



Human Rights Commission

Preliminary Observations on the Education for Persons with Disabilities Bill 2003

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1. Introduction

The Human Rights Commission (HRC) welcomes the opportunity to comment on the provisions of the Education for Persons with Disabilities Bill 2003. The promotion and protection of the human rights of persons with disability is a key area of work for the HRC. In our Strategic Plan, “*Promoting and Protecting Human Rights in Ireland: A Plan for 2003-2006*”, we have set out our principal objective in this area:

“The Commission will actively contribute to the process of consultation concerning new disability legislation. In particular, the Commission will aim to ensure that recent developments at international level towards a rights-based approach to the issue of disability are reflected in our domestic legislation.”¹

One of the functions of the HRC, as specified in s. 8 (d) of the Human Rights Commission Act 2000, is:

“Either of its own volition or on being requested to do so by Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the State”

Under s. 2 of the same Act “human rights” are defined as:

- “(a) The rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
- (b) the rights, liberties and freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.”

The following observations in relation to the present Bill are made in this context. It was also by reference to these standards that the HRC set out its general position on the provisions for legal redress, complaints and appeals that are required in regard to the provision of services to meet the needs of independently assessed means in our Paper, “*Observations on the Proposals Paper of the Disability Legislation Consultative Group (DLCCG)*”, published in May 2003.² The central conclusion of our analysis in that Paper is that international human rights standards, and specifically the International Covenant on Economic, Social and Cultural Rights, are supportive of the proposition that enforceable rights for persons with disabilities should be set out in Irish law. Those observations continue to have relevance in relation to the present Bill.

¹ At p. 15 of the Plan.

² Copies of this paper are available from the office of Human Rights Commission.

Ireland has made significant progress in recent years in advancing the legislative protection of the human rights of persons with disability, most notably through the enactment of the Employment Equality Act 1998 and the Equal Status Act 2000. The issue of providing an equal and effective right to educational attainment for persons with disability was also a cornerstone of the work of the Commission on the Status of People with Disabilities. The Education Act 1998 marked a further important step forward in ensuring the right to education for all. A key recommendation of the Commission on the Status of People with Disabilities was that a Disabilities Act should be enacted setting out the rights of persons with disabilities, including a right to legal redress³ and that education legislation should be enacted setting out a number of key rights of persons with disability to enjoy equal access to effective education services in the least restrictive environment possible.⁴

Two main issues arise in the context of the present Bill: how the substance of the rights set out in the Bill reflect human rights standards; and how those rights are given force in the State. Before considering the provisions of the present Bill, we wish to outline the ‘benchmarks’ by which any legislation in this area should be measured, i.e. the human rights standards set out in the Constitution and those set out in international treaties to which Ireland is a party. In sections 2 and 3 we will deal with those two categories of standards separately and, in section 4, we will summarise the central principles that should underpin the new legislation.

The HRC believes that the Education for Persons with Disabilities Bill 2003 represents an important step forward in guaranteeing to persons with disabilities the rights to equal and effective access to adequate levels of education. The observations in this Paper are intended only as an initial contribution to the consideration by the Oireachtas of the present Bill, and we look forward to making more detailed observations on the provisions of the Bill at the time of the Joint Oireachtas Committee’s hearings, where we hope to recommend more detailed suggestions as to how the Bill might be amended to fully realise the potential of those rights.

³ Commission Recommendation 9.

⁴ Commission Recommendations 165-181.

2. Relevant Human Rights Provisions of the Irish Constitution

The most relevant provision of the Constitution is Article 42, which deals with education. Article 42 largely revolves around striking a balance between the rights of parents, read in conjunction with the rights of the family under Article 41 of the Constitution, and the duty of the State to provide primary education. The rights under Article 42 have been developed and clarified through a number of cases.

Before looking at these cases, however, we wish to refer first to the guarantee of equality before the law in Article 40 of the Constitution and examine its relevance and applicability in the context of persons with disabilities.

The meaning of “equality”

In its submission to the Constitution Review Group, the Commission on the Status of People with Disabilities analysed the existing law around the guarantee of equality as it related to persons with disabilities.⁵ The Commission concluded that the existing formulation of Article 40 could not, in itself, sustain an understanding of equality that reflected contemporary conceptions of equality of opportunity.

The Commission was essentially making the point that international understandings of equality have moved well beyond the narrow negative definition on which the 1937 constitutional formulation was based. The Commission went on to recommend that the provision be redrafted to place equality as a core norm of the Constitution, to make the prohibition on discrimination more explicit and to allow for positive measures to be taken to combat past and persisting discrimination.⁶

What is clear from the submission of the Commission on the Status of People with Disabilities is that the Constitution clearly does not preclude strong legislation to strengthen the rights of persons with disabilities, but that it could be strengthened to underpin such legislation.

The meaning of “education”

In the case of *Ryan v Attorney General*, O’Dálaigh CJ interpreted “education” in Article 42 as encompassing:

“the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral”.⁷

⁵ Commission Document of 17th July 1995. The limitations of the constitutional equality provision are also discussed in Appendix B to the Final Report of the Commission and in Appendix 15 to the Report of the Constitutional Review Group.

⁶ Ibid. at paragraph 100.

⁷ [1965] IR 350.

This broad interpretation of the meaning of education was reaffirmed in later cases, suggesting that the constitutional right to education is universal and is centred on the role of education in developing the broad range of each individual's 'capacities'.

The obligation to provide free primary education

Article 42.4 places an obligation on the State to provide for free primary education. The nature of this obligation was clarified in the case of *Crowley & Ors. v Ireland, the Minister for Education & Ors.*,⁸ where McMahon J, in the High Court, stated that:

“The purpose of the obligation imposed by Article 42 (4) of the Constitution [to ‘provide for’] is to secure adequate primary education for all children, so long as that education is reasonably accessible...”

The ruling also creates a strong presumption that schooling should be reasonably accessible, at least in the geographical sense, and that where it is not so provided that there is an onus on the State to demonstrate a reasonable alternative system of transporting children to other schools.

The position of disabled children

In the case of *O'Donoghue*,⁹ the High Court was asked to consider whether the obligation on the State to provide education extended to children who might be considered 'ineducable'. In that case, O'Hanlon J approved the earlier judgment of O'Dálaigh CJ in *Ryan* and stated that the task of education was to enable the individual:

“ ‘to make the best possible use of his (or her) inherent and potential capacities, physical, mental and moral’ – however limited those capacities might be”.

O'Hanlon J went further to refer to the accepted conclusions of modern research as to the benefits of mainstream education for children with disabilities and held that this informed his belief that there was:

“...a constitutional obligation on the part of the State to respond to such findings by providing for free primary education for this group of children in as full and positive a manner as it has done for all children in the community.”

⁸ [1980] IR 102. That case was concerned with the lack of provision of primary schooling in a particular area and the Supreme Court ruling, which approved McMahon J's decision, suggests that the obligation to provide for primary education creates a corresponding and universal right to receive such education.

⁹ *Paul O'Donoghue, a Minor suing by his Mother and Next Friend v Min. for Health, Min. for Education, Ireland and the AG*, (Unrep.) High Court, 27th May 1993.

This strong statement of principle might be thought to have been circumscribed somewhat by the well-known recent case of *Sinnott v Minister for Education*.¹⁰ However, that case did not relate to the substance of Article 42, but rather to the subsidiary issues of a chronological ‘cut-off’ of 18 years in relation to the right to free primary education and the power of a court to grant mandatory injunctions against the State.¹¹

The HRC does not intend to rehearse the arguments raised in that case here, but we note that the central theme of the majority decision in that case relies heavily on an interpretation of the doctrine of the separation of powers. The Supreme Court contrasted the circumstances of the case with similar cases in other jurisdictions where the failure of the relevant authorities was set against the background of a statutory framework, and it was the absence of a statutory framework to guarantee the right to education for disabled person that was at the root of that judgment. In our view, the ruling in *Sinnott* is fully consistent with such rights being set out in legislation.

The Commission on the Status of People with Disabilities

The HRC would also like to refer briefly to some of the key recommendations contained in the *Report of the Commission on the Status of People with Disabilities*, which set out the objectives for reform of the law and administrative practice in relation to disability in Ireland. We lay particular emphasis on this Report, as it has been cited by successive Governments in Ireland’s reports under the UN treaty-monitoring process as being demonstrative of their commitment to making progress in the area.¹²

At paragraph 11.8 of the Report, the Commission set out the principles which it believed should underpin the provision of education to persons with disability. These include:

- Every child is educable. All children, including those with disabilities, have a right to free and appropriate education in the least restrictive environment. Appropriate education should be in mainstream schools, except where it is clear that the child involved will not benefit through being placed in a mainstream environment, or that other children would be unduly and unfairly disadvantaged.
- The unique needs of the individual person must be the paramount consideration when decisions are being made concerning the appropriate provision of education for that person. In so far as is practical a continuum of services must be available to meet those needs close to the person’s home and family. ...

¹⁰ *Jamie Sinnott v. Minister for Education*, Supreme Court, July 12, 2001

¹¹ In *Sinnott*, the Supreme Court overturned a High Court order imposing a mandatory duty on the State to provide adequate levels of service for an autistic adult.

¹² See for example paragraphs 29-31 of Ireland’s Second National Report under the ICESCR.

- Parents have primacy in the decision-making process as soon as their child with a disability has been identified as having particular educational needs. They [and the child wherever appropriate] must be entitled to make an informed choice on the educational placement of their child.
- Priority should be given to the needs of people with disabilities, within the broad framework of educational provision, and this should be reflected in the allocation of resources.

We further note that these principles have been more recently affirmed in the Government's *Progress Report on the Implementation of the Recommendations of the Commission on the Status of People with Disabilities*, published in December 1999. In particular, the Report stated that:

“The Minister for Education and Science supports the rights of parents to have their child educated in the least restrictive environment. The measures referred to [in relation to initiatives taken under the 1998 Act and subsequently] show his commitment to meeting the needs of children with disabilities in whatever school placement they choose.”¹³

A National Children's Strategy was also launched in November 2000, ostensibly with the purpose of advancing the implementation of Ireland's obligations under the UN Convention on the Rights of the Child (see below). Among the commitments contained in that Strategy was that children would be given a voice in all decisions affecting them and that adequate services would be put in place for all children.

¹³ Paragraph 11.49 at p. 149 of the Progress Report.

3. Relevant Human Rights Provisions under International Law

The human rights of persons with disabilities have been developed dramatically in recent years by a number of international bodies. This development has been characterised by the setting of general principles of rights by a number of bodies under the authority of the United Nations, and these principles have in turn been developed in more detail by regional bodies such as the Council of Europe. The Declaration of Malaga in May 2003¹⁴ represents the most up-to-date statement of intention by European Governments in this area, and it will soon be developed into a detailed 10 year Action Plan fleshing out the rights contained therein.

The HRC believes that it is also significant that Ireland has been at the forefront of the international movement to develop the human rights of persons with disabilities and has campaigned for a move towards the establishment of a specialised human rights treaty for persons with disabilities. This movement is based on drawing together the relevant existing rights' provisions of the UN treaties, to all of which Ireland is a party and which are outlined below.

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

The ICESCR is one of the two main international human rights treaties, along with the ICCPR (see below), both of which were ratified by Ireland in 1989. Ireland has submitted two reports under the Covenant, setting out the State's compliance with its provisions. The ICESCR contains a number of articles that set out substantive rights and states' obligations that have a direct relevance for persons with disabilities. These include the right to education and the right to adequate health care. Before examining the detail of these rights as set out in the Covenant, we wish firstly, to make some more general comments about the nature of Ireland's obligations under the ICESCR.

State Obligations under ICESCR

Article 2 (1) of the Covenant states that:

“Each State Party to the present Covenant undertakes to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including the adoption of legislative measures...”

¹⁴ The Declaration of Malaga, “*Improving the Quality of Life of People with Disabilities: Enhancing a Coherent Policy for and Through Participation*”, Second European Conference of Ministers with responsibility for integration policies for persons with disabilities, Malaga, Spain, 7th-8th May, 2003.

In our observations on the DLCG Paper, we referred at length to the Committee on Economic, Social and Cultural Rights' General Comment 3, which clarifies the nature of states parties' obligations under the Covenant. We will summarise briefly here the main points of that General Comment:

- States are obliged to take concrete and effective steps to give force to the Covenant's obligations, including where appropriate the enactment of legislation;
- While economic and social rights will often be progressive in their realisation, there is an obligation to move as expeditiously as possible in regard to certain rights, including the right to freedom from discrimination;
- Any deliberately regressive measures, such as cutbacks in the provision of services, must be fully justified by reference to the totality of rights set out in the Covenant and must be conducted in a rational and equitable basis;
- Each right under the Covenant gives rise to a core minimum obligation or required level of protection; and
- Judicial remedies for the failure to protect the Covenant rights is an important means of giving force to the Covenant and, in some areas, will be the most appropriate means of doing so.

The Committee addresses the linked issue of the domestic application of the ICESCR in its General Comment 9, also referred to in our observations on the DLCG Paper. While the General Comment states that judicial remedies may not always be required, it does state that even where there are administrative remedies for violations of rights, there should be some provision for appeal to a judicial authority. The General Comment further rejects any rigid distinction between economic, social and cultural rights on one hand and civil and political rights on the other in relation to the availability of legal remedies.

Equality under ICESCR

Article 2.2 sets out the general principle of non-discrimination that rights must be available to all persons and on an equal basis:

“States shall guarantee that the rights will be exercised without any discrimination of any kind as to ... social origin, birth or other status”.

The Right to Education under ICESCR

Article 13 of the ICESCR sets out a general right to education, and Article 14 deals specifically with primary education. Article 13 states:

“[States]...recognise 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.”

The substance of these rights has been developed by the Committee in its General Comment 13. Among other issues, the General Comment deals with the issue of the age at which the obligation to provide for basic educational needs ceases:

“23. Since everyone has the right to the satisfaction of their ‘basic learning needs’ as understood by the World Declaration, the right to fundamental education is not confined to those “who have not received or completed the whole period of their primary education”. The right to fundamental education extends to all those who have not yet satisfied their “basic learning needs”.

24. It should be emphasized that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.”

More importantly, the General Comment also explicitly requires states parties to ensure that education conforms to the aims and objectives in Article 13 (1) *as interpreted in the light of a number of international instruments*. The General Comment states that these other instruments include elements, not expressly provided for in Article 13 (1), such as specific references to gender equality and respect for the environment, but states that these new elements are implicit in, and reflect a contemporary interpretation of Article 13 (1). These other texts include: the World Declaration on Education for All (1990) (art. 1), the Convention on the Rights of the Child (art. 29 (1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2).¹⁵

The most significant of these in this context is the World Declaration on Education for All, which was adopted at the UNESCO World Conference on Education for All in 1990. In Article 3 (5) of the Declaration states:

¹⁵ Another significant international statement of the educational rights of persons with disability is the Sundberg Declaration of 1982. Article 1 of the Declaration states;

“Every disabled person must be able to exercise his fundamental right to have full access to education, training, culture and information.”

Article 3 of the Declaration goes on to state:

“Disabled persons must be given the opportunity to utilise their creative, artistic and intellectual potential to the full, not only for their own benefit but also for the enrichment of the community.”

“The learning needs of the disabled demand special attention. Steps must be taken to provide equal access to education to every category of disabled persons as an integral part of the education system.”

The UN World Plan of Action for the United Nations Decade for Human Rights Education states:

“120. ... The education of persons with disabilities should as far as possible take place in the general school system...laws regarding compulsory education should include children with all ranges of disabilities, including the most severely disabled.”

Disability under ICESCR

General Comment 5 of the Committee, dealing specifically with the rights of people with disability, devotes a section of its analysis to education:

“35. School programmes in many countries today recognise that persons with disabilities can best be educated within the general education system. Thus the UN Standard Rules [on the Equalisation of Opportunity for Persons with Disabilities] provide that “States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings”. In order to implement such an approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers...”

General Comment 5 relies heavily on the UN Standard Rules, adopted in 1993, which sets out the central principles underpinning contemporary UN policy on disability:

“The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis of planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. Persons with disabilities are members of society and have the right to remain within their communities. They should receive the support they need within the ordinary structures of education, health employment and social services.”¹⁶

¹⁶ UN Standard Rules at 204.

International Covenant on Civil and Political Rights (ICCPR)

Article 25 provides for equal participation in public life of all citizens. Article 26 of the ICCPR sets out a general, autonomous right to equality and equal treatment and General Comment 18 of the Human Rights Committee (the treaty monitoring body for the ICCPR) makes clear that states have a duty to take measures to eliminate conditions that perpetuate discrimination. Paragraph 10 of the General Comment states:

“...[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or to eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant...”

Convention on the Rights of the Child (CRC)

Ireland has ratified the CRC and the Committee on the Rights of the Child examined the Government’s first national report in 1998. Articles 28 and 29 of the Convention deal with education and Article 23 deals with the rights of children with disability. Article 23 states in clear terms:

“States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community...”

Recognising the special needs of a disabled child, assistance...shall be provided free of charge, whenever possible, taking into account the financial resources of parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”

In October 1997, the Committee on the Rights of the Child held a Day of Discussion on Children with Disabilities to deepen the understanding of the application of the CRC in this area. Among the three issues on which the Committee focussed was the right of children with disabilities to full participation in education. The discussion made two key conclusions regarding education. Firstly the Committee stated that the right to inclusion in education is distinguished from integration, with inclusion requiring that the school environment be changed to cater for the needs of children with disabilities.¹⁷ Secondly, the Committee recommended clearly that the child should be consulted and involved in any decision-making concerning their rights.¹⁸

¹⁷ UN Document CRC/C/66, Annex V, 16th Session, 6 October 1997 at paragraph 335.

¹⁸ Ibid. at paragraph 338 (1)

European Convention on Human Rights (ECHR)

The right to education is covered under Article 2 of Protocol 1 to the ECHR, which states, “No person shall be denied the right to education”. The right to education under Article 2 is to be read in conjunction with the non-discrimination provisions of Article 14 of the ECHR, and this might create specific rights for persons with disabilities. However, there have been few cases before the European Court of Human Rights, and the nature of the positive obligations on states parties to provide education services is quite weak. It is an area where there is likely to be considerable development as we move towards greater harmonisation of standards across the member states of the Council of Europe, and towards the strengthening of anti-discrimination provisions under the ECHR.¹⁹

Revised European Social Charter

Article 15 of the Revised Social Charter deals with the rights of all persons with disabilities to vocational training, rehabilitation and social resettlement. Article 15 states:

“With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes whenever possible or, where this is not possible, through specialised bodies, public or private;
2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment...;
3. to promote their full social integration and participation in the life of the community...”

The obligation under sub-paragraph 15(1) to take positive measures to provide services for persons with disability was not included in the original Social Charter and its inclusion in the Revised Charter provides a cue to the European Committee of Social Rights to take an expansive interpretation of the rights of individuals under this provision. The Committee’s intention to develop this right can already be seen by some of its most recent conclusions in relation to states’ reports in 2003.

¹⁹ Council of Europe Committee of Ministers Recommendation (92) 6 is evidence of a growing harmonisation in high standards of rights for persons with disabilities. This Recommendation is currently being redrafted to strengthen further European cooperation and standard-setting in this area. Protocol 12 to the ECHR will also greatly strengthen the anti-discrimination protections of the ECHR and is expected to come into effect in the coming years.

International Best Practice

Finally, the HRC has also looked to international models of best practice in this area, which can inform how Ireland can legislate to best effect in this area. The HRC believes that, while international human rights standards represent what national authorities ought to endeavour to achieve, the successful experiences of other states provide a clear indication of how we might achieve those objectives in practice.

We have looked, in particular, to the United States Individuals with Disabilities Education Act (IDEA), which is widely regarded as the leading example of how states can achieve the greatest level of protection of human rights in this area, and many of the recommendations contained in sections 4 and 5 below reflect the positive experience of the operation of that legislation.

4. Summary of Applicable Human Rights Principles

1. Legislation in this Area should be Based on Human Rights Standards

Based on the strong principles of human rights' protection set out in the constitutional and international norms discussed above, we believe that a comprehensive legislative framework is required to guarantee the human rights of all persons, including persons with disabilities, within the education system. This view is endorsed by the Report of the Commission on the Status of People with Disabilities. Therefore, the Human Rights Commission broadly welcomes the publication of the Education for Persons with Disabilities Bill 2003.

2. The Overall Objective of Legislation should be Equal Access to Effective and Adequate Levels of Education

The key objective of any legislation in this area must be to ensure equal opportunity of access to adequate and effective education services for persons with disabilities of any kind. Within the legislation 'education' and 'educational need' should be defined in a broad manner to reflect the duty of the State to nurture the full range of each individual's capacities.²⁰

3. Education should be Provided within the Mainstream Education System or in the Least Restrictive Alternative

The provision of education services should take place, insofar as is possible, within the mainstream education system and in the geographical locality of the individual's home. Services must also be physically accessible, including the requirement that adequate transport facilities be put in place. The presumption of mainstream provision of services creates particular duties on education providers to integrate persons with disabilities into the school system and to educate others around issues of disability. Where mainstream education in the local school system is not appropriate, education should be provided in line with the principle of the least restrictive alternative.²¹

²⁰ See rulings of O'Dálaigh CJ in *Ryan* and O'Hanlon J in *O'Donoghue* discussed above and Article 13 of the ICESCR.

²¹ See the case of *Crowley & Ors* discussed above and the Report of the Commission on the Status of People with Disabilities Rec. 11.49. See also General Comment 5 under the ICESCR and the UN World Plan of Action for the UN Decade of Human Rights Education, also referred to above. See also Committee on the Rights of the Child's Day of Discussion, UN Doc. CRC/C/66.

4. Education Services should be Based on an Individualised Assessment of Need

The provision of education services must be centred on the specific needs of the individual and based on an individualised assessment carried out by qualified experts. This obligation further requires regular reviews of each individual's progress against clear benchmarks on a periodic basis. Fundamental educational need should not be limited by age or any other ground and extends to adults, including older persons.²² In line with the principle of mainstream education for all persons, all assessments, including periodic reviews, should be carried out sufficiently in advance of the commencement of the school year, to allow pupils be integrated with their own peer group. The provision of services should also allow for any complementary services, including the possible provision for an extended school year.

5. Parental Involvement and, where possible, Involvement of the Person with Disabilities should be a Central Element of the Legislation

Parents, and where possible the person with disabilities themselves, should be centrally involved in the decision-making process. Provision should also be made for advocacy services. The involvement of the person with disabilities and their families can be achieved by regular consultation between experts, service providers and users of services at all stages at which decisions are taken effecting the rights of persons with disabilities.²³

6. Delivery of Services should be Based on the Principle of Progressive Achievement

The delivery of services within the education system should be on the basis of progressive achievement of the protection of individuals' human rights. This requires the State to allocate sufficient material and human resources to service providers, including teacher training and specialist services for individuals with disability. The principle of progressive achievement also requires that any cutbacks in services must always be justified on the basis of the totality of the individual's economic and social rights and must be conducted on a rational and equitable basis.²⁴

²² See General Comment 13 under the ICESCR and Article 3 of the World Declaration on Education for All, both discussed above.

²³ See reference to the Committee on the Rights of the Child's Day of Discussion above.

²⁴ General Comment 3 under the ICESCR.

7. **Judicial Remedies are an Essential Component of any System of Redress**

Where there is a failure to provide for the rights set out in the proposed Bill, provision should be made to allow for judicial remedies that are accessible and effective. This requires *inter alia* that legal aid and advocacy services be put in place for persons with disabilities and their families to allow them vindicate their rights.

5. Main Recommendations regarding the Education for Persons with Disabilities Bill 2003

The recommendations set out in this section are based on an application of the general principles identified in the preceding sections. They are intended only to provide a broad outline of the main observations of the HRC in relation to the proposed Bill, and we intend to make more detailed *seriatim* observations on the clauses of the Bill at a later stage.

1. Definitions and General Principles

The HRC recommends that the Bill make reference to the broad constitutional definition of education as set out by O’Hanlon J in *O’Donoghue* where he stated that the aim of education in relation to each person was:

“to make the best possible use of his (or her) inherent and potential capacities, physical, mental and moral – however limited those capacities might be”.

The HRC recommends that “best interests of the child”, as referred to in clause 2, should be defined by reference to the established standards of international human rights law, including the general presumption that the child should be educated within the mainstream school system.

The provision in clause 21 for the implementation of the Act also gives rise for concern, as it would allow for a period of 5 years from the establishment of the Council before the relevant provisions of the Act are implemented.

2. Mainstream Education

We feel that the present formulation of clause 2 affords too wide a discretion to exclude persons with disabilities from mainstream schools. We are concerned, in particular, that the proposed reference to the rights of other children in clause 2 (b) fails to take account of the duty of teachers to combat prejudice and to educate other students about disability.

We recommend that this clause be replaced by a clear statement of the presumption of mainstream education, with the qualifying statement that, in the limited circumstances where persons with disabilities are excluded from mainstream schools, effective and adequate services should be provided in line with the principle of the least restrictive alternative.

3. **Preparation of Education Plans by School Principals**

The main concern of the HRC about the proposed Bill is in relation to the system of preparation of education plans by school principals set out in clause 3.

In the first instance, we would question whether the school principal is the appropriate person to carry out an assessment of a student's needs and the preparation of an education plan in terms of the expertise of principals in relation to the needs of people with disability (particularly given the absence of a role for special needs teachers); the level of day-to-day contact between principals and pupils; and the competing demands on principals in the contemporary school.

Secondly, the obligation on the principal to prepare such a plan only runs from the moment when he/she decides that a need exists. This duty is unduly subjective, and the role of the principal in determining how the plan is developed seems to exclude a central role for the parent and the child in this process.

Thirdly, the process by which principals are then instructed to apply an education plan to a pupil based on guidelines which are set by other bodies, could lead to a situation where broad categorisation of students on the basis of their disabilities takes the place of properly individualised plans based on the particular capacities of the individual. Reference to planning by "category of special education need" also appears in clause 8.

4. **Preparation of Education Plans by Health Boards or the National Council for Special Education**

The system envisaged in clause 3 seems significantly divergent to that envisaged in clauses 4-7. While we retain some concerns regarding the detail of the provisions under clauses 4-7, in broad terms they appear to better reflect the principle of individualised needs-based assessment. The main criticism of those provisions would be the marginalised role, as we consider it, of the parent and/or child under those schemes.

The detail for the proposed education plans, as set out in clause 8, is inadequate in a number of respects. The absence of any reference to an extended school year, where that might be required, or to testing modalities to measure progress are significant flaws. To effectively secure the effective realisation of the right to an effective mainstream education, planning and the timely commencement of all services before the beginning of the school year are also basic requirements.

5. **Designation of Schools**

While we recognise that it may be necessary to concentrate resources in particular schools, we would be concerned that the designation of schools would not have the effect of undermining the right to accessible mainstream education in a geographically accessible place and the principle of equality as guaranteed under the Constitution. We would also be concerned the right of parents and students to determine which school they wish to access might be compromised by this provision. We again note the commitment of the Government in its Progress Report on the Recommendations of the Commission on the Status of People with Disabilities in relation to education in the school of the parents' choice.

6. **Review and Appeal Processes**

As a general observation, we believe that reference in the Explanatory Memorandum to the Bill to rights of recourse to the courts in instances of a failure to provide services has not found adequate expression in terms of concrete legal remedies in the Bill itself.

We consider the proposed system of Appeal Board, Council, Health Board, Consultative Forum and Minister to be unduly cumbersome and recommend a clearer mechanism of effective legal remedies to be put in place.

Specifically, we also consider the provision for review of education plans in clause 10 to be insufficient. We recommend that the proposed system of review be considered in its totality. Particular aspects of the review process that give rise to concern are:

- (i) the role of the principal in conducting such a review;
- (ii) the weak obligations on the principal to guarantee achievement of the goals set out in the plan; and
- (iii) the marginal role of parents in the conduct of the review.

7. **Discrimination in the Examination and Recording of Educational Attainment**

The Progress Report on the Recommendations of the Commission on the Status of People with Disabilities refers to measures that have been taken to adapt the national curricula, including the examinations regulations, to allow persons with learning disabilities to access the mainstream school system.²⁵

²⁵ Progress Report at paragraph 11.34, p144.

The HRC is aware, however, of a current practice in recording results in state examinations, whereby the results of persons with disabilities are marked as being distinct from the results of other candidates for exams. Although this issue has not been addressed in the present Bill, the HRC believes the opportunity should now be taken to address this issue, which we consider to be contravene to the principles of equality and of mainstream education under the Constitution and under international law.