NATIONAL MECHANISMS FOR PROTECTING THE RIGHT TO EDUCATION

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Introduction

For a period of about 10 years from the mid-1990s to the middle of this decade, the scope and enforcement of the right to education was one of the foremost problems occupying the Irish superior courts. The recognition by the High Court in *O'Donoghue v Minister for Health*[1] that the phrase "free primary education" in Article 42.4 of the Constitution was not confined to scholastic education provided in primary schools between ages 4 and 12, but extended to include the needs of all children, however limited their capacities, led to a deluge of litigation teasing out not only the boundaries of the right to free primary education itself, but also of the powers of the courts to enforce that right in cases where it has not been vindicated. Legislative reform and associated resource provision moved the issue away from centre stage for the latter part of the decade; however, recent cutbacks stemming from the economic downturn, and the delay of the implementation of new legislation, has made the issue of enforcing the right to education a hot topic once more.

The purpose of this paper is to examine the scope of the right to education in Irish law with particular reference to mechanisms available for its enforcement. To this end, Ireland's obligations under international law will first be set out, and compared with the parameters of the right under the Irish Constitution and relevant legislation. The particular areas where the vindication of the right is threatened in the current context will then be highlighted, before the various enforcement mechanisms available in domestic law are examined. The characteristics of an effective remedy for a breach of the right to education will be set out, and the various mechanisms, including statutory bodies, constitutional judicial review and international mechanisms, will be assessed against these criteria in order to establish how effective the remedial framework is and how it could be improved for the future.

[1] [1996] 2 I.R. 20.

International Law

In providing for the State's duty to educate, the consistent approach adopted in international law is that primary education must be provided free of charge, while other levels of education are to be provided on a progressive basis. Article 26(1) of the UDHR states that education shall be free "at least in the elementary and fundamental stages". The ICCPR provides that primary education shall be "available free to all";[2] secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education",[3] while higher education shall be made "equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education".[4] The UNCRC also provides for free primary education[5] and sets the goal of progressive introduction of free secondary education, while also placing States under a duty to offer financial assistance in case of need.[6]

It is clear from this overview that States are under an immediate duty to provide free primary education, and that the goal of free secondary education is to be aspired to, with free higher education more aspirational still. While the formulation of these duties is somewhat weak, it could be argued that the progressive implementation provisions should be read in light of Ireland's position as a highly developed and (by global standards) wealthy country. On this view of international law Ireland would be obliged to provide free secondary education at a minimum and arguably free third level education as well. However, even on such a view, it is clear that Ireland's obligations have been more than adequately discharged on the whole, as free primary, secondary and third level education are all currently available, albeit that problems persist in a number of respects, as will be discussed further below.

The right to education set out in the ECHR is of a somewhat limited nature when compared with the global instruments.[7] The negative formulation of Article 2 of the First

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[2] Article 13(2)(a).
[3] Article 13(2)(b).
[4] Article 13(2)(c).
[5] Article 28(1)(a).
[6] Article 28(1)(b).
[7] Mountfield, "The Implications of the Human Rights Act 1998 for the Law of Education" [2000] *Education Law Journal* 146 states at p.146 that "[t]he right not to be denied an education contained in the Convention is a limited and cautious right in comparison with some other instruments."

Protocol, which states that "[n]o person shall be denied the right to education", has been held by the European Court of Human Rights not require the State to provide any education at all, being interpreted instead as merely conferring a right of access to educational establishments existing at a particular time.[8] Viewed in isolation, this is clearly an unsatisfactory level of protection; however, it is worth noting that it has been argued by Van Dijk & Van Hoof:

> "However, the exercise of the right to education, understood as a right of equal access, requires by implication the existence and the maintenance of a minimum education provided by the State, since otherwise that right would be illusory, in particular for those who have insufficient means to maintain their own institutions. Denying a person the possibility to receive primary education has such far-reaching consequences for the development of the person and for his possibilities to enjoy the rights and freedoms of the Convention to the full that such a treatment is contrary, if not to the letter of Article 2, at all events to the whole system of the Convention, in the light of which Article 2 has to be interpreted."[9]

Indeed, it should also be borne in mind that the State Parties to the ECHR all had a system of free primary education in place at the time of the drafting of Article 2 of the First Protocol, and it could therefore be credibly argued that the continuation of this position is a minimum requirement of that provision.[10] Whether or not this is the case in respect of primary education, it is certainly highly unlikely that Article 2 of the First Protocol requires the provision of free secondary or third-level education. Nonetheless, since it requires equal access to existing educational establishments, it does have some application to education other than primary education.

As regards the issue of special educational needs, international law clearly contemplates that the right to free primary education extends to everyone, regardless of any special need or disability which he or she may have. Article 26(1) of the UDHR states that "[e]veryone has the right to education." This provision clearly contemplates that the right is vested equally in every human being, irrespective of his or her physical or mental capacity. The same argument applies to Article 13(1) of the ICESCR, which also recognises the right of "everyone" to education. Article 28(1) of the UNCRC also adopts

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[8] *Belgian Linguistics* case (1979–80) 1 E.H.R.R. 252.
[9] Van Dijk & Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed., Kluwer Law International, The Hague, 1998), p.647.
[10] A similar point is made in relation to the second sentence of Article 2 by Ovey & White, *Jacobs & White: European Convention on Human Rights* (4th ed., Oxford University Press, Oxford, 2006), pp.377–378.

an inclusive approach, stating that State Parties recognise the right of the child to education, and imposes duties on them to take certain measures "with a view to achieving this right…on the basis of equal opportunity."

This latter point relating to equal opportunity raises the interesting and relevant issue of the existence in international law of a right to equality of educational opportunity. Such a right would seem to be an inherent part of the ideal that all children should have the same opportunity to develop themselves to the best of their abilities and talents. The all-inclusive language of Article 26(1) of the UDHR and Article 13(1) of the ICESCR can be said to imply the existence of a right to equality of educational opportunity, particularly when read in tandem with Article 23 of the UNCRC (which is discussed below).

It would seem that Article 28(1) of the UNCRC removes all doubt on this issue by explicitly stating that the actions which States are obliged to take under the Convention must be with a view to achieving the right on the basis of equal opportunity. Indeed, Hodgson believes that the right to equality of educational opportunity is so well established in international law that it has satisfied the stringent criteria necessary to acquire the status of customary international law.[11] If all people are to enjoy equality of educational opportunity, then clearly it is impermissible to discriminate on grounds of learning difficulty or disability; consequently, children with special educational needs are entitled to education in the same way as everyone else, albeit with the necessary allowances made for differences in capacity.

Further detail relating to the educational rights of children with special educational needs is contained in Article 23 of the UNCRC, which deals specifically with the rights of disabled children. Paragraphs (1) to (3) of Article 23 state as follows:

> "1. States Parties recognize 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.
> 2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

[11] Hodgson, *The Human Right to Education (Ashgate, Aldershot, 1998)*, pp.63–64.

> 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child and shall be designed to ensure that the disabled child has effective access to and receives 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."

Article 23 clearly encourages all State Parties to provide free education and training to disabled children, although paragraph (2) allows them to avoid doing so where sufficient resources are not available. This clearly leads to difficulty where the political will is lacking to address the needs of a group such as disabled children, who are numerically small and geographically dispersed, and consequently do not have any electoral clout. Even when the economy is strong, politicians are reluctant to spend money on the disabled; in times of economic difficulty, they are among the first to suffer.

In relation to the ECHR, it can be argued on three grounds that Article 2 of the First Protocol does confer, to a certain extent, a right to special educational provision. The text of Article 2 of the First Protocol is—like Article 26(1) of the UDHR and Article 13(1) of the ICESCR—all-inclusive, stating that "[n]o person shall be denied the right to education." The use of the phrase "no person" clearly indicates, in a similar manner to the global instruments, that children with learning difficulties or disabilities have the same rights as anyone else. It could also be argued that the right to special educational provision was bolstered by the interpretation afforded to Article 2 by the European Court of Human Rights in the *Belgian Linguistics* case, where it was held that the right to education includes the right to an effective education,[12] implying the need to make allowances for differences of capacity. Finally, as noted above, the right guaranteed by Article 2 is generally viewed as being one of equal access to existing educational facilities; such a right would clearly prohibit discrimination on grounds of learning difficulty or disability.

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[12] (1979–80) 1 E.H.R.R. 252 at 280–281. Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995), p.543 have commented that although the Court did not expressly mention the right to an effective education, its existence may be "inferred generally from the language the Court used in terms appropriate to the facts before it." Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate, Aldershot, 1999), pp.67–68 also argues that the right exists, citing the principle set down in *Airey v Ireland* (1979–80) 2 E.H.R.R. 305 that the Convention guarantees rights of a practical and effective nature. Finally, in *Graeme v United Kingdom* (Application No. 13887/88, February 5, 1990), the Commission referred to the child's "right to have an as effective [*sic.*] education as possible."

Unfortunately, the ECHR case law which specifically deals with the issue of special educational needs seems to indicate that Article 2 of the First Protocol has a limited role to play in this area.[13] As noted above, it has been held that the negative formulation of the provision does not require the State to provide any education at all. Discussion has revolved almost entirely around the issue of integrated education for children with special needs, and the Commission and Court have left an enormous amount of discretion to national authorities as to how best to use their resources.[14]

Irish Law

The terms of Article 42.4 of the Irish Constitution make it clear that the only level of education which the State has a duty to provide for is primary education. It is well established that primary education need not be provided directly by the State – it may fund the provision of such education by a third party, which in practice is what has exclusively occurred in the primary school system since the foundation of the State. The courts have imposed conditions of effectiveness[15] and reasonable accessibility[16] on the provision of free primary education. The Constitution does not explicitly refer to any level of education other than primary education; what it does provide, in Article 42.4, is that the State "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". It is unclear what exactly this provision requires of the State, especially since it has not received any detailed consideration by the courts.

While the Irish Constitution makes no express provision for a right to special educational provision, the existence of such a right is no longer in any doubt, and indeed can be said to derive from a number of different provisions. By far the most relevant and most frequently litigated provision is the first clause of Article 42.4, which provides that "[t]he State shall provide for free primary education". Although this is expressed as a duty on

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[13] See generally McManus, *Education and the Courts* (Jordans, Bristol, 2004), pp.232–237.
[14] See, *e.g. P and LD v United Kingdom* (Application No. 14135/88, October 2, 1989); *Simpson v United Kingdom* (Application No. 14688/89, December 4, 1989); *Graeme v United Kingdom* (Application No. 13887/88, February 5, 1990), and *McIntyre v United Kingdom* (Application No. 29046/95, October 21, 1998).
[15] See McWilliam J. in *Crowley v Ireland*, unreported, High Court, December 1, 1977 at 7 and Parke J. in *G v An Bord Uchtála* [1980] I.R. 32 at 100.
[16] See McMahon J. in *Crowley v Ireland* [1980] I.R. 102 at 113.

the State rather than as a right of the child, it is well established that children have a right which corresponds to this duty since the Supreme Court decision in *Crowley v Ireland*:

> "…the imposition of the duty under Article 42, s. 4, of the Constitution creates a corresponding right in those in [*sic.*] whose behalf it is imposed to receive what must be provided. In my view, it cannot be doubted that citizens have the right to receive what it is the State's duty to provide for under Article 42, s. 4."[17]

In terms of whether this provision could extend to encompass special educational provision, it is certain that the framers of the Constitution in 1937 intended the term "primary education" to bear its ordinary meaning of the time: education from approximately the ages of 4 to 12 years provided in primary schools, comprised of reading, writing, arithmetic and religious instruction. However, it is also well established that the Constitution is to be interpreted in light of prevailing standards and attitudes.[18] Since the general conception of what education should comprise of has changed dramatically since 1937, the central question in special educational needs disputes has concerned what exactly is understood by the expression "primary education", as employed in Article 42.4, and whether it includes a right to special educational provision.

This issue first reared its head in the Irish courts in *O'Donoghue v Minister for Health*.[19] The applicant, a profoundly disabled child, claimed that by failing to provide education suitable to his needs, the State had failed in its duty to provide for his free primary education. Since the State had quite obviously failed to provide suitable education, its defence was directed towards showing that, in this case, no such duty existed. Accordingly, it relied on two main arguments. First, the State argued that the applicant, by reason of being profoundly mentally and physically disabled, was ineducable, and that all that could be done for him to make his life more tolerable was to attempt to train him in the basics of bodily function and movement.[20] O'Hanlon J. rejected this argument on the basis of the expert medical evidence presented.[21] Second, the State argued that the primary education contemplated by Article 42.4 was scholastic in character and exemplified in the curriculum of primary schools, and accordingly would not be of any

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[17] [1980] I.R. 102 at 122, *per* O'Higgins C.J.
[18] See, *e.g.* Walsh J. in *McGee v Attorney General* [1974] I.R. 284 at 319 and Denham J. in *Sinnott v Minister for Education* [2001] 2 I.R. 545 at 664.
[19] [1996] 2 I.R. 20.
[20] *ibid* at 25.
[21] [1996] 2 I.R. 20 at 62–63.

benefit to the applicant. Such training as could be given to the applicant, they argued, was not properly describable as "education", and could not be regarded as "primary education" within the meaning of that expression as used in Article 42.4. Thus the issue of the definition of education, and more particularly of primary education, came to be central to the educational rights of disabled children.

In his judgment on the issue, O'Hanlon J. adopted the definition of education set down 30 years earlier by Ó Dálaigh C.J. in *Ryan v Attorney General*,[22] but struck a powerful blow for the rights of disabled children by adding on the clause "however limited these capacities may be":

> "I conclude, having regard to what has gone before, that there is a constitutional obligation imposed on the State by the provisions of Article 42, s.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, *however limited these capacities may be*."[23]

This expansive definition of education clearly contemplated that even the most severely disabled in society should be entitled to free primary education. This approach was confirmed by McGuinness J. in *Comerford v Minister for Education*,[24] where she stated that "the right to free primary education extends to every child, although the education provided must vary in accordance with the child's abilities and needs."[25] The full extent of what could be encompassed by the expression "primary education" was considered in *Sinnott v Minister for Education*.[26] Both Barr J. in the High Court[27] and Keane C.J. in the Supreme Court[28] expressed their approval of O'Hanlon J.'s findings in *O'Donoghue* in respect of the definition of primary education and the existence of a right to special educational provision. Murray J. stated that "the nature and content of primary education

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[22] [1965] I.R. 294 at 350, *per* Ó Dálaigh C.J.
[23] [1996] 2 I.R. 20 at 65 (emphasis added). The learned judge reached this conclusion after considering, *inter alia*, legislative developments such as the English Education Act 1970 and the US Education of All Handicapped Children Act 1975 as well as reports such as the English *Warnock Report* (*Special Educational Needs: Report of the Committee into the Education of Handicapped Children and Young People* (1978) Cmnd 7212) and the Irish *Blue Report* (Stationery Office, Dublin, 1983).
[24] [1997] 2 I.L.R.M. 134.
[25] *ibid* at 143.
[26] [2001] 2 I.R. 545.
[27] *ibid* at 579.
[28] *ibid* at 628.

must be defined in contemporary circumstances. That means where children are capable of benefiting from primary education (however its content is defined) the State have an obligation to ensure that it is provided free to children who can benefit from it including those who suffer from severe mental or physical handicap."[29] Geoghegan J. rejected the argument that the requirements of profoundly disabled children, such as toilet training and speech therapy, are not education as such but are more properly regarded as health or therapy treatments:

> "If a handicapped child, unlike a normal child, cannot naturally acquire skills in the home but has to have special training to acquire them then I cannot see why that special training would be inappropriately described as "education". At any rate I do not think that health therapy and education requirements are mutually exclusive of each other. They can overlap and can be given a double if not a treble description."[30]

While Murphy J. dissented on this point, it is clear from the above that the weight of judicial opinion favours the view that the expression "primary education" in Article 42.4 encompasses special educational provision. Consequently, since the child has a right to receive the primary education which it is the State's duty to provide for,[31] it follows that the right to free primary education under Article 42.4 encompasses a right to receive free special educational provision.

More recently, in *O'Carolan v Minister for Education*,[32] MacMenamin J. held that in determining whether the applicant's constitutional right to education was being vindicated, the test was whether the provision on offer was "appropriate". The test was not whether an alternative placement was better or the best, so long as the placement in question was appropriate to the needs of the particular child.[33] This was in spite of the learned judge stating that he was basing his decision on the definition of education set down by O'Hanlon J. in *O'Donoghue v Minister for Health*[34] and subsequently approved in a number of cases. In this context, it should be recalled that in the relevant passage of that decision, O'Hanlon J. stated that the "education" contemplated in Article 42.4 should enable a child "to make the *best possible use* of his or her inherent and potential

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[29] *ibid* at 682.
[30] *ibid* at 724.
[31] *Crowley v Ireland* [1980] I.R. 102 at 122, *per* O'Higgins C.J.
[32] [2005] I.E.H.C. 296.
[33] *ibid* at 46.
[34] [1996] 2 I.R. 20 at 65.

capacities".[35] This would seem to run directly contrary to MacMenamin J.'s decision in *O'Carolan* that the test was not whether an alternative placement was better or the best, so long as the placement in question was appropriate to the needs of the particular child. Consequently, MacMenamin J.'s reliance on O'Hanlon J.'s decision in *O'Donoghue* would seem to be somewhat ill-founded, since that decision undermines rather than supports his position.[36]

In the case of some disabilities, such as autism, the termination of education results in an "unlearning" process whereby a cessation of education at any age results in the child regressing back to his or her condition prior to commencing education.[37] It would seem clear that to deny such children a right to ongoing education into adulthood at public expense is to render their previous education worthless and indeed a waste of time and money. This point was taken up by Barr J. in the High Court in *Sinnott v Minster for Education*, where he expressed his opinion that:

> "There is nothing in Article 42.4 which supports the contention that there is an age limitation on a citizen's right to on-going primary education provided by or on behalf of the State. It is evident that the right to primary education would be fundamentally flawed if narrowly interpreted as ending at an arbitrary age—18 years. … the ultimate criterion in interpreting the State's constitutional obligation to provide for primary education of the grievously disabled is "need" and not "age"…To cut off a crucial educational life-line because a child has reached his/her majority and to thereby condemn the sufferer to the risk of regression in hard earned gains which have enhanced his/her life would amount to an appalling loss, the effect of which might be to negative the advantages of the constitutional right to education (if provided) enjoyed by the sufferer for many years during infancy…Such an interpretation would create an obvious constitutional injustice."[38]

Unfortunately, this aspect of the decision was successfully appealed to the Supreme Court. In the absence of any reference to children in Article 42.4, the majority of the Court were influenced by the fact that such reference is made in every other subsection of Article 42; a harmonious interpretation requires that the education referred to in Article 42.4 is that to be given to children. Murray J. stated that Article 42.1, with its reference to children, "sets the tenor and ambit" of Article 42 and that "Article 42 taken as a whole is

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[35] [1996] 2 I.R. 20 at 65 (emphasis added).
[36] See further O'Mahony, "The Right to Education and 'Constitutionally Appropriate' Provision" (2006) 28 D.U.L.J. 422.
[37] See the evidence cited by O'Hanlon J., [1996] 2 I.R. 20 at 29–30.
[38] [2001] 2 I.R. 545 at 583–584.

child centred".[39] Murray J. stated that he did not find authority anywhere in the Constitution for interpreting it otherwise.[40] In her analysis of the issue, Denham J. stated that the term "child" "falls to be construed in light of the plain language of Article 42…[and] in general use describes a young person...The child is described within a family where the parents are the educator. It is addressed to a young person. It is age related."[41] Hardiman J. also examined the structure of Article 42 as a whole, noting its focus on the family,[42] and rejected the argument advanced by the plaintiff that "child" could be construed as meaning simply "offspring" without any connotation of age. He stated his view that "[a]part altogether from the analysis of the language and of the structure of the Article offered above, the first plaintiff's contention simply does violence to the ordinary meaning of the word."[43]

Geoghegan J. said that he did not attach any significance to the absence of the word "children" in Article 42.4.[44] He rejected the argument that disabled adults, due to their incapacities and child-like condition, are not "adults" in the normal sense of the word.[45] Furthermore, in spite of accepting that the "unlearning" process which would be suffered by some disabled children if their education was cut off at the age of 18 would render the education received useless in adult life, Geoghegan J. still held that to grant such children a right to education which extended into adult life "would amount to an excessive straining of the wording of Article 42.4 when read in context."[46] The learned judge concluded: "I am unable to discern in Article 42 no matter what contemporary interpretation one gives to it any justification for the view that it continues to apply into adulthood."[47]

Keane C.J. dissented on this point; the learned Chief Justice reviewed the various age thresholds set by the law relating to the age of criminal responsibility (14), the age of consent (17), the age to vote (18) and the age of eligibility to become President of Ireland (35), and concluded that none of these thresholds is of any significance to a

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[39] *ibid* at 683.
[40] [2001] 2 I.R. 545 at 683.
[41] *ibid* at 654.
[42] [2001] 2 I.R. 545 at 688–689.
[43] [2001] 2 I.R. 545 at 690.
[44] *ibid* at 719.
[45] *ibid* at 720.
[46] *ibid*.
[47] *ibid* at 722.

profoundly disabled child.[48] This, along with the unlearning aspect of the plaintiff's disability, led Keane C.J. to hold that the plaintiff was entitled to a declaration that State was "obliged by Article 42.4 of the Constitution to provide for free primary education for the plaintiff appropriate to his needs for as long as he was capable of benefiting from the same."[49]

The decision of the Supreme Court on the age issue has been the subject of much criticism for its restrictive effect for children and young adults suffering from disabilities such as autism which have an "unlearning" aspect.[50] On the positive side, the *Sinnott* case, and the many hundreds of similar cases which came to court around the same time, brought into focus the need for a legislative framework to provide for the education of children with special educational needs.[51] Such a framework was enacted in the form of the Education for Persons with Special Educational Needs Act 2004, which is a broadly progressive piece of legislation that has both borrowed from and improved upon the legal framework for special education in England & Wales, and makes detailed provision for assessments of educational needs and enforceable education plans for children diagnosed with special educational needs.[52] Unfortunately, while the implementation period envisaged full commencement of this Act by 2009, the economic downturn has led to a (more or less indefinite) delay in this schedule, and the most important provisions of the Act remain inoperable.[53] Moreover, the restrictive effect of the *Sinnott* decision can be seen in the fact that the scheme proposed under the 2004 Act applies only to children under the age of 18.

Apart from the area of special educational needs, the other major challenges which currently present themselves in the field of education are first, the quality of provision, particularly of facilities, and second, the lack of religious diversity in the primary

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[48] *ibid* at 639.
[49] *ibid*.
[50] See, in particular, O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall, Dublin, 2006), Chapter 6; Ryan, "Disability and the Right to Education: Defining the Constitutional 'Child'" (2002) 24 D.U.L.J. 96; Quinlivan & Keys, "Official Indifference and Persistent Procrastination: An Analysis of *Sinnott*" [2002] J.S.I.J. 163; De Blacam, "Children, Constitutional Rights and the Separation of Powers" [2002] 37 *Irish Jurist* 113, and Doyle, "The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation" [2002] 10 I.S.L.R. 222.
[51] On the need for a detailed legislative framework in the field of special educational needs, see O'Mahony, "Constitutionalism and Legislation in Special Educational Needs Law: An Anglo-Irish Perspective" [2008] *Public Law* 125.
[52] See O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall, Dublin, 2006), Chapter 7.
[53] See, e.g., "Education Cuts Run Deepest", *The Irish Times*, October 25, 2008.

education system in particular. In respect of the issue of quality, it is commonplace for schools to be housed in run-down buildings, or for temporary prefabs to become *de facto* permanent buildings. There is a serious shortfall in the capital funding provided to schools, with the result that many – perhaps most – schools seek to make up the shortfall through voluntary contributions from parents. This calls into question the extent to which the State is discharging its duty to provide for primary education free of charge, and the situation will undoubtedly be exacerbated by cutbacks in the coming years. Until an action is taken, it will remain unclear what the precise legal position is here, particularly since primary schools are exclusively privately owned and managed, albeit State funded.

As regards religious diversity, the Irish education system is overwhelmingly denominational in nature with over 90% of primary schools being Catholic denominational and most of the remainder being Protestant denominational. While a small multi-denominational sector is beginning to emerge, principally through the Educate Together movement, this still accounts for only a handful of the total number of primary schools.[54] Since denominational schools operate under the integrated curriculum, whereby "a religious spirit should inform and vivifies the whole work of the school",[55] the right guaranteed under Article 44.2.4° of the Constitution to withdraw a child from timetabled periods of religious "instruction" does not protect children of different or no denominations from being influenced by the broader religious "education" provided at the school.[56] Moreover, many schools do not have the resources to cater for such children during timetabled instruction and parents who seek to withdraw their children are frequently either given no opt-out whatsoever, or are told that they will have to care for them during this period.[57] Given the absence of any realistic alternative to a Catholic denominational school for the majority of parents and children in Ireland, it is

[54] Statistics provided to the author by the Department of Education for 2005/2006 indicate that during that year, 98.5 per cent of ordinary national schools were denominational, with 92.1 per cent being Catholic denominational. 44 out of 3160 ordinary national schools were multi-denominational, while 2 inter-denominational schools were also listed. A similar situation pertained to special schools, with 119 out of 124 being Catholic denominational. The number of multidenominational schools has increased somewhat in the three years since – there are now 56 Educate Together schools, with 12 more planned for next year – but it is clear that they still represent a tiny minority of the overall total.

[55] *Rules for National School* (Stationery Office, Dublin, 1965), Rule 68, p.38. Rule 68 goes on to state that the teacher "should constantly inculcate" various Catholic values in their students and that the primary duty of the educator is to habituate the students to observe the laws of God.

[56] See the distinction drawn by Barrington J. in *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 2 I.L.R.M. 81 at 101.

[57] See Mawhinney, "Freedom of religion in the Irish primary school system: a failure to protect human rights?" (2007) 27 *Legal Studies* 379.

clear that this position raises serious concerns for the right to freedom of thought, conscience and religion for those who are not members of the Catholic or Protestant faiths.[58]

Enforcement Mechanisms

In examining the enforcement mechanisms available in cases where the right to education has not been vindicated, it is important to assess the effectiveness of those mechanisms. A right to an effective remedy is clearly contemplated by international law, particularly in Article 8 of the UDHR which states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The concept of effectiveness should be considered specifically in the context of a failure to vindicate a child's right to education, where there are some particular considerations which must be taken into account if a remedy is to be considered effective:

1. *Speed*: time is of the essence for children whose right to education is not being vindicated. First, any delay in making adequate provision for their needs can cause irreversible damage to their educational prospects. Second, given that *Sinnott v Minister for Education* has imposed an age limitation on entitlements to provision, children have a limited time period during which they are legally entitled to benefit from State-funded educational provision. Any delay in securing their entitlements has the effect of reducing the length of this period even further.
2. *Accessibility*: given the cumulative disadvantage suffered by both children who suffer from educational disadvantage and their parents, it is essential that remedies be made as accessible as possible to them. They already have enough obstacles to overcome in life, and they do not need further unnecessary obstacles placed between them and an effective remedy for a genuine grievance.[59]
3. *Compensation for past inadequacies in provision*: if inadequate provision has been made for a child in the past, then that child has lost a period of educational

[58] See generally O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall, Dublin, 2006), Chapter 4, pp.69–83.
[59] On this point see further Lynch & Connolly, "Equality before the Law" in *Report of the Constitution Review Group* (Stationery Office, Dublin, 1996), p. 588.

provision which can never be adequately replaced. Financial compensation should be awarded as a mark of disapproval of the failure to make adequate provision, and to attempt to go some of the way towards compensating the child for the resulting damage. Financial compensation alone, however, is not enough.

4. *Guarantee of securing adequate provision in the future*: what has happened in the past cannot be changed, but what will happen in the future can be. To this end, a remedy is only adequate if it ensures that the inadequacies from which the child's provision has suffered in past are not repeated in the future. Unless mandatory relief is available for this purpose, the only alternative in cases where the needs of the child remain unmet is to repeatedly award damages; as already stated, damages can never fully compensate a child for an inadequate education.

A plaintiff in Ireland seeking a remedy for a failure to vindicate his or her right to education has, broadly speaking, four main avenues that can be pursued. The most obvious and most travelled route is to seek judicial review on the basis of a failure to vindicate the right to free primary education under Article 42.4 of the Constitution. Alternatively, in certain circumstances, a case may be based on a claim for breach of statutory duty, particular under the Education Act 1998 and (when implemented) the Education for Persons with Special Educational Needs Act 2004. A number of statutory bodies may also afford redress of sorts, specifically the Ombudsman for Children, the Director of Equality Investigations and (when implemented) the Special Education Appeals Board. Finally, in certain types of cases, particularly where a special educational need is misdiagnosed or addressed incorrectly, a plaintiff may seek damages in tort law for professional negligence or so-called educational malpractice.

Breach of Constitutional Right

Where a breach of the right to education under the Constitution is alleged, there are three main remedies which may be pursued: damages, declaratory relief and mandatory injunctive relief. Damages are designed to compensate for past loss of education, and are available at ordinary, aggravated and exemplary levels.[60] However, given the nature of cases where the right to education has not been vindicated, the courts have accepted

[60] See *Conway v Irish National Teachers Organisation* [1991] 2 I.R. 305.

that damages are not an adequate remedy.[61] In order to secure future vindication, declaratory relief is the preferred option, whereby the courts make a declaration of the law applicable to the case at hand, and leave it to the parties to the case to respond so as to bring their conduct into line with the law as declared. In this way, the courts seek to avoid dictating matters of policy and resource allocation to the Executive branch of government by leaving the details of the response to the declared legal position to the relevant Minister.[62] However, in a number of cases in the late 1990s, the Executive failed to respond to a series of court declarations in virtually identical cases. In *DB v Minister for Justice*,[63] Kelly J. found that this failure was as a result of culpable delay stemming from bureaucratic wrangling between government departments, and ultimately took the additional step of granting mandatory injunctive relief compelling the Minister to provide specified facilities within a designated timeframe. Kelly J. repeated this course of action shortly afterwards in *TD v Minister for Education*,[64] noting that of the many cases that had come before him, *DB* was the only one where the rights of the applicant had been responded to by the Executive.

As a course of action designed to give teeth to a justiciable constitutional right that was being consistently flouted, the granting of a mandatory injunction by Kelly J. had much to commend it, and a substantial body of jurisprudence to support it.[65] The decisions in *DB* and *TD* made it crystal clear that the injunction was a last resort to be utilised only where previous declaration had been ignored, the applicants were at serious risk of harm, time was of the essence and reasonable efforts had not been made by the Executive to put things to right.[66] In other words, an injunction should only be granted where all other remedies have been proven to be ineffective for the vindication of the right, and Kelly J. felt that this had been adequately established in the cases at hand. In spite of this, *TD v Minister for Education* was appealed to the Supreme Court, who overturned the decision by a majority of 4 to 1.[67]

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[61] See, e.g., *Nagle v South Western Area Health Board* (unreported, High Court, Herbert J., October 30, 2001 at 43) and *Cronin v Minister for Education* [2004] 3 I.R. 205 at 214.
[62] See, e.g., *O'Donoghue v Minister for Health* [1996] 2 I.R. 20 at 71 and *Comerford v Minister for Education* [1997] 2 I.L.R.M. 134 at 147–148
[63] [1999] 1 I.L.R.M. 93.
[64] [2000] 3 I.R. 62.
[65] See, e.g., *State (Quinn) v Ryan* [1965] I.R. 70 at 122; *Byrne v Ireland* [1972] I.R. 241 at 265 *Boland v An Taoiseach* [1974] I.R. 338 at 362, and *DG v Eastern Health Board* [1997] 3 I.R. 511 at 522.
[66] See the criteria set down by Kelly J. at [2000] 3 I.R. 62 at 84.
[67] [2001] 4 I.R. 259.

The central feature of the majority decision in the Supreme Court was that a mandatory injunction compelling the provision of educational services involved the courts in policy formation and resource allocation; as such, it was a matter of distributive justice, which is more properly dealt with by the Executive, who are electorally accountable for their actions and better placed than the courts to respond to competing claims on the public purse. In this regard, extensive reliance was placed on the decision of the High Court in *O'Reilly v Limerick Corporation*,[68] in which Costello J. distinguished between distributive justice, as described above, and commutative justice, which involves calculating what is due from one individual or body to another on foot of a wrong, and which is properly within the domain of the courts. The view was also expressed that to allow the courts to make orders such as these would be to recognise the courts as being superior to the elected organs of State, where no such relationship was recognised by the Constitution. The reasoning in the case has been extensively criticised; it has been observed by the present author that a case involving the breach of the right to education is in fact a case of commutative justice, in which mandatory relief was the only effective way of righting the wrong in the case at hand, and that the courts are merely giving effect to the supremacy of the Constitution rather than attempting to establish any supremacy of the courts. The majority decision fails to recognise that the right to education is, in fact, a justiciable right under the Irish Constitution, and that the applicant, whose rights have been found not to have been vindicated, has been left without an effective remedy.[69]

More recently, in *Cronin v Minister for Education*,[70] Laffoy J. suggested that the decision in *TD* applied only to situations where an injunction ordered the provision of an entirely new range of services; she held that the interlocutory injunction which she granted, which compelled the extension to the applicant of services already made available by the Minister, did not "fall foul" of *TD*. This has alleviated the restrictive effect of *TD*, but gives rise to an unsatisfactory situation whereby an effective remedy is available for the less serious failure to extend existing services to an individual, but not for the more serious failure to provide any services at all for an entire category of children.[71]

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[68] [1989] I.L.R.M. 181.
[69] See O'Mahony, "Education, Remedies, and the Separation of Powers" (2002) 24 D.U.L.J. 57 and *Educational Rights in Irish Law*, Chapter 8.
[70] [2004] 3 I.R. 205.
[71] See O'Mahony, "A New Slant on Educational Rights and Mandatory Injunctions?" (2005) 27 D.U.L.J. 363.

Breach of Statutory Duty

In Ireland, a cause of action is available for a breach of a statutory duty as a matter of strict liability, provided that the duty is an absolute duty rather than a discretion, and that it is owed to a limited and identifiable class of people.[72] Hogan & Morgan have commented that since the statute itself rarely specifies whether a breach of a statutory duty would give rise to a private cause of action, "the courts will engage in the fictitious exercise of imputing legislative intent in order to determine whether breach of the statute will give rise to a civil action."[73] In the context of educational rights, there are two pieces of legislation which may be relevant to an action for breach of statutory duty: the Education Act 1998 and the Education for Persons with Special Educational Needs Act 2004. The Education Act 1998 imposes a number of statutory duties; of these, the very limited amount of litigation which has taken place relates primarily to the variety of functions of the Minister for Education which arise under s.7.[74] In *Nagle v South Western Area Health Board*, Herbert J. found that there was a real possibility that the plaintiff would succeed, at the hearing of the action, in obtaining a declaration that the Minister for Education had failed in his statutory duty under s.7 of the 1998 Act, and granted an interlocutory mandatory injunction accordingly.[75] A similar course of action was followed by Laffoy J. in *Cronin v Minister for Education*.[76]

The question of whether a private law right of action lies in respect of breach of the variety of statutory duties set down in the Education for Persons with Special Educational Needs Act 2004 has not yet been litigated as the Act has not yet been commenced. However, all the signs point towards the existence of such a right. First, it could be said that children with special educational needs are very much a limited and identifiable class of people. Furthermore, in imputing legislative intent, discussion at Committee stage clearly indicates that a right to sue for breach of statutory duty is

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[72] See *Pine Valley Developments Ltd v Minister for the Environment* [1987] I.R. 23 at 36.
[73] Hogan & Morgan, *Administrative Law in Ireland* (3rd ed., Sweet & Maxwell, Dublin, 1998), p.816.
[74] These functions include to ensure that there is made available to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person; to determine national education policy; to plan and co-ordinate the provision of education and support services; to provide funding for schools, and to monitor and assess the quality, efficiency and effectiveness of the education system.
[75] Unreported, High Court, Herbert J., October 30, 2001 at 43–44.
[76] [2004] 3 I.R. 205 at 214. Note that the plaintiff in *Cronin* also relied on s.6(g) of the 1998 Act, which provides that every person concerned in the implementation of the Act should have regard to the object of promoting effective liaison and consultation between all schools, teachers, authorities or other persons or bodies who have a special interest in or experience of the education of students with special educational needs and the Minister.

contemplated within the legislation.[77] In relation to s.7 of the Education Act 1998, then it must be noted that the scope of that provision is hugely restricted by its in-built resource qualification.[78]

Special Education Appeals Board

Cases for breach of constitutional rights and breach of statutory duty have the advantage that applicants may be awarded damages for past failures and potentially, in certain circumstances, secure mandatory injunctions compelling future provision. However, in relation to the other characteristics of an effective remedy – speed and accessibility – they are severely lacking, as court actions are prohibitively complex and expensive and far too protracted to constitute an adequate response to a child whose right to education is being breached. Accordingly, specialist tribunals are one way of circumventing the slow and inaccessible nature of the courts. In this regard, when the Education for Persons with Special Educational Needs Act is eventually commenced, one of its major features from an enforcement perspective is the establishment of the Special Education Appeals Board under s.36, a move which seems to be based largely on the success of the Special Educational Needs and Disability Tribunal (SENDIST) in England & Wales.[79] Specific provision is made for the independence of the Appeals Board[80] as well as the informality of its proceedings.[81] Strict time limits are set out for the determination of appeals, varying from one month to six months, depending on the nature of the appeal. The Minister for Education is required by the Act to appoint a chairperson and ordinary members "from among persons who have special interest in or knowledge of education and in particular the education of persons with special educational needs."[82]

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[77] See the comments made by the Minister for Education and Science, Noel Dempsey, Dáil Select Committee on Education and Science, January 28, 2004.
[78] s.7(4)(a)(i) provides that one of the matters to which the Minister for Education is required to have regard in carrying out his functions under s.7 is the availability of resources.
[79] The SENDIST was established as the Special Educational Needs Tribunal by s.177 of the Education Act 1996, and re-named as the SENDIST by s.333(1z) of the Education Act 1996 (as inserted by Sch.18, paragraph 4 of the Education Act 2002). For a detailed account of the operation of the SENDIST, see Harris, "Access to justice for parents and children over schooling decisions—the role and reform of education tribunals" [1995] 7 C.F.L.Q. 81 and *Special Educational Needs and Access to Justice: The Role of the Special Educational Needs Tribunal* (Jordans, Bristol, 1997).
[80] s.36(4).
[81] s.36(3)(b).
[82] s.36(6).

The jurisdiction of the Appeals Board is, like the SENDIST, largely procedural in nature, and the right of appeal is largely exercised by parents "in respect of their child".[83] While the Appeals Board adopts the same approach as the SENDIST in excluding the child from the appeals process, it differs from the SENDIST in that the right of appeal is not entirely restricted to parents. Provision is also made for appeals to be taken by a school principal against a decision of the National Council for Special Education,[84] a board of management of a school against the designation of the school in an education plan,[85] and even for the Appeals Board to be called upon to resolve a dispute between a health board and the Council.[86] This is an interesting difference of approach to England & Wales, where only the parents may appeal to the SENDIST, even if the request being refused has been made by someone else.[87] While the 2004 Act makes extensive provision for time limits for the determination of appeals, it has been criticised for the inconsistency of its approach to the imposition of time limits on the bringing of appeals.[88]

Appeals may be brought to the Special Education Appeals Board in respect of the following matters:

1. A refusal by the Council to arrange for an assessment following a request by a school principal—appeal to be brought by the principal or the parents.[89]
2. A refusal by the Council to arrange for the preparation of an education plan following a request by a school principal—appeal to be brought by the principal or the parents.[90]
3. A refusal by a health board or the Council to arrange for an assessment following a request by a child's parents—appeal to be brought by the parents.[91]
4. An assessment, on the grounds that it was not carried out in a manner which conformed to the standards determined under the Act—appeal to be brought by the parents.[92]

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[83] See ss.6 and 12.
[84] See s.3(13).
[85] See s.10(3).
[86] See s.7(5).
[87] See, *e.g.* s.329A(8)(b) of the Education Act 1996 (as inserted by s.8 of the Special Educational Needs and Disability Act 2001).
[88] See Meaney, Kiernan & Monahan, *Special Educational Needs and the Law* (Thomson Round Hall, Dublin, 2005), pp.230–231.
[89] Education for Persons with Special Educational Needs Act 2004, s.3(13)—no time limit for the determination of the appeal.
[90] s.3(13)—no time limit for the determination of the appeal.
[91] s.4(7)—time limit of 6 weeks for the determination of the appeal.

5. A dispute between a health board and the Council as to which of them can more effectively provide particular services identified as being required in respect of a child by an assessment or an education plan.[93]
6. The designation of a particular school in a child's education plan—appeal to brought by board of management.[94]
7. A recommendation of the Council, communicated to the school as part of that designation, in respect of the additional resources to be given to the school for the purposes of implementing that education plan—appeal to be brought by the board of management.[95]
8. A refusal by the Council to designate the school requested by the parents in an education plan—appeal to be brought by the parents.[96]
9. A refusal by a school principal to comply with a parent's request for a review of an education plan—appeal to be brought by the parents.[97]
10. The description of a child's special educational needs in an education plan—appeal to be brought by the parents.[98]
11. A failure to implement an education plan or any part thereof—appeal to be brought by the parents.[99]
12. A refusal by a health board to comply with a request by the Council to assist in the implementation of an education plan—appeal to be brought by the Council.[100]

The most obvious omission is the rather puzzling failure to provide for a right of appeal against the substantive determination of an assessment of educational needs. The powers of the Appeals Board upon determining an appeal are largely similar to those of the SENDIST, such as directing a body to comply with the request refused, to amend the education plan or recommendation complained of, or to dismiss the appeal. The Appeals Board does not have jurisdiction to grant interim relief or to award damages. In this latter respect, the Appeals Board shares the major failing of the SENDIST in that its powers

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[92] s.6(1)—time limit of 2 months for the determination of the appeal, in accordance with s.6(2). The standards referred to are set down in ss.4 and 5 of the Act.
[93] s.7(5)—time limit of 2 months for the determination of the appeal. Such a dispute is to be referred to the Appeals Board by either or both of the bodies within 2 months of arising.
[94] s.10(3)(a)—time limit of 2 months for the determination of the appeal, in accordance with s.10(9).
[95] s.10(3)(b)—time limit of 2 months for the determination of the appeal, in accordance with s.10(9).
[96] s.10(6)—time limit of 2 months for the determination of the appeal, in accordance with s.10(9).
[97] s.11(6)—time limit of 1 month for the determination of the appeal, in accordance with s.11(7).
[98] s.12(1)(a)—time limit of 2 months for the determination of the appeal, in accordance with s.12(2).
[99] s.12(1)(b)—time limit of 2 months for the determination of the appeal, in accordance with s.12(2).
[100] s.39(5)—no time limit for the determination of the appeal.

upon determining an appeal are rather limited. However, this need not necessarily be as big an issue as it is in England & Wales, where the mere existence of the SENDIST has been deemed to preclude the availability of actions for judicial review in cases falling within its jurisdiction, in spite of the limited powers of the Tribunal.[101] It is quite possible that an Irish court would hold that the limited powers of the Appeals Board do not provide adequate protection for the constitutional right to education, and that consequently a case may still be brought which relies on constitutional principles. Such an outcome is by no means certain, but it is submitted that the limited powers of the Appeals Board do not justify its existence acting as a bar to recourse to the Constitution. Having said that, the Appeals Board would be a more effective mechanism if it could act as more of a "one-stop shop" which could not only direct a particular course of action, but also award compensation for past failures without the need for recourse to lengthy and burdensome court proceedings.

Director of Equality Investigations

The Equal Status Act 2000 has a somewhat limited impact in the field of educational rights. While the Act places educational establishments under certain obligations not to discriminate on grounds of disability,[102] the force of these obligations is largely undermined by affording a defence to such establishments in the event that any necessary special treatment and facilities involve more than a nominal cost.[103] Furthermore, although s.3 of the Act also prohibits discrimination on grounds of religion, s.7(2)(c) permits educational institutions to engage in such discrimination in its admissions if it is necessary to do so in order to maintain the religious ethos of the school. Nonetheless, in spite of these qualification to the application of the Act to educational establishments, the remedial procedures established by the Act merit discussion here as a separate and distinct statutory remedy.[104]

Under s.21(1) of the 2000 Act, a person who claims to have been discriminated against by an educational establishment may seek redress by referring his case to the Director

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[101] See *R v Special Educational Needs Tribunal ex parte F* [1996] E.L.R. 213 at 216 and *R v Special Educational Needs Tribunal ex parte South Glamorgan County Council* [1996] E.L.R. 326 at 329.
[102] See ss.3, 4, 7 and 14.
[103] See s.4(2).
[104] For a discussion of some of the educational case law taken under these mechanisms, see Whyte, "Implications for Schools of Irish Equality Legislation" in *Litigation Against Schools: Implications for School Management* (Glendenning & Binchy eds., Firstlaw, Dublin, 2006), pp.126–130.

of Equality Investigations (as established under s.75(1) of the Employment Equality Act 1998). Before any such referral can be made, the complainant is required, within 2 months of the alleged discrimination taking place, to notify the respondent in writing of the nature of the allegation and the complainant's intention, if unsatisfied with the respondent's response to the allegation, to seek redress by referring the case to the Director.[105] The complaint must be referred to the Director within 6 months of the alleged discrimination taking place.[106] Additionally, the Equality Authority is empowered under s.23(1) to refer cases to the Director where it appears to the Authority that discriminatory conduct is being generally directed against persons, or has been directed against a person who has not made a claim under s.21(1) and it is not reasonable to expect that the person will do so. Such a referral is to be dealt with in the same manner and to the same extent as if the case had been referred to the Director by an individual under s.21(1).[107]

The Director may refer cases referred to him under s.21 to mediation if it appears that the case could be resolved by mediation and neither party objects.[108] Otherwise, s.25(1) requires the Director to investigate the complaint and to hear all persons appearing to the Director to be interested and desiring to be heard. At the conclusion of the investigation, the Director is required to make a decision, and if the case is decided in favour of the complainant, the decision must make provision for redress.[109] Such redress may be either an order for compensation for the effects of the discrimination, or an order that a person or persons specified in the order take a specified course of action, or both.[110] Decisions of the Director can be appealed to the Circuit Court under s.28; no further appeal lies, other than to the High Court on a point of law. Application can also be made to the Circuit Court under s.31 to enforce compliance with an order made in a decision of the Director. In the event of a referral to the Director under s.23 results in the Director deciding that discriminatory conduct has taken place and that there is a

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[105] s.21(2); exceptions to this rule are provided for by ss.21(3) (as amended by s.54 of the Equality Act 2004).
[106] s.21(6); exceptions to this rule are provided for by ss.21(7). Both of these subsections have been amended by s.54 of the Equality Act 2004.
[107] s.23(2).
[108] ss.24(1) and ss.24(2). The procedures for such mediation are governed by ss.24(3)–24(6).
[109] s.25(4).
[110] s.27(1). The maximum amount of compensation which may be ordered under this section is limited by s.27(2) as the maximum amount that could be awarded by the District Court in civil cases in contract. This is currently set at €20,000 by s.14 of the Courts and Court Officers Act 2002. Section 27(4) (as inserted by s.61 of the Equality Act 2004) states that an order for compensation under this sections cannot be made in favour of the Equality Authority in a case referred to the Director under s.23(1).

likelihood of a further occurrence of the conduct, the Equality Authority may apply to the Circuit Court or High Court for an injunction or such other relief as the Court deems necessary to prevent the further occurrence.[111] Within the scope of the Equal Status Act 2000, referrals to the Director of Equality Investigations are a useful remedy; however, the limited scope of the Act itself clearly dilutes their overall utility.

Ombudsman for Children

One other statutory remedial avenue which should be discussed for the sake of completeness is the office of the Ombudsman for Children.[112] The Ombudsman for Children Act 2002 established the office of the Ombudsman for Children, whose functions include the examination and investigation of complaints against schools[113] in connection with the performance of their duties under s.9 of the Education Act 1998 (which include the identification and making of provision for students with a disability or other special educational needs and the promotion of equality of opportunity for all students[114]) and against public bodies.[115] The Act sets down a list of a number of grounds on which such an investigation may proceed.[116] Upon concluding the investigation, the Ombudsman for Children sends a statement of the results of the investigation to all interested parties[117] and can recommend that a matter be further considered[118] or the implementation of remedial measures.[119] Although on the whole, this is not a particularly significant remedial avenue for individual cases in the area of educational rights, given the lack of coercive force behind recommendations made by the Ombudsman, it is interesting to note that since the operation of the office commenced in 2004, almost half of the complaints received by the Ombudsman have related to a problem with the education of the child, with the most prominent sources of

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[111] s.23(3).
[112] See further Martin, "Key Roles of the Ombudsman for Children in Ireland: Promotion of Rights and Investigation of Grievances" (2004) 26 D.U.L.J. 56.
[113] Ombudsman for Children Act 2002, s.9.
[114] ss.9(a) and 9(e).
[115] Ombudsman for Children Act 2002, s.8.
[116] ss.8((b) and 9(1) of the Act state that the complaint should be examined or investigated if it seems that the action complained of was or may have been (i) taken without proper authority, (ii) taken on irrelevant grounds, (iii) the result of negligence or carelessness, (iv) based on erroneous or incomplete information, (v) improperly discriminatory, (vi) based on an undesirable administrative practice, or (vii) otherwise contrary to fair or sound administration.
[117] s.13(2).
[118] s.13(3)(a).
[119] s.13(3)(b).

complaints being special educational needs, school transport and the handling of bullying.[120]

Educational Malpractice

A limited form of remedy in certain cases is the possibility of suing in negligence for so-called educational malpractice in cases where a special educational need is either negligently misdiagnosed or not diagnosed at all. Such a cause of action has been successfully established in England & Wales following a number of cases, most prominently *Phelps v Hillingdon London Borough Council*.[121] It is likely that such a case, if it were to arise in the Irish context, would be dealt with on a similar basis, given the similarities in the law of professional negligence in the two jurisdictions.[122] However, the remedy suffers from a number of limitations apart from the obvious problems associated with the cost and delay inherent in court proceedings. It can only lead to an award of damages, which only relates to a past breach, and does not in itself secure adequate provision in the future (although it has clear deterrent value). Most cases where adequate provision was not made as a result of negligence will overlap with a breach of either the constitutional right to education or a statutory duty. Moreover, a successful negligence action will require the normal elements of professional negligence to be established, most particularly a departure from the accepted professional norms, the presence of quantifiable harm suffered by the child as a result and a causal link between that harm and the alleged negligence. For these reasons, it may be more straightforward to simply pursue a case for a breach of the constitutional right to education or of a statutory duty in the majority of cases, and restrict negligence actions to exceptional cases where negligence is present but the case is, for whatever reason, not covered by a constitutional or statutory duty.[123]

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[120] The breakdown of complaints received each year can be seen in the Annual Reports of the Ombudsman for Children, available at www.oco.ie. Education complaints accounted for 51% of complaints received in 2005, 41% in 2006, 44% in 2007 and 41% in 2008

[121] [1998] E.L.R. 38 (High Court); [1999] 1 All E.R. 421 (Court of Appeal); [2000] 4 All E.R. 504 (House of Lords).

[122] The combined effect of the seminal cases of *Bolam v Friern Hospital Management Committee* [1957] 2 All E.R. 118 and *Bolitho v City and Hackney Health Authority* [1997] 4 All E.R. 771 in England & Wales is essentially the same as the effect of the classic Irish authority of *Dunne v National Maternity Hospital* [1989] I.R. 91.

[123] See further O'Mahony, "Educational Malpractice Claims in Ireland: A Spectre on the Horizon?" (2004) 39 *Irish Jurist* 301 and *Educational Rights in Irish Law* (Thomson Round Hall, Dublin, 2006), Chapter 10.

Conclusion

The provision of free primary education appropriate to a child's needs, while clearly an essential component of the personal development of individuals and the political and economic development of society, is an inherently expensive and slow-burning exercise, where the long-term benefits are rarely seen within the lifetime of a particular government. Consequently, the provision of adequate funding to fully vindicate the right to education will always be under threat in times of recession, while the provision of adequate education to children with special educational needs will be permanently under threat – even when the economy is buoyant – as such provision is resource-intensive but does not gain much political capital, since it addresses the needs of a geographically dispersed minority. In this light, the only way to ensure that our politicians respond adequately to long-term educational needs rather than to short-term political interests is to have a strong constitutional right to education accompanied by a detailed legislative framework and the necessary enforcement mechanisms to give effect to it. Such enforcement mechanisms should be quick and accessible and be capable of providing compensation for past failures in provision as well as securing adequate provision into the future.

At present, Irish law falls down on the basis that the mechanisms that are potentially quick and accessible do not have the teeth to fully address both past and future failures in provision. The eventual commencement of the Education for Persons with Special Educational Needs Act 2004 and the establishment of the Special Education Appeals Board will partly address these failings, but the limited powers of the Appeals Board will mean that recourse to the courts will still be necessary. Until its establishment, the majority of aggrieved parties have no option other than costly and protracted court proceedings, where the discomfort of the present Supreme Court with the enforcement of even a justiciable economic and social right has resulted in a number of restrictive decisions relating to the scope and enforcement of the right to education, most notably *Sinnott* and *TD*. The eventual commencement of the 2004 Act will also help in this respect by shifting the focus of enforcement proceedings from constitutional rights to statutory duties, which the Courts are more willing to enforce. The key challenge in the meantime will be to keep the commencement of the Act on the political agenda during the current economic downturn and to resist any attempt to water down its provisions.