt with by the Court the following year concerned school students who wished to wear Muslim headscarves or Sikh under-turbans.⁸⁹ The students were denied access to the schools after refusing to remove their headwear. The European Court declared the applications inadmissible because the

85 *Hasan and Eylem Zengin v Turkey* (App. 1448/04), at paragraph 70 (available at: <http://hudoc.echr.coe.int/eng?i=001-82580>).

86 Some of these have been grouped by the Court in the information it has provided, as follows:

- *Köse and Others v Turkey* (App. 26625/02) (Information note on the decision on admissibility available at: <http://hudoc.echr.coe.int/eng?i=002-3516>);
- *Aktas v France* (App. 43563/08), *Bayrak v France* (App. 14308/08), *Gamaleddyn v France* (App. 18527/08), *Ghazal v France* (App. 29134/08), *J Singh v France* (App. 25463/08) *R Singh v France* (App. 27561/08) (Single press release for the six decisions on admissibility issued by the Registrar available at: <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237>);
- *Dogru v France* (App. 27058/05) (judgment available at: <http://hudoc.echr.coe.int/eng?i=001-90039>);
- *Kervanci v France* (App. 31645/04) (English information note summarising the judgment available at: <http://hudoc.echr.coe.int/eng-press?i=002-1794>; judgment in French only available at: <http://hudoc.echr.coe.int/eng?i=001-90047>).

87 *Dogru v France* (App. 27058/05) (judgment available at: <http://hudoc.echr.coe.int/eng?i=001-90039>).

88 *Kervanci v France* (App. 31645/04) (English information note summarising the judgment available at: <http://hudoc.echr.coe.int/eng-press?i=002-1794>; judgment in French only available at: <http://hudoc.echr.coe.int/eng?i=001-90047>).

89 *Aktas v France* (App. 43563/08), *Bayrak v France* (App. 14308/08), *Gamaleddyn v France* (App. 18527/08), *Ghazal v France* (App. 29134/08), *J Singh v France* (App. 25463/08) *R Singh v France* (App. 27561/08) (Single press release for the six decisions on admissibility issued by the Registrar available at: <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237>).

interference with the students' freedom to manifest their religion was prescribed by law and pursued a legitimate aim of protecting the rights and freedoms of others and of public order. The Court decided to deal with these complaints only under Article 9 (on the right to freedom of religion) and decided not to deal with them under Article 2 of Protocol 1 (on the right to education). As in *Dogru and Kervanci*, the Court invoked the doctrine of the margin of appreciation afforded to the State in reaching its decisions.

78. The European Court has also considered a case concerning the display of a crucifix in classrooms in an Italian state school. In *Lautsi and Others v Italy*⁹⁰, Ms Lautsi and her two sons raised concerns with the presence in the boys' classrooms of crucifixes, which they felt were contrary to the principle of secularism by which Ms Lautsi wished to raise her children. The school decided to retain the crucifixes and Ms Lautsi unsuccessfully pursued the matter in the Italian courts. The Grand Chamber of the European Court of Justice ruled that the Italian authorities 'acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'⁹¹.

2.2.6 Constitution of Ireland

79. Article 44.2.4° of the Constitution provides that legislation providing State aid for schools shall 'not be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school'.
80. In *Campaign to Separate Church and State Ltd v Minister for Education*, Mr Justice Barrington observed that 'if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it. But such a child was to have the right not to attend any course of religious instruction at the school'.⁹²

2.2.7 View of the Commission

81. The Commission considers that, in line with the jurisprudence of the European Court of Human Rights, the statement of the characteristic spirit and general objectives of the school should stipulate that information relating to religion will be conveyed in an objective, critical and pluralistic manner.
82. The Commission considers that the Bill may be a useful opportunity to set down minimum standards in relation to the school's policy on arrangements for exemptions for students who do not wish to attend religion, in the spirit of pluralism and

90 *Lautsi and Others v Italy* (App. 30814/06) (available at: <http://hudoc.echr.coe.int/eng?i=001-104040>).

91 *Lautsi and Others v Italy* (App. 30814/06), Grand Chamber, at paragraph 76 (available at: <http://hudoc.echr.coe.int/eng?i=001-104040>).

92 *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 *Irish Reports*, 321 at page 356.

interculturalism and in a way that is not overly onerous on the student or his or her parents, with a requirement that alternative classes are provided during religion class.

83. **The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that, in setting out the characteristic spirit and general objectives of the school, outside the specific context of faith formation and religious instruction which parents wish to avail of and where exemptions apply, regard shall be had to providing information in relation to religion in an objective, critical and pluralistic manner that avoids indoctrination, in accordance with the jurisprudence of the European Court of Human Rights.**
84. **The Commission recommends that the Bill set down minimum standards in relation to the nature of exemptions for students who do not want to attend religious instruction or provide that the Minister for Education and Skills may regulate how schools shall provide for such students.**
85. **The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that in setting out the characteristic spirit and general objectives of the school, the school shall ensure that the values of an inclusive school that respects and accommodates diversity across all nine grounds in the equality legislation are respected.**

3 Previous connection to the school

86. The Commission notes that the Bill does not contain provisions that were in the Education (Admission to Schools) Bill 2015 to enable the Minister for Education and Skills to regulate the use in an admission policy of a connection with a school by virtue of the prospective student's relationship with specified categories of person.⁹³ The Commission also notes that the Minister for Education and Skills has stated he intends to introduce amendments to the current Bill at committee stage to deal with this question. On the advice of the Attorney General, this will be addressed in the substantive primary legislation rather than by regulation.⁹⁴
87. The Commission notes that the EU 'Race' Directive⁹⁵ is binding law within the State, and that the Equal Status Act in part transposes that Directive into Irish law.⁹⁶ The Directive

93 Section 7 of the Education (Admission to Schools) Bill 2015, which would have inserted this provision into the Education Act 1998 and two related provisions to allow the Minister to grant derogations and the period and conditions relating to any such derogation.

94 See:

- Minister for Education and Skills, Richard Bruton TD, 'Questions on Proposed Legislation', *Parliamentary Debates: Dáil Éireann*, 7 July 2016, p. 11.
- Minister for Education and Skills, Richard Bruton TD, 'Written Answers: Proposed Legislation' (question no. 81), *Parliamentary Debates: Dáil Éireann*, 14 July 2016, pp. 129–130.

95 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Communities*, L 180, 19 July 2000, pages 22–26 (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>).

prohibits discrimination on the grounds of racial or ethnic origin, including specifically in education.⁹⁷

88. The Commission notes that the issue has been the subject of an important case in which it was claimed that the practice of giving preference in admission to the children of former pupils is discriminatory. That case – *Stokes* – was dealt with in the first instance by the former Equality Tribunal under the Equal Status Acts and was appealed, ultimately as far as the Supreme Court.⁹⁸ The former Equality Authority acted as *amicus curiae* to the Supreme Court in those proceedings.⁹⁹
89. The core of the issue is that a number of groups that are protected from discrimination under one or more of the nine grounds in the Equal Status Acts do not or cannot have previous connections with a school, in particular connections by virtue of a parent having been a student at the school. The claim in *Stokes* was that this gives rise to indirect discrimination: ‘where an apparently neutral provision puts a person [...] at a particular disadvantage compared with other persons’¹⁰⁰. In his decision in the *Stokes* case, the Director of the Equality Tribunal (who investigated the complaint himself) summarised the case on behalf of Mr Stokes as follows:

‘As a member of the Traveller community, his father (and the rest of his extended family) is statistically much less likely to have attended second level education than the settled population. This criterion of having a family member who attended the school therefore disproportionately affects members of the Traveller community and amounts to indirect discrimination.’¹⁰¹

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- 96 The Equal Status Act 2000 was amended by the Equality Act 2004 to transpose into Irish law a number of provisions in the ‘Race’ Directive that had not been part of the Irish legislation when it was originally enacted. The Employment Equality Act 1998, particularly as amended by the Equality Act 2000, transposes provisions of the ‘Race’ Directive that apply in employment.
- 97 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 3(g), *Official Journal of the European Communities*, L 180, 19 July 2000, pages 22–26 (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>).
- 98 *Mary Stokes (on behalf of John Stokes a minor) v Christian Brothers High School Clonmel* [2015] IESC 13 (available at: <http://courts.ie/Judgments.nsf/0/1C5FCE1D9E7D731280257DF60058D13C>).
- 99 Equality Authority (2012) *Christian Brothers High School Clonmel and Mary Stokes (on Behalf of John Stokes a minor): Legal Submissions on the Behalf of the Equality Authority* [amicus submission to the High Court] (available at: https://www.ihrec.ie/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_ors__13_dec_2012_.pdf).
- 100 Section 3(1)(c) of the Equal Status Acts (as amended). See also Article 2(2)(b) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Official Journal of the European Communities*, L 180, 19 July 2000, pages 22–26, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>). The original provision on indirect discrimination in the Equal Status Act 2000 was amended by the Equality Act 2004 in light of this EU directive.
- 101 *Mary Stokes (on behalf of her son John Stokes) v Christian Brothers’ High School, Clonmel and The Department of Education and Skills*, DEC-S2010-056, in section 4 of the decision (available at: <https://www.workplacelrelations.ie/en/Cases/2010/December/DEC-S2010-056-Full-case-report.html>).

90. The Supreme Court held that on the facts of the case there was insufficient evidence to suggest that a Traveller child had experienced a ‘particular disadvantage’ in accessing the school on the basis of his membership of the Traveller community. It also held that analysing the effect of a provision that is claimed to give rise to indirect discrimination ‘necessarily carries with it some degree of statistical analysis’¹⁰². However, the EU ‘Race’ Directive does not *require* statistical analysis, although statistical analysis *may* be drawn upon where that is appropriate. In particular, the preamble of EU ‘Race’ Directive states, at Recital (15), that rules for inferring indirect discrimination ‘may provide in particular for indirect discrimination to be established by any means *including* on the basis of statistical evidence’ [emphasis added].¹⁰³
91. Furthermore, the Supreme Court held that the burden of proof lay with Mr Stokes.¹⁰⁴ However, the EU ‘Race’ Directive provides that when a person who considers that they have experienced discrimination establishes a *prima facie* case, then the burden of proof shifts to the respondents.¹⁰⁵
92. The Commission notes that the Supreme Court did not examine the issues before it in the context of the EU ‘Race’ Directive¹⁰⁶ or in the context of the interpretation of ‘indirect discrimination’ by the Court of Justice of the European Union, whether in cases under the EU ‘Race’ Directive or under other directives that contain identical or near-identical definitions of indirect discrimination¹⁰⁷. It therefore considers that the

102 Mr Justice Clarke in *Mary Stokes (on behalf of John Stokes a minor) v Christian Brothers High School Clonmel* [2015] IESC 13, at paragraph 8.6 (available at: <http://courts.ie/Judgments.nsf/0/1C5FCE1D9E7D731280257DF60058D13C>).

103 The European Court of Human Rights has also established that statistical evidence is not essential in order for indirect discrimination to be established – see *DH and Others v the Czech Republic* (App. 57325/00): ‘This does not, however, mean that indirect discrimination cannot be proved without statistical evidence’, at paragraph 188 (available at: <http://hudoc.echr.coe.int/eng?i=001-83256>).

104 Mr Justice Clarke in *Mary Stokes (on behalf of John Stokes a minor) v Christian Brothers High School Clonmel* [2015] IESC 13, at paragraphs 10.10 and 12.9 (available at: <http://courts.ie/Judgments.nsf/0/1C5FCE1D9E7D731280257DF60058D13C>).

105 Specifically, the wording of Article 8(1) of the EU ‘Race’ Directive provides: ‘when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’

106 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Communities*, L 180, 19 July 2000, pages 22–26 (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>).

107 For example:

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in Article 2(2)(b) (*Official Journal of the European Communities*, L 303, 2 December 2000, pages 16–22; available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0078>);
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, in Article 2 (*Official*

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.

93. The Commission further notes that given the historical absence from schools of Travellers, the application of a rule by some schools that gives preference in admission to the children of parents inevitably will result in the segregation of Travellers into other schools. In addition, the children of immigrants will also be ‘segregated out’ of schools that apply such a rule. Finally, the children of people with a disability will also experience exclusion from such schools given the historical practice of the segregation of children with disabilities and their exclusion from school.¹⁰⁸
94. **The Commission recommends that the forthcoming amendment should prohibit the use of a connection with a former student of the school as a criterion in the admission of a student.**

4 Application of principle of the best interest of the child

95. The Bill integrates the best interests of the child standard at different points, in particular in the context of the designation by the National Council for Special Education (NCSE) or the Child and Family Agency (the Agency) of a school for an individual child.¹⁰⁹ Article 3(1) of the UN Convention on the Rights of the Child (UNCRC) provides that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. In addition, Article 12(1) of the UNCRC provides:

Journal of the European Union, L 373, 21 December 2004, pages 37–43; available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32004L0113>); and

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), in Article 2(1)(b) (*Official Journal of the European Union*, L 204, 26 July 2006, pages 23–36; available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476369228124&uri=CELEX:32006L0054>).

108 Anne Lodge and Kathleen Lynch (editors) (2004) *Diversity at School*. Dublin: Institute of Public Administration, at page 79 (available at: https://www.ihrec.ie/download/pdf/diversity_at_school.pdf).

109 The new section 66(2) to be inserted into the Education Act includes, among others, the following as two of the criteria that shall apply to the making of a designation by the NCSE:

- (c) where appropriate, and in accordance with the age and maturity of the child concerned, the wishes of the child,
- (d) the school that, in the Council’s view, it would be in the best interests of the child concerned to attend [...].

The new section 66(4) includes, among others, the following as two of the criteria that shall apply to the making of a designation by the Agency:

- (b) where appropriate, and in accordance with the age and maturity of the child concerned, the wishes of the child, [...]
- (d) the school that, in the Agency’s view, it would be in the best interests of the child to attend.

‘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, the views of the child being given due weight in accordance with the age and maturity of the child’.


96. The Commission welcomes the inclusion of this standard in the context of the designation of a school for children with special educational needs and for other children where a school placement is not forthcoming. However, the Commission considers that in line with the UNCRC the relevant provisions could be enhanced by providing that the best interest of the child is the *primary* concern that the NCSE or Agency is to use in making its decisions on designation (including a decision not to make any designation).¹¹⁰
97. The new section 66 provides for appeals by a school against a designation by the NCSE or Agency, and for appeals by a parent where the NCSE or Agency has not made a designation that the parents requested.¹¹¹ The Bill does not provide that an appeal may be made by a parent where a school has been designated but the parent is of the view that the designation is not in the best interest of the child or that the wishes of the child were not considered where this would have been appropriate.¹¹² Furthermore, the Bill does not set out any criteria that the appeals committee is to apply in deciding on an appeal by a parent. In light of the fact that the appeals committee will be a quasi-judicial or administrative body making decisions regarding children, the Bill should ensure that the human rights standards set out in the UN Convention on the Rights of the Child should be applied in its decision making. Of particular concern is that section 67 does not oblige the appeals committee itself in deciding an appeal to take account of the wishes of the child or to take account of the best interest of the child in considering an appeal.
98. **The Commission recommends that the wording of the new sections 66(2) and 66(4) that are to be inserted into the Education Act be amended to ensure that the best interest of the child is the *primary* standard to which the National Council for Special Education or Child and Family Agency, as the case may be, shall have regard in both making a designation and making a decision not to designate a school.**
99. **The Commission recommends that the new Section 66 be amended to permit a parent to make an appeal when a school has been designated by the Child and Family Agency or NCSE when the parent believes that the designation is not in the best interest of the child or that the Agency or NCSE failed to take account of the wishes of the child.**

110 Article 42A of the Constitution provides as follows: ‘The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable by its laws protect and vindicate those rights.’ This Article provides a robust foundation on which legislative measures can prioritise the best interests of the child.

111 The new section 66(5)–(19).


112 Section 66(8) sets out that a parent may make an appeal when the Agency or NCSE fails or refuses to designate a school, and section 88(9) provides only that the appeals committee may either require the Agency or NCSE to designate a school or dismiss the appeal.

100. The Commission recommends that the Bill be amended to provide that Appeals Committees provided for in the new section 66 be required to apply the best interest of the child as the *primary* consideration in assessing an appeal, and that they be required to take account of the wishes of the child.



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