

**Submission to the Department of  
Education and Skills on its  
discussion paper on a regulatory  
framework for school enrolment**

October 2011

## Introduction

1. The Irish Human Rights Commission (IHRC) has a statutory remit under the Human Rights Commission Act 2000 to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State. Its functions include keeping under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights, and making such recommendations to Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and uphold human rights in the State.

2. In the present instance, the IHRC is making a submission to Government on the measures the it considers should be taken to strengthen, protect and uphold human rights in the State and in particular, to ensure that all children have access to a school in their area which respects their rights, in line with the State's obligations under the Constitution, the European Convention on Human Rights (ECHR) and other international human rights standards.

3. The Observations in this paper are informed by the current reality of the education system in Ireland and the challenges facing it in terms of inclusivity. In this regard it is noted that almost 97% of primary schools are under denominational control, with a significant majority of secondary schools also under denominational patronage.<sup>1</sup> This impacts on the admission policies of those schools, and raises concerns about whether the needs of minority faith and non - faith children are being properly met.<sup>2</sup> Later in this paper we will refer to the "intersectionality" between religion and race, and again would question whether "newcomer" communities to the State are being properly catered for in terms of school admission policies. Travellers and children with disabilities are also vulnerable to exclusion in the education system and the present regulatory system does not appear to adequately address their particular circumstances.

4. For the above reasons, the IHRC wishes to welcome the Minister for Education and Skills' commitment to ensuring equality of educational opportunity "*through inclusive, transparent and fair enrolment policies and practices in our schools.*"<sup>3</sup> In May 2011, the IHRC published its report entitled "Religion & Education: A Human Rights Perspective", (hereafter "IHRC Report") in which it highlighted the human rights concerns that have arisen as a result of the lack of diversity of school type in the Irish educational system. While the IHRC Report did not address the issue of admissions in detail, it did observe that in the context of religion and patronage, a school's ethos may have implications for a school's enrolment admissions policy particularly in relation to students of a minority religion or from a non-faith background.<sup>4</sup> The IHRC welcomes this opportunity to consider the human rights standards applicable to the current school enrolment process.

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<sup>1</sup> See IHRC Report *Religion & Education: A Human Rights Perspective* May 2011 at p. 41. 97% of schools are under the patronage and management of a religious denomination of which 89% are Catholic.

<sup>2</sup> *Ibid.*

<sup>3</sup> Department of Education and Skills, "*Discussion Paper on a Regulatory Framework for School Enrolment*" June 2011 at p.3.

<sup>4</sup> IHRC Report *Religion & Education: A Human Rights Perspective* May 2011 at p.18. Available at <http://www.ihr.ie/enquiriesandlegal/religionandeduc.html>

## 1. Law and Practice in the State Regarding School Enrolment

### i. The Constitution

5. Education is dealt with in Articles 42 and 44 of the Constitution. In its Report, the IHRC made a number of observations in relation to the right to education under the Constitution which may be summarised as follows: Every child in the State has a right to free publicly funded education.<sup>5</sup> Under the Constitution, the State is not obliged to provide education, but it must make arrangements for the provision of same.<sup>6</sup> The State must respect parental choice, but it does not have to meet that choice in every aspect, and is entitled to adopt an educational scheme or policy that is rational and reasonable.

6. At a minimum therefore school admission policies cannot be such as to effectively deny a child his or her right to education as to do so would be a breach of that child's constitutional rights.

### ii. Education Act 1998

7. Individual school admission policies are governed by the Education Act 1998 ("the 1998 Act"). Section 6 of the 1998 Act outlines the objectives of the Act, namely to promote equality of access and participation in education, to promote parental choice in education, and to enhance transparency in the making of decisions. Admission practices are addressed specifically in sections 9 and 15 of the 1998 Act. Section 9(m) provides that a school shall:

*Establish and maintain an admission policy which provides for maximum accessibility to the School.*

Section 15(2) (d) obliges the Board of Management to publish:

*the policy of the school concerning admission to and participation in the school, [...] by students with disabilities or who have other special educational needs, and ensure that as regards that policy principles of equality and the right of parents to send their children to a school of the parents' choice are respected.<sup>7</sup>*

Section 15(2)(b) also provides that the Board of Management is accountable to the patron of the school for upholding the "*characteristic spirit*" of the school. These sections are largely non-prescriptive in relation to the actual content of admissions policies and allow schools significant flexibility in this regard.

8. Under section 14 of the Education Act 1998 the Board of Management is charged with the day-to-day running of the school. It is also the body which primarily deals with parental

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<sup>5</sup>Article 42.4 of the Constitution provides that: "The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

<sup>6</sup> *Crowley v. Ireland* [1980] I.R. 102.

<sup>7</sup> Section 33 of the Act provides that the Minister may make regulations relating to all or any of matters set out in the Act including at 33(g) "admission of students to schools". To date, this power has not been exercised in respect of enrolment.

complaints and grievances. If parents are unhappy with the outcome of the grievance procedures at a local level, including in relation to the refusal to enrol their child, they have a right of appeal to the Secretary General of the Department of Education under section 29 of the 1998 Act.<sup>8</sup> The section 29 appeals process will be discussed further below.

### **iii. Education (Welfare) Act 2000**

9. As outlined in the Discussion Paper, section 19 of the Education (Welfare) Act 2000 provides that the Board of Management shall not refuse to admit a student, except where such refusal is in accordance with the admission policy of the school concerned. This section also provides that the parent of a child applying for admission shall provide the school with such information as may be prescribed by the Minister and that, as soon as practicable, but not later than 21 days after a parent has provided such information, the Board of Management of the school concerned shall make a decision in respect of the application and inform the parent in writing of that decision.

10. The Discussion Paper further states that section 26 (1) of the Education (Welfare) Act 2000 provides the National Educational Welfare Board (“NEWB”) with the right to appeal a decision of a Board of Management pursuant to section 29 of the Education Act.<sup>9</sup> Furthermore, section 27 imposes a duty on NEWB where a child is refused admission or permanently excluded to make all reasonable efforts to have the child enrolled in another school or to make such other arrangements as it considers appropriate to ensure that a child receives a certain minimum education.<sup>10</sup>

### **iv. Education for Persons with Special Educational Needs Act, 2004**

11. As referred to in the Discussion Paper, section 10 of the Education for Persons with Special Educational Needs Act 2004 provides that the National Council for Special Educational Needs (NCSE) may, either of its own volition or at the request of a parent, designate the school which a child with special educational needs will attend. However, as section 10 has not been commenced as yet it does not form part of the current regulatory framework relating to school admissions.<sup>11</sup>

### **v. Equal Status Acts 2000-2008**

12. The Equal Status Acts 2000-2008 (“Equal Status Acts”) prohibit discrimination on nine distinct grounds namely gender, marital status, family status, age, disability, race, sexual orientation, religious belief and membership of the Traveller community. Section 3(1) of the Equal Status Acts defines discrimination as both direct and indirect discrimination.<sup>12</sup>

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<sup>8</sup> Discussion Paper at p.13. Sections 16 or 17 gives the Minister or the Patron the power to remove a Board of Management where there is a concern about how a Board has discharged its functions in relation to school admission.

<sup>9</sup> Discussion Paper at p.12. The right of appeal does not require the NEWB to consult or obtain the approval of the parent or pupil.

<sup>10</sup> Discussion Paper at p.12.

<sup>11</sup> Discussion Paper at p.13.

<sup>12</sup> Section 3 provides that: (a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the “discriminatory grounds”) which —(i) exists, (ii) existed but no longer exists, (iii) may exist

Under the Act, although there is a general prohibition on discrimination in the provision of education, certain exceptions apply in relation to gender and religion. Therefore where a school has a denominational ethos it may give preference to admission of students of a particular religious denomination in preference to others. In addition, the Acts allow a school to refuse admission to a student not of the same denomination promoted by the school, but only insofar as this is “essential” to maintain the ethos of the school.

In addition it may be noted that in relation to a refusal of enrolment there may be two possible remedies open to a parent: an appeal under section 29 and/or a complaint under the Equal Status Acts.

#### vi. European Convention on Human Rights Act 2003

13. Section 3(1) of the European Convention on Human Rights Act 2003 (“ECHRA”) provides that:

*Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*

It is certainly arguable, although not as yet determined, that schools governed by the Education Act 1998 are “organs of the State” for the purpose of the ECHRA insofar as they may be considered to be a body through which the “legislative, and executive” powers of the State are exercised. If schools are an organ of the State then they have a direct and enforceable statutory duty under section 3(1) ECHRA, and an individual parent might conceivably be able to bring proceedings against a school whose admission policy was not in compliance with the rights protected under the ECHR.

14. In any event, as outlined above, school admission policies are the subject of legislative regulation, pursuant to sections 9 and 15 of the Education Act 1998, which brings the formulation and application of such policies within the control of the State. This is distinct from those aspects of the internal administration of schools where State control is specifically excluded.<sup>13</sup> **Therefore, insofar as the State has sought to legislate for and regulate school admission policies, the State is obliged to keep within the boundaries of its obligations both under the Constitution and the ECHR.**

15. While the Constitution is largely silent in relation to State regulation of schools, subject to each child receiving a minimum education, the rights protected under the ECHR may place more specific obligations on the State. This can be discerned from the case law of the

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in the future, or (iv) is imputed to the person concerned, (b) where a person who is associated with another person—(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and (ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a) constitute discrimination, or (c) where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

<sup>13</sup> See *Crowley v. Ireland* [1980] I.R. 102.

European Court of Human Rights (“ECtHR”) discussed further below.<sup>14</sup> **In this regard certain concerns arise in relation to the current practice whereby schools and boards of management have very significant discretion in the manner in which their enrolment policies and selection criteria are formulated.**

## **2. Issues Highlighted in the Department’s Discussion Paper**

- The Department’s Discussion Paper outlines the various challenges which exist as a result of current admission practices. In line with the IHRC Report, the Department acknowledges that certain enrolment practices “*may not fully accommodate the needs and diversity of our modern society.*”<sup>15</sup> Religion, linguistic grounds, the date of application, the fact that applicants already have siblings in the school or the fact that the applicant is a child of staff or past pupils of the school are all identified in the Discussion Paper as commonly used selection criteria<sup>16</sup> which have the potential to interfere with a child’s access to a school. This was also observed in the *Report of the Audit of School Enrolment Policies* which highlighted the degree to which disparities exist between schools in terms of the enrolment of “newcomer” pupils, pupils with special educational needs and pupils from the Traveller community.<sup>17</sup> Taking local factors into consideration, the Audit highlighted that, in a number of school clusters, some school were taking more responsibility for enrolling children of all backgrounds and needs than others within their community.<sup>18</sup>

- The Discussion Paper suggests there is a need for greater consistency, transparency and accountability in relation to enrolment policies to give parents more confidence in the system.<sup>19</sup> The lack of public availability of enrolment policies is highlighted as a concern where oversubscription arises and transparency as to how available places are allocated to applicants is lacking.<sup>20</sup>

- The Discussion Paper also sets out concerns in relation to the adequacy of the existing redress procedures in relation to admissions provided by Section 29 of the Education Act 1998.<sup>21</sup> It is stated that the process has become overly burdensome for parents, schools and the Department<sup>22</sup> with the emergence of legal challenges to appeal committee decisions by way of judicial review strengthening the need for a quicker, less

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<sup>14</sup> Discussed further below in relation to Articles 8, 9 and 14 of the ECHR.

<sup>15</sup> Discussion Paper at p.2.

<sup>16</sup> Discussion Paper at p.7.

<sup>17</sup> Department of Education and Skills, *Audit of School Enrolment Policies by Regional Offices Service*, November 2007. (Henceforth “Audit of School Enrolment”). This audit surveyed almost 2,000 schools at primary and post-primary level in the country. Available at: [http://www.education.ie/insreports/des\\_enrolment\\_audit\\_report.pdf](http://www.education.ie/insreports/des_enrolment_audit_report.pdf)

<sup>18</sup> See letter issued by Minister for Education and Science Mary Hanafin T.D. to Education Partners on Enrolment Audit Follow-up, 24 April 2008. Available at: [http://www.education.ie/insreports/des\\_ltr\\_enrolment\\_audit.doc](http://www.education.ie/insreports/des_ltr_enrolment_audit.doc)

<sup>19</sup> Discussion Paper at p.14.

<sup>20</sup> Discussion Paper at p.17.

<sup>21</sup> Discussion Paper at pp.15 to 17.

<sup>22</sup> Discussion Paper at p. 16. The procedures provide for a full hearing by an independent appeal committee. This committee reviews the documentation and presentations from parents, schools and as appropriate the NEWB and NCSE.

formal and more parent friendly alternative to the section 29 process as it applies to enrolment.<sup>23</sup> Moreover where there are a number of rejections by different schools, it is noted in the Discussion Paper that parents have to take multiple section 29 appeals against each individual school's decision to refuse enrolment.<sup>24</sup>

- The Discussion Paper draws attention to the fact that circumstances can arise where a child is unable to gain a place in any school in a locality even though one or more schools in the area have available places.<sup>25</sup> It is also noted in the Discussion Paper that there is limited evidence of inter-school co-operation at post primary level or across primary schools located in the same locality but under different patronage. This is notwithstanding the potential benefits identified in the Discussion Paper that inter-school co-operation can bring in terms of ensuring places for all children, reducing appeals, and providing clarity and certainty for parents.<sup>26</sup>

### **3. International Human Rights Standards**

#### **i. European Convention on Human Rights**

##### **1. Article 2 of Protocol 1**

16. The right to education under Article 2 of Protocol 1 of the European Convention on Human Rights has been interpreted by the European Court of Human Rights in conjunction with Article 8 (respect for private and family life), Article 9 (right to freedom of conscience and religion) and Article 14 (prohibition of discrimination).

Article 2 of Protocol 1 of the ECHR provides that:

*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

Article 2 of Protocol 1 means that State parties shall not deny any person the right to education. Therefore State Parties may not interfere with an individual's exercise of the right by excluding him or her from the benefit of State-provided educational opportunities. The second sentence of Article 2 gives discretion to the State to ascertain the nature and ambit of its commitment to education and teaching.<sup>27</sup>

17. In *Campbell and Cosans v the United Kingdom* the Court held that the State has a duty to regulate the provision of education.<sup>28</sup> In this case while the Court acknowledged that the

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<sup>23</sup> Discussion Paper at p.23.

<sup>24</sup> The Audit of School Enrolment also observed the matter of how parents might be equipped to deal with a refusal that is presented as informal "advice" to enrol in another school on the basis that the other school would better meet the needs of the child concerned.

<sup>25</sup> Discussion Paper at p.18.

<sup>26</sup> Discussion Paper at p.18.

<sup>27</sup> Glendenning, *Education and the Law*, (Butterworths, Dublin, 1999) at p. 255.

<sup>28</sup> *Campbell and Cosans v United Kingdom* (App. no. 7511/76 and 7743/76) (1982) 4 EHRR 293.

use of corporal punishment may, in a sense, be said to belong to the internal administration of a school, it found that the attempt by the Government to separate matters from its remit was “artificial” as it was ultimately the State who had “assumed responsibility for formulating general policy.”<sup>29</sup> The Court held that:

*the second sentence of Article 2 (P1-2) is binding upon the Contracting States in the exercise of "each and every" function that they undertake in the sphere of education and teaching.*<sup>30</sup>

The Court in *Costello-Roberts v United Kingdom* observed that:

*the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.*<sup>31</sup>

Thus in the context of admission policies, not only does the State have a positive duty to regulate in this area, it is also clear that the State cannot absolve itself from any responsibility or liability in relation to human rights breaches simply because the specific details of enrolment policies are left to the discretion of schools and boards of management. When schools draw up enrolment policies they are exercising powers delegated to them by the Education Act 1998 thus engaging the responsibility of the State.

## 2. Article 8

18. There is a positive obligation on the State to protect the rights in Article 8. This Article provides that:

*(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

*(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*

Any interference with a person’s private life must be “in accordance with the law”, “necessary in a democratic society” and in line with the other criteria stipulated under Article 8(2). In relation to enrolment policies the State has a positive obligation to ensure that the right to respect for a person’s private life is upheld. It appears that some enrolment policies which elicit information or predicate enrolment either directly or indirectly on *inter alia*, a parent or child’s religious, educational, social or ethnic background may come within the ambit of Article 8, and therefore may only be justified in strict accordance with the second paragraph of that Article.

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The applicants felt that their Article 2 Protocol 1 rights were being violated on account of the existence of corporal punishment as a disciplinary measure in the schools attended by their children.

<sup>29</sup> *Ibid.* at para. 33.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Costello-Roberts v. United Kingdom* (App. no. 13134/87) (1993) 19 EHRR 112 at para 27.



### 3. Article 9

19. Article 9 provides that “everyone has the right to freedom of thought, conscience and religion.”<sup>32</sup> This is given further expression in Article 2 of Protocol 1 which protects “the right of parents to ensure the education of their children is in conformity with their own religious and philosophical convictions”.

In the first case under Article 9 the Court acknowledged that:

*freedom of thought, conscience and religion is one of the foundations of a "democratic society"...It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.*<sup>33</sup>

When Article 2 of Protocol 1 is taken together with Article 9, it may be regarded as imposing an obligation on the State to ensure that admission policies operated by these schools are not unfairly excluding or breaching the rights of parents and children from a minority religion or from a non faith background.

20. As noted earlier, the majority of schools in Ireland are under denominational control, with a very small number specifically catering for minority beliefs or children from a non faith background. Such schools will naturally promote a religious ethos and this may further be reflected in admission policies.

21. In *Folgerø v Norway*<sup>34</sup> the Court observed that a school procedure which requires parents to divulge their religious or non religious convictions concerned “a risk of undue exposure of their private life.” The Court held that:

*information about personal religious and philosophical conviction concerned some of the most intimate aspects of private life...imposing an obligation on parents to disclose detailed information to the school authorities about their religious and philosophical convictions may constitute a violation of Article 8 of the Convention and, possibly also, of Article 9.*<sup>35</sup>

Thus in the context of education Article 8 and 9 are closely linked. In considering enrolment policies the State must consider whether the present system allows schools to interfere with the private life of parents and children and if so, whether this can be justified under Article 8(2). In addition the State must consider whether the fact that schools give preference in enrolment to one denominational group over another may in fact lead to a breach of Article 9 even if this is not the intended consequence. For instance a parent should not feel

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<sup>32</sup> Article 9 ECHR provides that: 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and 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.

<sup>33</sup> *Kikkinakis v. Greece* (App. No.14307/88) (1994) 17 EHHR 397 at para. 31.

<sup>34</sup> *Folgerø v. Norway* (App. 15472/02) (2008) 33 EHHR 1147.

<sup>35</sup> *Ibid.* at para. 98.

pressurised to have their child baptised into a certain religious denomination, simply for the purpose of ensuring their child can secure a place in their local school.

#### 4. Article 14

22. Article 2 of Protocol 1 taken together with Article 14 ECHR guarantees the right to non-discriminatory access to publicly funded schools. The scope of the prohibition against discrimination under the Convention is very broad.<sup>36</sup>

23. Article 14 covers both direct discrimination; where the difference in treatment between a member of one group and a member of another group is clear, and indirect discrimination; where a policy or general measure although seemingly neutral has a particularly negative effect on one group, it may be considered discriminatory, unless it may be objectively justified and is proportionate to achieving that objective.<sup>37</sup> Discrimination based on certain grounds will be particularly suspect<sup>38</sup> such as discrimination on the grounds of a person's race or ethnicity.<sup>39</sup>

24. In *D.H. and Others v. The Czech Republic* the applicants argued that Czech laws relating to special schools resulted in the segregation of Roma children from mainstream education practice.<sup>40</sup> A disproportionately high number of Roma pupils formed the majority of the pupils in these special schools which catered for children with learning difficulties and which did not follow the full State curriculum. The Court reiterated that under Article 14 the justification put forward by the State is assessed by reference to whether the differential treatment pursues a legitimate aim and whether it draws a fair balance between the interests of the particular individual or group and the interest of society.<sup>41</sup> The Court found that the Government had a legitimate aim, namely that the decision to retain the special school system was motivated by the desire to find a solution for children with special educational needs. However the Court held that the means employed to achieve this aim, namely the assessment of the intellectual ability of all children with the same test, allowed for the prospect that the tests were “biased” and “that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them.” In these circumstances, the seemingly neutral tests resulted in a disproportionate disadvantage to Roma children and therefore constituted indirect discrimination in relation to the right to education under Article 2 of Protocol 1.

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<sup>36</sup> Article 14 provides that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” In *Glor v Switzerland*, Judgment 30 April 2009, the European Court found that disability constituted a “status” under Article 14.

<sup>37</sup> Under the case-law of the European Court a certain “margin of appreciation” is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the “margin of appreciation” will vary according to the circumstances, the subject matter and its background.

<sup>38</sup> Ovey and White, *The European Convention on Human Rights*, (Oxford University Press, Oxford 2010) at 561. Suspect grounds identified include sex, religion, sexual orientation, nationality and race.

<sup>39</sup> *Timishev v. Russia* (App. no. 55762/00 and 55974/ 00) 2007 44 EHRR 776.

<sup>40</sup> *D.H. and others v. The Czech Republic* (App. no. 57325/00) 47 EHRR 59.

<sup>41</sup> *Ibid.* at para. 196.

25. In relation to enrolment policies in Irish schools, it is necessary to examine both those criteria where there is a clear difference in treatment between children, such as a religious requirement, and also criteria which may unfairly disadvantage certain minorities, for example the “parental rule” that may affect newcomer students and children from the Traveller community disproportionately. It should also be noted that there is always a danger that differences of treatment on religious grounds may co-exist with a difference in treatment on racial grounds which heightens the possibility for impermissible discrimination to occur in this context.<sup>42</sup>

## ii. United Nations Standards

### 1. Economic, Social and Cultural Rights

26. The right to education is enshrined in a range of international conventions to which the State is a party.<sup>43</sup> Article 13 of the Convention on Economic, Social and Cultural Rights (ICESCR) is one of the most wide-ranging and comprehensive articles on the right to education. Article 13.1 states that:

*The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

27. Article 13(2) provides for the right to receive an education. It specifies that education, in all its forms and at all levels, shall exhibit the following interrelated and essential features, including the elements of availability, accessibility, acceptability and adaptability.<sup>44</sup> Enrolment policies inevitably have an impact on all these factors. The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the Convention, has affirmed that educational institutions and programmes have to be accessible to all, in law and fact, without discrimination on any of the prohibited grounds.<sup>45</sup>

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<sup>42</sup> See further below.

<sup>43</sup> Special Rapporteur on the Right to Education, *The right to education of persons with disabilities* A/HRC/4/29 19 February 2007 at para. 22. Human rights law places three broad obligations on States in relation to the right to education. First, State Parties must not interfere with the enjoyment of this right. Secondly, State parties must protect against discrimination and ensure the equal enjoyment of this right between men and women. Thirdly, State Parties must take steps, using the maximum of available resources, with a view to achieving the full realisation of the right to education. Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.10.Add2.doc>

<sup>44</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13 *The right to education (article 13 of the Convention)* E/C12/1999/10 (Twenty-first session, 1999) at pp. 2-3.

When considering the appropriate application of these “interrelated features” the best interests of the student shall be a primary consideration. Available at:

<http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>

<sup>45</sup> *Ibid.* at para. 6. Education must also be physically and economically accessible.

The prohibition on discrimination is enshrined in Article 2(2) of the ICESCR. The importance of non-discriminatory practices in the field of education has been described by the Committee as “an empowerment right”:

*As, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.*<sup>46</sup>

28. The right to education enshrined in the CECSR puts a strong onus on the State to prevent violations of article 13 by the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education and the failure to take measures which address de facto educational discrimination.<sup>47</sup>

The Committee has outlined that:

*States parties have immediate obligations in relation to the right to education, such as the “guarantee” that the right “will be exercised without discrimination of any kind” (art.2 (2)) and the obligation “to take steps” (art. 2 (1)) towards the full realization of article 13. Such steps must be “deliberate, concrete and targeted” towards the full realization of the right to education.*<sup>48</sup>

## **2. Convention on the Rights of the Child**

29. Article 28 of the Convention on the Rights of Children (CRC) recognises the right of the child to education.<sup>49</sup> Article 29 of the CRC then goes on to elaborate on the aims of education. These aims include respect for diversity.<sup>50</sup>

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<sup>46</sup> *Ibid.* at para. 1.

<sup>47</sup> *Ibid.* at para. 59.

<sup>48</sup> *Ibid.* at para. 43.

<sup>49</sup> Article 28 provides that: 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

<sup>50</sup> Article 29 states: 1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

In commenting on Article 29 the Committee on the Rights of the Child recognises that access to education may be undermined by the occurrence of discrimination:

*Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. While denying a child's access to educational opportunities is primarily a matter which relates to article 28 of the Convention, there are many ways in which failure to comply with the principles contained in article 29 (1) can have a similar effect.*

...

*All such discriminatory practices are in direct contradiction with the requirements in article 29 (1) (a) that education be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.<sup>51</sup>*

The State parties not only have a duty to support equal access to education, it has also been stated that they must also take the necessary steps to formally incorporate the principles enshrined in Article 29 into their education policies and legislation at all levels.<sup>52</sup> It is necessary that the State combats both overt and hidden barriers to access to education in order to respect the human dignity of the child.

### **3. Convention on the Elimination of All Forms of Racial Discrimination**

30. Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination provides that:

*In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law [...].*

Article 5 (v) requires that the right to education and training is free from all forms of discrimination.

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(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

<sup>51</sup> Committee on the Rights of the Child General comment No. 1, *The Aims of Education* CRC/GC/2001/1, 17 April 2001 at para. 10.

<sup>52</sup> *Ibid.* at para. 17.

31. The UN Special Rapporteur on the Right to Education has classified migrants, refugees and asylum seekers as groups traditionally marginalised and vulnerable to discrimination in education.<sup>53</sup> The Committee on the Elimination of Racial Discrimination citing Article 2 of the CRC confirms that:

*the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.*<sup>54</sup>

The CERD Committee has paid particular attention to the rights of Travellers in the Irish context and has identified education as a problematic area recommending that:

*The State party should ensure that concrete measures are undertaken to improve the livelihoods of the Traveller community by focusing on improving students' enrolment and retention in schools.*<sup>55</sup>

In addition, the CERD Committee has expressed concern regarding the denominational character of Irish schools. In the Committee's Concluding Observations on Ireland issued in 2005 it stated:

*The Committee, noting that almost all primary schools are run by Catholic groups and that non-denominational or multid denominational schools represent less than 1 per cent of the total number of primary education facilities, is concerned that existing laws and practice would favour Catholic pupils in the admission to Catholic schools in case of shortage of places, particularly in the light of the limited alternatives available (art. 5 (d) (vii) and 5 (e) (v)).*<sup>56</sup>

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<sup>53</sup> Special Rapporteur on the Right to Education, The right to education of migrants, refugees and asylum seekers A/HRC/14/25 16 April 2010 at para. 2. The ERSI Report, Adapting to Diversity: Irish schools and Newcomer Students, 2009, states that: "Where schools are oversubscribed, enrolment criteria...are likely to favour settled communities and thus newcomers will be under-represented in these schools." at p. xiv.

<sup>54</sup> Committee on Economic, Social and Cultural Rights, General Comment No.13, *The right to education (article 13 of the Convention)* E/C.12/1999/10 para. 34. See also Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation No. 30, *Non- citizens*. 01 October 2004. at para. 30. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument).

<sup>55</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Ireland*, CERD/C/IRL/CO/3-4 (Seventy-eight session) 4 April 2011 at para. 13. In 2006 the Advisory Committee on the Framework Convention for the Protection of National Minorities referred to a survey of Traveller Education Provision in Irish Schools. This survey suggested that some schools did not welcome Traveller children but would refer them to other schools, known to have enrolled Traveller students. The Advisory Committee therefore urged the State to make sure that there is "no direct or indirect anti-Traveller bias in enrolment processes." Advisory Committee on the Framework Convention For the Protection of National Minorities, Second Opinion on Ireland, adopted on 6 October 2006 ACFC/OP/II (2006) 007 at p.19. Available at [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_2nd\\_OP\\_Ireland\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Ireland_en.pdf)

<sup>56</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Ireland*, CERD/C/IRL/CO/2 (Sixty-sixth session) 14 April 2005 at para. 18. Available at: <http://tb.ohchr.org/default.aspx?Symbol=CERD/C/IRL/CO/2>

32. In the Committee's Concluding Observations issued in March 2011, the Committee recalled its previous Concluding Observations and noted with concern that:

*students of the Catholic faith are favoured for enrolment into Catholic schools against students of other faiths in case of shortage of places. The Committee further expresses its 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 (articles 2, 5(d)(vii) and 5(e)(v)).*<sup>57</sup>

The Committee has specifically encouraged the State:

*to promote the establishment of non-denominational or multi-denominational schools and to amend the existing legislative framework so that no discrimination may take place as far as the admission of pupils (of all religions) to schools is concerned.*<sup>58</sup>

The CERD Committee has also highlighted the fact that discrimination on religious grounds is intertwined with discrimination on racial grounds. In its Concluding Recommendations, the CERD Committee described this as "intersectionality".

*Recognising the 'intersectionality' between racial and religious discrimination, the Committee reiterates its previous concluding observations (CERD/C/IRL/CO/2) and recommends that the State party accelerates its efforts to establish alternative non-denominational or multi-denominational schools and to amend the existing legislation that inhibits students from enrolling into a school because of their faith or belief. The Committee further recommends to the State party to encourage diversity and tolerance of other faiths and beliefs in the education system by monitoring incidents of discrimination on the basis of belief.*<sup>59</sup>

#### **4. Convention on the Rights of Persons with Disabilities**

33. Ireland has yet to ratify the UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>60</sup> Many of the provisions of the CRPD may impact on the obligations of the State in relation to the right to education of persons with disabilities, whether they have a physical, mental or intellectual disability. Specifically, Article 24 CRPD provides.

*States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal*

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<sup>57</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Ireland*, CERD/C/IRL/CO/3-4 (Seventy-eight session) 4 April 2011 at para 26. Available at: [http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/CERD-C-IRL-3\\_4.doc](http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/CERD-C-IRL-3_4.doc)

<sup>58</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Ireland*, CERD/C/IRL/CO/2 (Sixty-sixth session) 14 April 2005 at para. 18.

<sup>59</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on Ireland*, CERD/C/IRL/CO/3-4 (Seventy-eight session) 4 April 2011 at para. 26.

<sup>60</sup> The IHRC has called on the government to ratify ratify the (CRPD) by the end of 2011. <http://www.ihrc.ie/international/upr/voluntarycommit.html>

*opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning.*

34. In addition, the Committee on Economic, Social and Cultural Rights has submitted that the effects of disability-based discrimination have been particularly severe in the fields of education:

*Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities. For the purposes of the Covenant, "disability-based discrimination" may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.*<sup>61</sup>

The Special Rapporteur on the Right to Education has stated that the State should also respect the liberty of parents to choose schools for their children with disabilities, which in effect means that such parents should not be overly circumscribed when seeking a school for their child.<sup>62</sup>

#### **4. Conclusions**

35. When schools and boards of management draw up admission policies they are exercising a legislative function that has been conferred on them by the State pursuant to sections 9 and 15 of the Education Act 1998. As the State has "*assumed responsibility*" for the overall regulation of such policies, it cannot divest itself from responsibility in relation to any possible human rights violations simply because it has delegated its responsibilities to private entities. An overly permissive approach by the State to the issue of admission policies risks running contrary to the judgment of the ECtHR in *Costello-Roberts v United Kingdom*.<sup>63</sup>

36. Article 2 of Protocol 1 of the ECHR provides that the State shall not deny any person the right to education. The State thus has a duty to ensure that admissions policies are free from overly restrictive criteria that would exclude a child from an educational opportunity in practice. The universality of the right to education is also reflected in the Constitution and other international instruments such as the ICESCR and the CRC.

37. Article 14 of the ECHR prohibits discrimination on the grounds of, race, colour, language, religion, political or other opinion, national or social origin, and association with a national minority. In *DH v The Czech Republic*<sup>64</sup> the ECtHR reiterated that racial discrimination cannot be objectively justified.<sup>65</sup> The Committee on Economic, Social and

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<sup>61</sup> *Ibid.* at para. 15.

<sup>62</sup> Special Rapporteur on the Right to Education, *The right to education of persons with disabilities* A/HRC/4/29 19 February 2007 at para. 15.

<sup>63</sup> *Costello-Roberts v. United Kingdom* (App. no. 13134/87) (1993) 19 EHRR 112.

<sup>64</sup> *D.H. and others v. The Czech Republic* (App. no. 57325/00) 47 EHRR 59.

<sup>65</sup> *Ibid.* In that case the Court stated: "*Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.*" at para. 176



Cultural Rights has urged States to repeal legislation which discriminates against individuals and groups and to take measures to address *de facto* educational discrimination. The Committee on the Rights of the Child observes that the discrimination and prejudice in allowing a child access to education is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. **Therefore it is vitally important that the State effectively addresses direct or indirect discrimination in admission policies.**

38. Discriminatory and exclusionary enrolment policies may prevent persons with disabilities from exercising their right to education on an equal basis with persons without disabilities.<sup>66</sup> Admission forms that seek information in relation to a child's disability may be considered discriminatory in the absence of a clearly articulated obligation on schools in relation to the enrolment of children with disabilities.

39. Certain enrolment criteria put "newcomers" at an obvious disadvantage, for example the practice of retaining lengthy waiting lists or the practice of providing preference to children of past-pupils has a disproportionate affect on foreign national children, and in turn members of racial or ethnic minorities.

40. The judgment of the ECtHR in *D.H. v The Czech Republic*, requires the State to consider whether certain enrolment criteria such as the "parental rule" may have a disproportionate affect on children and families from the Traveller community because the criteria fails to give "*special consideration*" to the "*needs and different lifestyle of this group.*" It may be that the nomadic history and historically low educational participation of Travellers may *de facto* exclude them from enrolment in certain schools.

41. The Education Act 1998 and section 7 of the Equal Status Acts 2000-2008 supports the right of denominational schools to give priority to children of a particular faith. In a context where the vast majority of schools in the State have a Roman Catholic ethos and parents have limited choice when seeking to enrol their children, this inevitably disadvantages those of a minority or non-faith background. In this context **there is a real risk that admission policies which require parents to disclose their religious or philosophical convictions may variously constitute a breach of Articles 8, 9, Article 2 of Protocol 1 and/or Article 14 of the ECHR.**

42. Similarly admission policies that unnecessarily require parents to disclose their educational or social background may also breach Article 8 of the ECHR where seeking such information is not proportionate to the legitimate aim sought to be achieved.

43. On the basis of the observations in the Discussion Paper and indeed the IHRC Report it is apparent that **section 29 of the Education Act 1998 is possibly inadequate to vindicate the rights of parents and children refused enrolment to a school.**

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<sup>66</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 5, *Persons with disabilities* (Eleventh session, 1994). Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument)

## 5. Recommendations

- The IHRC Report *Religion & Education: A Human Rights Perspective* recommended that the State ensure a diversity of provision of school type within all educational catchment areas reflecting the diversity of religious and non-religious convictions represented in the State.<sup>67</sup> This recommendation is reiterated in the present context as diversity of school provision would also address a number of the concerns regarding human rights standards and school enrolment policies as set out in this submission.
- In addition the IHRC recommends that the State put in place legislative measures to ensure that admission policies are free from discrimination, respect privacy and uphold the right to freedom of religion, conscience and thought, including the philosophical convictions of parents and children.
- The IHRC urges the Government to ratify the CRPD.<sup>68</sup> Further, the IHRC urges the Government to commence section 10 of the Education for Persons with Special Educational Needs Act, 2004, while extending the provision to address the situation of any child left without a school place for whatever reason.
- The IHRC recommends that pending further diversity in school provision the Government amend section 7 of the Equal Status Acts 2000-2008 which allows primary and second-level schools which have a particular denominational ethos to give preference in admission to students of a particular religious denomination over others and to refuse admission to such students where this is essential to uphold the ethos of the school.
- The IHRC welcomes the recommendation in the Discussion Paper to standardise admission forms. In light of the *Folgerø v Norway*<sup>69</sup> judgment, these forms should not compel parents to unnecessarily disclose their religious or philosophical convictions or other personal information that is unnecessary to the school enrolment process.
- All admissions policies should be readily available to parents, possibly being provided through a centralised database. Schools in catchment areas should be required to co-operate in ensuring effective access to all children in the area to those schools, with special measures designed to ensure access of children from minority groups, including persons of minority or no faith, Travellers, children with special needs and “newcomers”.
- Reflecting its previous recommendation the IHRC recommends the creation of an expanded Ombudsman body, whose remit should include complaints in relation to

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<sup>67</sup> See IHRC Consultation report at p. 104.

<sup>68</sup> See also IHRC, *Enquiry Report on the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for persons with a severe to profound Intellectual Disability*, March 2010 at p.382.

<sup>69</sup> *Folgerø v. Norway* (App. 15472/02) (2008) 33 EHHR 1147.

school enrolment, and which would have adequate powers to vindicate the rights of the child concerned in light of the human rights standards highlighted in this submission.