

Irish Human Rights and Equality Commission

**Observations on the Education (Admission to
Schools) Bill 2015**

November 2015



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

Irish Human Rights and Equality Commission

1. Summary of Observations and Recommendations

1 In accordance with section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014 ('2014 Act'),¹ the Irish Human Rights and Equality Commission ('the Commission') provides the following observations and recommendations on the human rights and equality implications of the Education (Admission to Schools) Bill 2015 ('2015 Bill'):

(a) Education admissions and the religious exemption clause:

Within the context of the 2015 Bill, the Commission recommends the Equal Status Acts should be amended to give effect to the principle that no child should be given preferential access to a publicly funded school on the basis of their religion. The amendment could include an individualised derogation granted by the Minister for Education and Skills in the case of a specific school where refusal to admit a student is proved to be essential to maintain the ethos of the school, and where no other alternative means is reasonably available to the Minister in that particular case.

(b) Schools admission policies and promoting the inclusive school:

The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that, in setting out the characteristic spirit and general objectives of the school, outside the specific context of faith formation and religious instruction which parents wish to avail of and where exemptions apply, regard shall be had to providing information in relation to religion in an objective, critical and pluralistic manner that avoids indoctrination.

The Commission recommends that the 2015 Bill presents an important opportunity to set down some minimum standards in relation to the nature of exemptions for students who do not want to attend religious instruction.

The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that in setting out the characteristic spirit and general objectives of the school regard shall be had to the values of an inclusive school that respects and accommodates diversity across all nine grounds in the equality legislation.

(c) School admission policies and the student's connection to the school:

The Commission recommends that the possibility of obtaining a derogation from the prohibition on schools from using the student's connection to the school by virtue of his or her relationship

¹ Section 10(2)(c) of the 2014 Act provides that a function of the Commission is 'to examine any legislative proposal and report its views on any implications for human rights or equality'.

with a specific category or categories of person should be limited to where a sibling is currently attending the school.

(d) The best interests of the child in decision making and appeals:

The Commission recommends that the wording of the new sections 66(2) and 66(4) that are to be inserted into the Education Act be amended to ensure that the best interest of the child is the *primary* standard to which the National Council for Special Education or Child and Family Agency, as the case may be, shall have regard to in both making a designation and making a decision not to designate a school.

The Commission recommends that the new Section 66 be amended to permit a parent to make an appeal when a school has been designated by the Child and Family Agency or NCSE when the parent believes that the designation is not in the best interest of the child or that the Agency or NCSE failed to take account of the wishes of the child.

2. Introduction

2 The Commission was established under the 2014 Act with a statutory remit to protect and promote human rights and equality, to encourage the development of a culture of respect for human rights, equality and intercultural understanding in the State, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.² The Commission is tasked with reviewing the adequacy and effectiveness of law and practice relating to the protection of human rights and equality, and with making recommendations to Government on measures to strengthen, protect and uphold human rights and equality accordingly.³ In accordance with section 10(2)(c) & (d) of the 2014 Act,⁴ the Commission would like to take this opportunity to provide its observations and recommendations on the human rights and equality implications of the 2015 Bill and some other measures the Commission considers the Government should make to strengthen protect and uphold human rights and equality in respect of admissions to schools.

3 The Commission welcomes the publication of the 2015 Bill.⁵ The stated aim of the legislation and the proposed accompanying regulations is to provide a new framework to govern school admissions policies for all primary and post-primary schools.⁶ The 2015 Bill proposes measures that will give practical effect to the existing right of children to be protected from discrimination in admission to school, and has the potential to support inclusion and interculturalism in schools and in Irish society more generally. While welcoming the overall aims and much of the content of the 2015 Bill as an important development in Ireland's education law, the Commission has a number of recommendations to strengthen the proposed legislation having regard to its statutory mandate to promote human rights and equality, and to encourage good practice in intercultural relations.

² The 2014 Act merged the former Irish Human Rights Commission and the former Equality Authority into a single enhanced body. In carrying out its statutory function under Part II of the 2014 Act, the Commission will have regard to the applicable definition of human rights in the Act as follows: (a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution; (b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by an agreement, treaty or convention to which the State is a party; and (c) without prejudice to the generality of paragraphs (a) and (b), the rights, liberties and freedoms that may reasonably be inferred as being: (i) inherent in persons as human beings, and (ii) necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the State.

³ Section 10(2)(b) and section 10(2)(d) of the 2014 Act.

⁴ Section 10(2)(c) provides that a function of the Commission is 'to examine any legislative proposal and report its views on any implications for human rights or equality'. Section 10(2)(d) provides that the Commission may 'either of its own volition or on being so requested by the 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 and equality in the State'.

⁵ See further: Emily Logan, 'Jan O'Sullivan must ensure schools admission policy allows equality of access', *Irish Times*, 10 April 2015 (<http://www.irishtimes.com/opinion/jan-o-sullivan-must-ensure-schools-admission-policy-allows-equality-of-access-1.2170587>).

⁶ Education (Admission to Schools) Bill 2015 Explanatory Memorandum, at p. 1.

3. Legislative and Policy Context regarding School Admissions

3.1 Proposals in the 2015 Bill

4 The stated purpose of the 2015 Bill is to ensure that every child is treated fairly and that the way in which schools decide on applications for admission is structured, fair and transparent.⁷ The 2015 Bill leaves the existing substantive law prohibiting discrimination intact, and seeks to prevent the existing prohibitions on discrimination from being evaded in practice by ensuring that all parents are informed by schools, as a routine part of the enrolment process, of their children's rights in this area. In principle, the Commission considers this approach has the potential to enhance non-discrimination in the practice of school admissions and to strengthen procedures for oversight of admissions policy.

5 The new Section 62 to be inserted into the Education Act 1998 proposes that schools shall be required to publish what is termed an 'admission policy' following consultation with various stakeholders which, among other matters, will set out the characteristic spirit and general objectives of the school.⁸ The admission policy shall outline the process for enrolment and the selection criteria that will be applied in diverse situations where, for example, the number of students seeking admission is greater than the number of places available in the school.⁹ The admission policy will also set out the manner and sequence in which the selection criteria will be applied.¹⁰ Where a parent wishes to appeal an admission decision, the admission policy shall outline the procedure to be followed.¹¹ The admission policy will contain details in relation to the school's arrangements for students who do not wish to attend religious instruction.¹²

6 The new section 61 to be inserted into the Education Act stipulates that there shall be an 'admission statement' contained within the admission policy, stating that the school shall not discriminate in its admission of a student to the school on nine grounds, namely gender, civil status, family status, sexual orientation, religion, disability, race, the Traveller community and special educational needs. The new section 61(2) stipulates that the exemptions under section 7(3)(c) of the Equal Status Acts 2000–2012 ('Equal Status Acts') relating to gender and religious denomination shall continue to apply within an admission policy. Specifically, the exemptions under the Equal Status Acts allow primary and second-level schools which have a particular denominational ethos to give preference in admissions to students of a particular religious denomination over those of another

⁷ Education (Admission to Schools) Bill 2015 Explanatory Memorandum, at p. 1.

⁸ The new section 62(1) to be inserted into the Education Act 1998 stipulates that the board of the school shall consult with the patron of the school, parents of students attending the school, the staff of the school and any other persons the Minister may determine. See also the new section 62(6)(a).

⁹ The new section 62(6)(c) and 62(5)(c)(d).

¹⁰ The new section Section 62(6)(e).

¹¹ The new section 62(6)(g) to be inserted in the Education Act.

¹² The new section 62(6)(h) to be inserted in the Education Act.

denomination or none, and in the case of a refusal to admit, this is permitted but only insofar as this is necessary to maintain the ethos of the school.¹³

7 To accompany the proposed legislative framework, the new section 64 provides that the Minister for Education and Skills, having regard to the principles of inclusion and equality of access to and participation in education, shall publish regulations setting out the requirements surrounding school admission policies. The regulations may deal with a broad range of both technical and more substantive issues and in particular will set out the criteria that schools shall be permitted to apply where the number of students seeking admission to the school is greater than the number of places available.¹⁴ The selection criteria that the school will be prohibited from applying will include a student's connection to the school by virtue of his or her relationship with a specific category of persons (or the so called 'parent rule'), and the student's academic ability, skills or aptitude.¹⁵ In the context of the so called 'parent rule', a derogation shall be permitted and the details of the derogation will be set out in the regulations.¹⁶

8 Welcome provisions in the 2015 Bill propose powers for the National Council for Special Education (NCSE)¹⁷ in the case of children with special educational needs and the Child and Family Agency (the Agency)¹⁸ in the case of all other children, to designate a school for the enrolment of a specific child.¹⁹ This can occur either at the volition of the NCSE or the Agency, or alternatively at the request of a parent who, having made all reasonable efforts, has failed to obtain any school placement for the child.²⁰ Factors that will be required to be taken into account in the designation shall include: the wishes of the child's parents; where relevant, the special education needs of the child; the availability of places in the school and locality; and the best interests of the child.²¹ It is proposed that the Board of a school will be empowered to appeal a designation.²² On appeal, where the school can prove that the refusal to admit a child is essential to maintain the religious ethos of

¹³ Section 7(3)(c) applies to the religion ground. In addition, section 7(3)(a) applies to the gender ground and section 7(4)(b) to the disability ground.

¹⁴ The new sections 64(3)(a)(i)–(xiv) to be inserted in the Education Act.

¹⁵ The new sections 64(3)(d)(i) and (v) to be inserted in the Education Act.

¹⁶ The new section 64(3)(g) to be inserted in the Education Act.

¹⁷ The National Council for Special Educational Needs was established to improve the delivery of education services to persons with special educational needs arising from disabilities with particular emphasis on children. See <http://ncse.ie/about-us>.

¹⁸ The Child and Family Agency (also called Tusla) operates under the Child and Family Agency Act 2013 as an independent state agency with responsibility for improving wellbeing and outcomes for children. The Agency incorporates Children and Family Services that were previously operated by the Health Service Executive, the former Family Support Agency, the former National Educational Welfare Board and some psychological services and a range of services responding to domestic, sexual and gender based violence. See <http://www.tusla.ie/about>.

¹⁹ The new section 66 to be inserted in the Education Act.

²⁰ The new section 66(1)(a) and (b) and 66(3)(a) and (b) to be inserted in the Education Act.

²¹ The new section 66(2)(a)–(e) and Section 66(4)(a)–(d) to be inserted in the Education Act.

²² The new section 66(5) to be inserted in the Education Act.

the school, the designation can be cancelled, thereby retaining the religious exemption clause under section 7(3)(c) of the Equal Status Acts in the case of a designation.²³

9 Appeal of a decision not to enrol a student under section 29 of the Education Act 1998 to the Secretary General of the Department of Education and Science has been retained, contrary to a proposal at the General Scheme stage.²⁴ The new section 62(6)(g) will require the school to outline an appeal procedure for parents and students in its admission policy. The new sections 67–70 provide for welcome proposals relating to oversight and monitoring of admission policies where a school may be failing to publish a policy statement or where the admission policy does not comply with the legislative framework. The oversight and monitoring framework consists of the Minister for Education and Skills, the patron of the school and an independent person appointed by the Minister.

3.2 Relevance of the Existing Legal Framework

10 The proposed 2015 Bill forms part of a wider legislative framework that has implications for the full realisation of equality and human rights in school admissions and in the operation of schools more generally. This framework includes the Education Act 1998 (which is proposed to be substantially amended by the Bill), the Education (Welfare) Act 2000, the Education for Persons with Special Educational Needs Act 2004, the Equal Status Acts, and the European Convention on Human Rights Act 2003 ('2003 Act'). The Equal Status Acts prohibit both direct and indirect discrimination, including in admission to school, with the relevant exemptions under section 7(3) as outlined above.²⁵

11 Further legal obligations on schools in respect of both their admission policies and the performance of their functions more generally may arise from section 3(1) of the 2003 Act. Specifically, the 2003 Act provides that 'every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions' subject to any statutory provision or rule of law.²⁶ It is certainly arguable, although not as yet determined, that schools governed by the Education Act 1998 are 'organs of the State' for the purpose of the 2003 Act because they are bodies through which certain legislative²⁷ and executive powers of the State are

²³ The new section 66(7)(b) to be inserted in the Education Act.

²⁴ See further *Advice of the Ombudsman for Children on the General Scheme of the Education (Admission to Schools) Bill 2013*, November 2013 at pp. 21–22.

²⁵ Section 7(2) provides, among other things, that a primary or second-level school shall not discriminate in admission of a student. The nine grounds named in the *Equal Status Acts* are: gender, civil status, family status, age, disability, race, religion, sexual orientation, and membership of the Traveller community. Limited exemptions in relation to school admissions apply on the disability and religion grounds, and a full exemption on the gender applies to single-sex schools. The Equal Status Acts prohibit direct discrimination, indirect discrimination, and discrimination by association, and all of these prohibitions apply to school admission.

²⁶ Section 3(1) of the 2003 Act.

²⁷ For example, under sections 9 and 15 of the Education Act 1998 the drawing up and adoption by a school of an admission policy by a school board of management could be regarded as the exercise of a legislative function.

exercised.²⁸ Organs of the State have a direct and enforceable statutory duty under section 3(1) of the 2003 Act to undertake their functions in a manner compatible with the State's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²⁹ Some guidance as to whether schools may properly be regarded as 'organs of the State' may be derived from the case law concerning the amenability of decisions of schools to judicial review, a form of public law remedy and the context in which most claims under the 2003 Act are made. For example in the case of *Becker v Board of Management St Dominic's Secondary School Cabra*,³⁰ the High Court made a distinction between decisions that relate to contractual private relations between a teacher and the school, and that as such are not subject to judicial review, and those decisions of a school that are in the public domain and subject to public law scrutiny. In this regard it is notable that the High Court highlighted aspects of section 9 of the Education Act 1998 as being clearly within the public domain and thus amenable to judicial review. Most notably in the present context, section 9 imposes a duty on schools to establish and maintain an admissions policy which provides for maximum accessibility to the school. The further amplification of this statutory obligation on schools under the 2015 Bill provides further support for the view that schools can be regarded as organs of the State, at least insofar as admissions are concerned, and thereby subject to the obligation imposed on such organs by section 3(1) of the 2003 Act.³¹

12 Notwithstanding whether a school is considered to be an organ of State within the meaning of the 2003 Act, the State may nonetheless be liable in the European Court of Human Rights (ECtHR) for its failure to put in place a legal framework to prevent violations of human rights in schools. For example, in the case of *Costello-Roberts v the United Kingdom*, the ECtHR found that the state had a positive duty to regulate the provision of education and thus 'cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals'.³² This position was reiterated in the 2014 decision of *O'Keeffe v Ireland* where the ECtHR found Ireland liable for a violation of Article 3 (inhuman and degrading treatment) as it failed to 'fulfill its obligation to protect the applicant'.³³ This is despite the fact that the State did not provide the education directly, but instead as highlighted by the former IHRC in its *amicus curie* brief to the European Court of Human Rights, it delegated a 'public service function to a private body'.³⁴ Therefore, the State retains an obligation to ensure that children are admitted to school in a manner that complies with the State's obligations under the ECHR, and that their treatment while in school is in compliance with the ECHR. In light of the potential relevance of the 2003 Act, in each of the areas

²⁸ For a discussion of the meaning of 'organs of State' under the 2003 Act, see further Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act, Operation, Impact and Analysis*, (Dublin: Roundhall, 2010) at pp. 97–129.

²⁹ Section 3(1) of the 2003 Act.

³⁰ *Becker v Board of Management of St Dominic's Secondary School Cabra* [2005] IEHC 169.

³¹ Publicly funded schools in the United Kingdom are subject to a similar obligation in respect of the European Convention on Human Rights pursuant to the Human Rights Act, 1998. For example in the case of *R (on the application of Begum) v Head teacher & Governors of Denbigh High School* [2007] 1 AC 100, the issue of a restriction on religious dress for a student was challenged by reference to Article 9 of the ECHR.

³² *Costello-Roberts v the United Kingdom* (Application No. 13134/87) Judgment of 23 February 1993.

³³ *O'Keeffe v Ireland* (Application No. 35810/09) Judgment of 11 July 2012.

³⁴ *Amicus curiae* of the IHRC in the case of *O'Keeffe v Ireland*.

of the 2015 Bill outlined below an analysis of the jurisprudence of the European Court of Human Rights is provided where relevant.

13 The EU Race Equality Directive³⁵ is also relevant in considering the nature of the State's legal obligations to provide access to education in a non-discriminatory manner in both the public and private sectors.³⁶ The scope of the Race Equality Directive is wide ranging and is directed to ensuring the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin including in the sphere of education, in both the public and the private sectors.³⁷ The Equality Chapter of the Charter of Fundamental Rights of the European Union (EU Charter) contains the guarantee of equality before the law, in Article 20. Also, the non-discrimination provision in Article 21.1 prohibits 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'. It is noteworthy that provisions in relation to the rights of children are included in the Equality Chapter of the EU Charter. In particular, Article 24 provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be considered.³⁸ In addition the Charter contains a freestanding right to education, a right that is arguably phrased in more absolute terms than that set out in Article 2 of Protocol 1 of the ECHR. The applicability of the EU Charter in Irish law is, in accordance with Article 51, confined to situations falling within the scope of EU law, including laws that were designed to implement aspects of an EU Directive. Therefore, the Equal Status Acts and potentially the provisions of the 2015 Bill when enacted insofar as they are relevant to the implementation of the Race Equality Directive should be implemented in a manner that complies with the EU Charter.³⁹

14 Within domestic law, the human rights and equality obligations of public bodies have been strengthened more generally through the inclusion of a new public sector duty under the Irish Human Rights and Equality Act 2014. Section 42(1) of the 2014 Act requires a public body to perform its functions having regard to the need to eliminate discrimination, promote equality of opportunity and protect the human rights of its staff and the members to whom it provides a service.⁴⁰ A public body is defined to include any person, body, organisation or group 'financed wholly or partly out of money provided by the Oireachtas' that stands prescribed by the Minister for Justice and Equality

³⁵ Council Directive 2000/43/EC of the 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [the 'Race Equality Directive'].

³⁶ See further Judy Walsh, *Equal Status Act 2000–2011 Discrimination in the Provision of Goods and Services*, (Blackhall Publishing & Irish Council for Civil Liberties, 2012).

³⁷ *Amicus curiae* brief of the Equality Authority in the case of *Christian Brothers High School Clonmel v Mary Stokes (On behalf of John Stokes a Minor)*, at p. 13.

³⁸ See further Eilís Barry, 'Non-Discrimination and Equality', in Children's Rights Alliance, *Making Rights Real for Children: A Children's Rights Audit of Irish Law*, (Dublin: Children's Rights Alliance, 2015); Suzanne Kingston & Liam Thornton, *A Report on the Application of the European Convention on Human Rights Act 2003 and The European Charter of Fundamental Rights: Evaluation and Review*, (Dublin: Law Society of Ireland, 2015).

³⁹ *Ibid.*

⁴⁰ Section 42(2) of the 2014 Act sets out some elements of the measures that should be taken to give effect to the public sector duty. Sections 41(3)–(10) outline the various roles of the Commission in relation to encouraging and providing guidance to public sector bodies in the performance of the public sector duty.

having regard to the public interest and the spirit of the 2014 Act.⁴¹ While the Minister for Justice and Equality has not yet prescribed schools as coming within the meaning of public bodies under the 2014 Act, the Commission is of the view that in light of the foundational role of education in promoting respect for human rights, equality and a person's ability to achieve his or her full potential, schools are important entities and further consideration should be given to whether publicly funded schools should be designated under the 2014 Act.⁴² In any event, the Department of Education and Skills comes within the ambit of the public sector duty which in turn is relevant where the Department and Minister are regulating school admissions. Flowing from the public sector duty, the Commission touches on the role of schools in eliminating discrimination, promoting equality of opportunity and protecting human rights in the analysis below, in particular through their admission policies.

4. Human Rights and Equality Implications of the 2015 Bill

4.1 Education Admissions and the Religious Exemption Clause

15 As outlined, the Equal Status Acts permit primary and second-level schools which have the object of providing education in an environment that promotes certain religious values to give preference in admissions to students of a particular religious denomination over those of another denomination or of none.⁴³ Also, the Equal Status Acts allow a school to refuse admission to a student not of the same denomination as the school, but only insofar as this is essential to maintain the ethos of the school.⁴⁴ The 2015 Bill does not propose to amend the existing religious exemption clauses. Furthermore, where a school is designated for a child under the new section 66 to be inserted into the Education Act, the school will be enabled to appeal and overturn that designation where it can prove that the refusal to admit a child is essential to maintain the religious ethos of the school.⁴⁵

16 The Commission notes that the former Equality Authority and the former IHRC have expressed concerns at current law and practice, in particular in relation to whether the needs of children of a minority faith or of no faith are being properly met in certain instances.⁴⁶ To put this in

⁴¹ Section 2(1) 'Public body' (h) of the 2014 Act.

⁴² It is noted in this regard that publicly funded schools and other further education establishments are subject to the public sector equality duty in the UK. See section 150 and Schedule 19, Equality Act 2010,

⁴³ Section 7(3)(c) of the Equal Status Acts.

⁴⁴ Section 7(3)(c) of the Equal Status Acts.

⁴⁵ Section 66(7)(b) of the 2015 Bill.

⁴⁶ See IHRC, *Submission to the Department of Education and Skills on its discussion paper on a regulatory framework for school enrolment*, October 2011 at p. 3 and p. 18; IHRC, *Religion and Education: A Human Rights Perspective*, May 2011; see Equality Authority and Department of Education and Science, *Schools and the Equal Status Acts* (2nd edn., 2005) pp. 16–18. The Ombudsman for Children has also provided a considered view on section 7(3)(c) of the Equal Status Act 2000 in *Advice of the Ombudsman for Children on the General Scheme of the Education (Admission to Schools) Bill 2013*, November 2013, at pp. 16–19.

context, the Commission notes that in the 2011 Census there were almost 15,000 children of primary school age and 14,478 children of secondary school age who had no religion, while there were tens of thousands of children of school-going age who are members of minority religions.⁴⁷ In contrast, 96 per cent of primary schools are under denominational control, with a significant majority of secondary schools also under denominational patronage.⁴⁸ The Government established a time-limited *Forum on Patronage and Pluralism in the Primary Sector* in 2011⁴⁹ which reported in 2012.⁵⁰ Its task was to allow all stakeholders, including parents, to engage in open debate on change of patronage in communities where it is appropriate and necessary. The report of the Forum expressed particular concern about areas where there is only one primary school (or a small number of primary schools) available to serve a small population where challenges arise in the provision of diversity of choice of school where a different school is not an option.⁵¹ The Forum established that there are approximately 1,700 such ‘stand-alone’ schools, outside urban areas, where the nearest school is approximately 3km away and that there are approximately 310 schools where the nearest school is 5km away.⁵² As there are 3,169 primary schools in the State, this means that 54 per cent of the State’s primary schools are the only school available in an area and parents have no alternative available to them.⁵³ Notably, the *Forum on Patronage and Pluralism in the Primary Sector* concluded that,

‘the derogation in the Equal Status Act, 2000, Section 7(3)(c) may impede the Department of Education and Skills duty to provide for education for all children. In the light of experience, further consideration might need to be given to the amendment of this derogation’.⁵⁴

An important observation in relation to the derogation is the fact that very few schools are actually undersubscribed, such as would involve a ‘refusal’ of admission to a particular applicant in order to protect the religious ethos of the school. In practice children not of the denomination of the school, where the school is oversubscribed, will be placed on a waiting list with varying degrees of priority, and while there may be no real prospect of being admitted to the school, the issue of refusal never

⁴⁷ CSO Census Figures 2011.

⁴⁸ See John Coolahan *et al.*, *The Forum on Patronage and Pluralism in the Primary Sector: Report of the Forum’s Advisory Group*, (Dublin: Department of Education and Skills, 2012) at page 29. The figure of 96 per cent is the combined total of 89.65 per cent under Catholic patronage, 5.49 per cent under Church of Ireland patronage, and fewer than one per cent under each of Presbyterian, Methodist, Jewish, Islamic, and Quaker patronage.

⁴⁹ *Programme for Government 2011–2016: Statement of Common Purpose*.

⁵⁰ Coolahan *et al.*, *The Forum on Patronage and Pluralism in the Primary Sector: Report of the Forum’s Advisory Group*. The Forum examined a range of issues beyond the scope of the 2015 Bill, such as school self-evaluation and the composition of boards of management.

⁵¹ Coolahan *et al.*, *The Forum on Patronage and Pluralism in the Primary Sector: Report of the Forum’s Advisory Group*, at page 2.

⁵² *Ibid.* at page 73.

⁵³ The Forum used the data for the 2010–2011 school year, and did not include special schools. The numbers have changed in the intervening years, including the provision of greater choice in some areas, but not in a way that significantly changes the situation described by the Forum.

⁵⁴ Coolahan *et al.*, *The Forum on Patronage and Pluralism in the Primary Sector: Report of the Forum’s Advisory Group*, at page 77.

arises. It is therefore difficult, under section 7(3)(c) as currently formulated, to challenge the failure of a child not of the favoured denomination to gain a place in a denominational school.⁵⁵

4.1.1 Relevant Constitutional Jurisprudence

17 The exemption under section 7(3)(c) of the Equal Status Acts must be viewed against the backdrop of the jurisprudence developed under Article 42 and Article 44 of the Constitution, which discloses two different lines of reasoning.⁵⁶ One line of reasoning frames the State's support for denominational schools as an aspect of parental choice and the State's duty to assist parents with the religious and moral formation of their children.⁵⁷ The implication of this line of reasoning is that denominational schools should be able to give preferential access to children of the same denomination.⁵⁸ For example, as Hogan and Whyte note, one could argue that State financial support for a discriminatory admissions policy is analogous to the legislative authorisation of religious discrimination by schools in employment policies which was upheld by the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*.⁵⁹

18 The second line of reasoning draws on the principle in Article 44.2.3^o that the State must not discriminate on the ground of religion or belief, and supports the claim that if a school is in receipt of public funds, any child should be entitled to attend without discrimination arising from the child's or parents' beliefs.⁶⁰ In the *Campaign to Separate Church and State Ltd v Minister for Education*, for example, Barrington J observed that 'if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it. But such a child was to have the right not to attend any course of religious instruction at the school'.⁶¹ The tension between these two principles outlined above has never been explicitly addressed by either the Courts or the Houses of the Oireachtas.⁶²

⁵⁵ See for instance the decision of the Equality Tribunal in *A (on behalf of her son X) v A Secondary School*, DEC-S2014-010. In that case the Equality Officer held that a 'refusal' for the purpose of section 7(3)(c) of the Equal Status Acts only occurs 'when a denominational school has capacity and declines an application for admission'; mere failure to gain admission as a consequence of preference being given to certain applicants does not amount to a refusal.

⁵⁶ See further in G. Hogan and G. Whyte, *JM Kelly: the Irish Constitution*, 4th edn., (Dublin: LexisNexis Butterworths, 2003) at pp. 2070–2071; see also *Advice of the Ombudsman for Children on the General Scheme of the Education (Admission to Schools) Bill 2013*, November 2013, at pp. 16–19.

⁵⁷ See reference to *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321 in G. Hogan and G. Whyte, *JM Kelly: the Irish Constitution*, 4th edn., at para. 7.8.59 (p. 2054).

⁵⁸ See, for example, in G. Hogan and G. Whyte, *JM Kelly: the Irish Constitution*, 4th edn., at pp. 2070–2071.

⁵⁹ *Re Article 26 and the Employment Equality Bill 1996* (1997) 2 IR 321. In that case, the Supreme Court upheld legislative provisions which permitted religious bodies operating religious, educational or medical institutions to discriminate on religious grounds between employees and prospective employees for the purpose of maintaining the religious ethos of the institution, stating that: 'It is constitutionally permissible to make distinction or discriminations on grounds of religious profession, belief or status insofar – but only insofar – as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion in the Constitution'.

⁶⁰ *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321 at 356.

⁶¹ *Ibid.* at p. 356.

⁶² As the Office of the Ombudsman for Children has noted in its advice, 'The two broad approaches outlined above cannot be applied generally in an unqualified manner at the same time: children cannot simultaneously have equal access to all publicly funded schools and also be given priority in admission to schools of their

19 In light of the Commission’s statutory mandate, the exemption under section 7(3) of the Equal Status Acts must also be considered in the context of Ireland’s obligations under the European Convention for the Protection of Fundamental Rights and Freedoms (ECHR), within the framework of EU anti-discrimination law and under the international human rights treaties to which Ireland is a State party.

4.1.2 Relevant European Convention on Human Rights Jurisprudence

20 Under the ECHR, the right to education is protected under Article 2 of Protocol 1 to the ECHR. Specifically, the ECHR provides that no person shall be denied the right to education and the State shall ‘respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’.⁶³ The Court has read Article 2 of Protocol 1 in conjunction with Article 9 of the ECHR, which guarantees freedom of thought, conscience and religion, including freedom not to belong to a religion.⁶⁴ The term ‘religious and philosophical convictions’ refers not only to religious convictions but also the views of the ‘supporters of secularism’.⁶⁵ In general, States enjoy a wide margin of appreciation in formulating the framework for education in relation to the question of who educates children, whether this occurs through State schools or through private patrons, as well as in determining the syllabus and the curriculum.⁶⁶ However, in a line of jurisprudence including cases such as *Lautsi v Italy*, while affording the state a certain margin of appreciation, the Court has stated that given that the aim of the ECHR is to safeguard the possibility of pluralism in education, the Convention requires the State, in exercising its functions with regard to education and teaching, to take care that the information or knowledge included in the State curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind, particularly with regard to religion in a calm atmosphere free of any proselytism.⁶⁷ Specifically, the State is forbidden from pursuing an aim of indoctrination in the context of education that might be considered as not respecting parents’ religious and philosophical convictions.⁶⁸ This does not appear to exclude faith formation or religious instruction being offered by a school under religious patronage. Nonetheless, insofar as the State has a role in such matters derived under both the Constitution and statute, there is an obligation to ensure that those

denomination, especially if most publicly funded schools are denominational’. See *Advice of the Ombudsman for Children on the General Scheme of the Education (Admission to Schools) Bill 2013*, November 2013 at p. 18.

⁶³ *Lautsi v Italy*, (Application No. 30814/06) Judgment of 18 March 2011, at para. 58. See also *Campbell and Cosans v United Kingdom*, (Applications Nos. 7511/76 and 7743/76) Judgment of 25 February 1982.

⁶⁴ See Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs White & Ovey: The European Convention on Human Rights* (Oxford: Oxford University Press, 2014) at p. 529.

⁶⁵ *Lautsi v Italy*, (Application No. 30814/06) Judgment of 18 March 2011, at paras 61 and 62.

⁶⁶ See *Kjeldson & Ors v. Denmark*, (Applications Nos. 5095/71; 5920/72; 5926/72) Judgment of 7 December 1976; *Folgero & Ors v. Norway*, (Application No. 15472/02) Judgment of 29 June 2007; *Hasan and Eylem Zengin v. Turkey*, (Application No. 1448/04) Judgment of 9 October 2007. See further IHRC, *Religion and Education: A Human Rights Perspective*, May 2011 at pp. 87–88 for a summary of the relevant principles (<http://www.ihrec.ie/publications/list/religion-and-education-a-human-rights-perspective/>).

⁶⁷ *Lautsi v Italy*, (Application No. 30814/06) Judgment of 18 March 2011, at para. 62

⁶⁸ *Hasan and Eylem Zengin v Turkey*, (Application No. 1448/04) Judgment of 9 October 2007, at para. 52.

attending publicly funded schools who do not wish to attend religious instruction are accommodated appropriately.⁶⁹

21 Article 14 of the ECHR prohibits both direct and indirect discrimination in the enjoyment of Convention rights, including the right to education. Article 14 is a comprehensive equality guarantee that lists multiple grounds of discrimination including religion or other status. It is established jurisprudence under the ECHR that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.⁷⁰ A difference of treatment cannot be considered to have an objective and reasonable justification if it does not pursue a legitimate aim and there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁷¹ The Court has accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, notwithstanding that it is not specifically aimed at that group, including in the education sphere.⁷² Discrimination on account of a person's ethnic origin is a form of racial discrimination which is considered a particularly invidious form of discrimination that is not capable of being objectively justified within a contemporary democratic society.⁷³ Where official statistics provide *prima facie* evidence that a specific rule, although formulated in a neutral manner, impacts a clearly higher percentage of one group than of another, the onus of demonstrating that the rule is not discriminatory shifts to the State Party.⁷⁴ Therefore, in the case of *D.H. and Others v The Czech Republic*, the Court found that statistics demonstrating that a significantly larger proportion of Roma children were placed in special schools revealed a dominant trend that could be considered *prima facie* evidence of indirect discrimination.⁷⁵ In that case the Court found the Government to be in violation of the ECHR because the tests and criteria applied to admission to schools failed to take account of the special needs of the disadvantaged Roma community and resulted in their disproportionate placement in special schools for children with intellectual disability.⁷⁶

⁶⁹ Article 42.2 of the Constitution provides that 'The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral intellectual and social'. In this regard it is arguable that the State must ensure that all children receive some form of moral education appropriate to their circumstances whether they are of the majority religion, a minority religion or no religion.

⁷⁰ See further Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs White & Ovey: The European Convention on Human Rights* (Oxford: Oxford University Press, 2014) at pp. 567–593.

⁷¹ See, for example, *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium*, (Applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64) Judgment of 23 July 1968 [*'Belgian Linguistic Case (No. 2)'*].

⁷² *D.H. and Others v The Czech Republic*, (Application No. 57325/00), Judgment of 13 November 2007 at para. 194.

⁷³ See for example *Nachova and Others v. Bulgaria*, (Application Nos. 43577/98 and 43579/98), Judgment of 6 July 2005; *Timishev v Russia*, (Application Nos. 55762/00 and 55974/00) Judgment of 13 December 2005.

⁷⁴ *D.H. and others v. the Czech Republic*, (Application No. 57325/00) Judgment of 13 November 2007, at para. 180.

⁷⁵ *D.H. and others v. the Czech Republic*, at paras 188–192.

⁷⁶ *D.H. and others v. the Czech Republic*, at para. 207.

4.1.3 European Union Race Equality Directive and EU Charter of Fundamental Rights

22 The jurisprudence that has emerged under the Race Equality Directive, which prohibits both direct and indirect discrimination on grounds of race and ethnic origin, also has important interpretative value for the formulation of Irish law.⁷⁷ While primarily applicable to the race and ethnic origin ground, the Race Equality Directive may have applicability in the prohibition against direct discrimination in the enjoyment of access to education in both public and private institutions where religious status is coexistent with ethnicity – for example for some groups such as Sikhs and Jews.⁷⁸ For example, in the case of *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* the UK Supreme Court considered whether admission criteria to an Orthodox Jewish school applied on the grounds of religion treated people differently because of their ‘ethnic origin’ amounted to direct discrimination.⁷⁹ To be recognised as Jewish in accordance with the religious criteria applied by the school, a child had to show an orthodox Jewish mother or ancestress in the matrilineal line.⁸⁰ The UK Supreme Court found that the criteria applied by the orthodox Jewish school, while motivated by benign religious values, amounted to a difference of treatment on the basis of ethnic origin because it was linked to the matrilineal descent of the child.⁸¹ In the context of indirect discrimination, similar to the ECHR jurisprudence, the Directive stipulates that where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, it can only be considered acceptable where it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate.⁸²

23 Statistical evidence from the Central Statistics Office (CSO) illustrates that a significant proportion of people who are classified as ‘non-Irish’ for statistical purposes do not profess either the Catholic or Protestant religions, which are the religions of the vast majority of denominational primary and secondary schools.⁸³ In light of these statistics, it is foreseeable that the religious exemption clause under the Equal Status Acts, and reproduced in the 2015 Bill, could place children of non-Irish or new migrant communities at a particular disadvantage when compared with children of Irish parents, in potential violation of the Race Directive.⁸⁴ Notably, statistics gathered by the Department of Education and Skills census carried out in the 2013–2014 academic year revealed

⁷⁷ *Amicus curiae* brief, Equality Authority in the case of *Christian Brothers High School Clonmel v Mary Stokes (On behalf of John Stokes a Minor)* at p. 12 (para. 38). See also Eilís Barry, ‘Non-Discrimination and Equality’, in Children’s Rights Alliance, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law*, (Dublin: Children’s Rights Alliance, 2015).

⁷⁸ Judy Walsh, *Equal Status Act 2000–2011 Discrimination in the Provision of Goods and Services*, (Blackhall Publishing & Irish Council for Civil Liberties, 2012) at p. 131.

⁷⁹ *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15.

⁸⁰ *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* at p. 26 para. 74.

⁸¹ *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* at pp. 35–36.

⁸² *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* at pp. 35–36.

⁸³ CSO Census 2011 reveals that of the 544,357 so called ‘non-Irish’ living in Ireland, only 282,357 – slightly more than 50 per cent – classify themselves as Catholic. The census data also reveal that the total of people with no religion, atheists and agnostics increased fourfold between 1991 and 2011 with 14,769 children being classified as having no religion.

⁸⁴ In addition to Article 2 of Protocol 1 read in conjunction with Article 14 of the ECHR.

that 80 per cent of migrant children attended only 25 per cent of schools.⁸⁵ Additionally, where religious status coexists with ethnicity, for example in the case of Sikh or Jewish children, or if admission criteria particularly disadvantage children of a specific racial group, there is a risk that direct discrimination within the meaning of the Race Equality Directive may arise.⁸⁶ More broadly, in the interests of intercultural relations and the promotion of tolerance and the acceptance of diversity in the State, which is one of the tasks of the Commission under the 2014 Act, the Commission considers that the operation of the religious exemption clause in practice may be undermining interculturalism and tolerance within schools.⁸⁷

4.1.4 Concluding Observations of International and Regional Human Rights Bodies

24 In the field of international human rights law, a number of diverse United Nations treaty monitoring bodies have expressed concern in relation to the religious exemption under the Equal Status Acts and the implications of this exemption for school admissions more generally. For example, under the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'), the Committee on the Elimination of Racial Discrimination has twice examined the situation in Ireland against the standards required of the State under CERD. In its *Concluding Observations* concerning Ireland in 2011, the Committee expressed 'regret that the provisions of the Equal Status Act give the power to schools to refuse to admit students to denominational schools on grounds of religion'.⁸⁸ The Committee recommended that the State 'amend the existing legislation that inhibits students from enrolling into a school because of their faith or belief'.⁸⁹ In 2006, the UN Committee on the Rights of the Child assessed the situation in Ireland against the standards required under the UN Convention on Rights of the Child (CRC).⁹⁰ This Committee expressed concern in relation to the low proportion of multi-denominational primary schools,⁹¹ and recommended that Ireland 'amend the existing legislative framework to eliminate discrimination in school admissions'.⁹² Numerous other international treaty monitoring bodies have made similar recommendations including the Human Rights Committee in respect of Ireland's obligations under the International Covenant on

⁸⁵ P. Duncan, 'We have allowed segregation to happen', *The Irish Times*, 24 February 2015 (<http://www.irishtimes.com/news/education/we-have-allowed-segregation-to-happen-1.2109973>).

⁸⁶ See further Eilís Barry, BL, 'Non-Discrimination and Equality' in Children's Rights Alliance, *Making Rights Real for Children: A Children's Rights Audit of Irish Law* (Dublin: Children's Rights Alliance) at p. 19 who observes that '[i]t is questionable that a broad interpretation of this provision would be in compliance with the Race Directive as the issue of ethnicity and religion are often closely connected'.

⁸⁷ In its report on Ireland published in 2012, the Advisory Committee on the Framework Convention for the Protection of National Minorities, in light of the largely denominational character of education in the State made the following recommendation: 'The Advisory Committee encourages the authorities to ensure that the Guidelines on Intercultural Education are properly reflected in the curriculum at primary and especially post primary levels.' Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Ireland, October 2012, ACFC/OP/III(2012)006. The Advisory Committee also provides thematic commentaries including in relation to education, wherein the Committee provides guidance in relation to intercultural education. ACFC/25DOC(2006)002, at p. 15.

⁸⁸ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland* (2011) CERD/C/IRL/CO/3-4, at para. 26.

⁸⁹ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland* (2011) CERD/C/IRL/CO/3-4, at para. 26.

⁹⁰ *Concluding Observations of the Committee on the Rights of the Child: Ireland* (2006) CRC/C/IRL/CO/2.

⁹¹ At para. 60.

⁹² At para. 61.

Civil and Political Rights⁹³ and the Committee on Economic Social and Cultural Rights. Most recently, in June 2015, during its examination of Ireland's third periodic report under the International Covenant on Economic, Social and Cultural Rights, the Committee expressed its concern at the discrimination faced by certain groups of children of school-going age including 'children with disabilities, migrant children, children belonging to a religious minority, Traveller and Roma children'.⁹⁴ In particular, it referred to the operation of section 7 of the Equal Status Acts which allow schools to give preference to admission of students based on religion.⁹⁵ The Commission notes that the State accepted a recommendation made during its Universal Periodic Review in 2011 to '[a]ccelerate efforts in establishing a national network of schools that guarantee equality of access to children irrespective of their religious, cultural or social background'.⁹⁶ However, the State did not accept a recommendation to 'eliminate religious discrimination in access to education' and referred to the 'growing non-denominational school sector' and the review of the system for school admissions.⁹⁷

25 At the regional level, in 2007 the Council of Europe's Commissioner for Human Rights at the time, Mr Thomas Hammarberg, in an official visit to Ireland noted that 'the lack of [school] choice remains a problem' and that 'the growing diversity of Irish society has seen an increase in the demand for multi-denominational or non-denominational schools'.⁹⁸ The Commissioner, concluded that 'the current practical and legislative infrastructure is unable to meet [this demand], in particular when schools are obliged to enrol Catholic applicants first'.⁹⁹ The European Committee of Social Rights (the ECSR) is in the process of assessing Ireland's conformity with its obligations under Article 17 of the Revised European Social Charter. While the Committee in the past deferred reaching a conclusion of conformity or non-conformity pending the receipt of further information from the Irish Government, it reiterated the concerns expressed by the Council of Europe's Commissioner for Human Rights, including the observation that the current practical and legislative infrastructure is unable to meet the demand for multi-denominational and non-denominational schools.¹⁰⁰

⁹³ In 2008, the Human Rights Committee recommended that the State increase its efforts to ensure non-denominational primary education is widely available in all regions, see *Concluding observations of the Human Rights Committee: Ireland (2008)* CCPR/C/IRL/CO/3, at para. 22. In 2014, the Committee expressed concern 'about the slow progress in increasing access to secular education through the establishment of non-denominational schools, divestment of the patronage of schools and the phasing out of integrated religious curricula in schools accommodating minority faith or non-faith children'. The Committee concluded that one of the steps Ireland should take is to 'introduce legislation to prohibit discrimination in access to schools on the grounds of religion, belief or other status', see, *Concluding observations of the Human Rights Committee: Ireland (2014)* CCPR/C/IRL/CO/4, at para. 21.

⁹⁴ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Ireland*, (Geneva: Office of the High Commissioner for Human Rights, 2015), para. 30.

⁹⁵ Ibid.

⁹⁶ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Ireland – Addendum*, 21 December 2011, A/HRC/19/9/Add. 1, para. 37.

⁹⁷ Ibid.

⁹⁸ Council of Europe Commissioner for Human Rights (2008) *Report by The Commissioner for Human Rights Mr. Thomas Hammarberg on His Visit To Ireland 26–30 November 2007* CommDH(2008)9, at para. 55.

⁹⁹ Para. 55.

¹⁰⁰ European Committee of Social Rights, *Conclusions 2011 (Ireland)* – Article 17, paragraph 2.

26 In light of the jurisprudence under the ECHR and Race Equality Directive, of the criticism of section 7(3)(c) by regional and international human rights bodies, and of the broader policy context where there is a lack of diversity of schools for both minority faith and non-faith children, the Commission considers that the 2015 Bill provides a vital opportunity to revise the religious exemption clause in the Equal Status Acts. In reaching this conclusion, the Commission is cognisant that its mandate includes protecting and promoting human rights and equality, and encouraging the development of a culture of respect for human rights, equality and intercultural understanding in the State.¹⁰¹ In light of this mandate, the Commission is of the view that children should not be given preferential access to publicly funded education on the basis of their religion. Specifically, the Commission considers the State's equality legislation should reflect that principle. In making this recommendation, the Commission is mindful of the protection afforded to denominational education by the Constitution as an expression of parental choice and the State's duty to respect and support that choice. However, the Commission considers this principle could be incorporated by means of an individualised derogation granted by the Minister for Education and Skills in cases of specific schools where it is proven that the operation of the principle of equal access to publicly funded education is essential to maintain the ethos of the school, and where no other alternative means are reasonably available to the State authorities in that particular case. Further detail in relation to the operation of this derogation could be stipulated in regulations emphasising the very exceptional circumstances in which derogation would be permitted.

IHREC Recommendation in relation to the religious exemption clause

Within the context of the 2015 Bill, the Commission recommends the Equal Status Acts should be amended to give effect to the principle that no child should be given preferential access to a publicly funded school on the basis of their religion. The amendment could include an individualised derogation granted by the Minister for Education and Skills in the case of a specific school where refusal to admit a student is proved to be essential to maintain the ethos of the school, and where no other alternative means is reasonably available to the Minister in that particular case.

4.2 School Admissions Policies and Promoting an Inclusive School

27 As outlined, the new section 62 to be inserted into the Education Act proposes that a school will be required to prepare an admission policy following consultation with the patron, the parents of the school, the staff and any other relevant person, setting out the characteristic spirit and general objectives of the school.¹⁰² It will also require the admission policy to provide details of the school's policy in relation to its arrangements for any students who do not wish to attend religious instruction.¹⁰³

¹⁰¹ Section 10(1) of the 2014 Act.

¹⁰² The new section 62(6)(a) to be inserted into the Education Act.

¹⁰³ The new section 62(6)(h).

28 The question of the conditions of participation and exemptions for students who are not of a school's religion has been examined in a line of jurisprudence by the European Court of Human Rights.¹⁰⁴ As outlined above, the Court has held that the State must take care that the information or knowledge included in the State-prescribed curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism.¹⁰⁵ Specifically, the European Court of Human Rights has held that exemption procedures for minority and non-faith children to religious instruction must not be unduly onerous for the parents and for the children concerned.¹⁰⁶ In this context, the UN Special Rapporteur on Freedom of Religion and Belief has noted that

'religious instruction in the public school system must always go hand in hand with specific safeguards on behalf of members of religious or belief minorities. ... Moreover, the possibility of opting out should not be linked to onerous bureaucratic procedures and must never carry with it *de jure* or *de facto* penalties. Finally, wherever possible, students not participating in religious instruction due to their different faith should have access to alternative courses provided by the school.'¹⁰⁷

29 The question of the conditions of participation after the enrolment of a student who is not of a school's religion has arisen in both the legal case work and research work of the former Irish Human Rights Commission and the former Equality Authority.¹⁰⁸ In one case communicated to the former Equality Authority, the student was required to sit in the corridor outside the religion class as the method for non-participation in religious instruction. The school settled the case following

¹⁰⁴ See *Folgero & Ors v Norway*, (Application No. 15472/02) Judgment of 29 June 2007; *Hasan and Eylem Zengin v Turkey*, (Application No. 1448/04) Judgment of 9 October 2007.

¹⁰⁵ *Lautsi v Italy*, (Application No. 30814/06) Judgment of 18 March 2011, at para. 62.

¹⁰⁶ In *Folgero v Norway*, the European Court considered the right to education in relation to the curriculum of religious education provided in Norway. The particular curriculum adopted in Norway imparted knowledge of a wide range of religions but placed emphasis on the Lutheran religion which was the most common religion in the State, and also included an element of instruction in religious practice, over and above mere knowledge. Although parents were entitled to remove their children from any part of the curriculum that was contrary to their own conscience, the system of exemption was very onerous and complicated and involved the parents giving the school information about their personal religious and philosophical convictions to justify seeking an exemption. The European Court found that the State had failed to take 'sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner' and that the failure by the school to grant their child full exemption from the religious subject amounted to a violation of the ECHR. For further details see IHRC, *Religion and Education: A Human Rights Perspective*, May 2011 at pp. 83–85 (<http://www.ihrec.ie/publications/list/religion-and-education-a-human-rights-perspective/>).

¹⁰⁷ *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, Human Rights Council, Sixteenth session, Agenda item 3, A/HRC/16/53, at para. 50 (<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-53.pdf>).

¹⁰⁸ See IHRC, *Religion and Education: A Human Rights Perspective*, May 2011 at pp. 83–85 (<http://www.ihrec.ie/publications/list/religion-and-education-a-human-rights-perspective/>). See *Equality Authority Annual Report 2007*, p. 41. In addition, unpublished research commissioned by the former Equality Authority in 2006 examined a sample of admission policies for second-level schools. A small number of schools had admission policies that required attendance at religion classes unless the Department of Education, parents or others provided resources for the student to be supervised. One school in the sample stated in its admission policy that daily attendance at religious services was compulsory for all students, see Anne Lodge and Maria Feeney (2008) *Equality Assessment of Admission Policies in Second-level Schools* (unpublished manuscript, Equality Authority).

correspondence from the former Equality Authority and arranged for the student to be supervised by other teachers in their classrooms.¹⁰⁹

30 The Commission considers that, in line with the jurisprudence of the European Court of Human Rights, the statement of the characteristic spirit and general objectives of the school should stipulate that information relating to religion will be conveyed in an objective, critical and pluralistic manner. Also, the Commission considers that the 2015 Bill may be a useful opportunity to set down minimum standards in relation to the school's policy on arrangements for exemptions for students who do not wish to attend religion, in the spirit of pluralism and interculturalism and in a way that is not overly onerous on the student or his or her parents, with a requirement that alternative classes are provided during religion class.

31 More generally, in line with the Commission's promotional role under the 2014 Act the Commission considers that in setting out the characteristic spirit and general objectives of the school, regard should also be had to the importance of creating an inclusive and tolerant school that promotes tolerance, diversity and respect for the freedom and dignity of each child.¹¹⁰ Specifically, an inclusive school would respect, value and accommodate diversity across all nine grounds.

IHREC Recommendations in relation to Admission Policies and Promoting an Inclusive School

The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that, in setting out the characteristic spirit and general objectives of the school, outside the specific context of faith formation and religious instruction which parents wish to avail of and where exemptions apply, regard shall be had to providing information in relation to religion in an objective, critical and pluralistic manner that avoids indoctrination.

The Commission recommends that the 2015 Bill presents an important opportunity to set down some minimum standards in relation to the nature of exemptions for students who do not want to attend religious instruction.

The Commission recommends that the new section 62(6) to be inserted into the Education Act should be amended to the effect that in setting out the characteristic spirit and general objectives of the school regard shall be had to the values of an inclusive school that respects and accommodates diversity across all nine grounds in the equality legislation.

4.3 School Admissions Policies and the Student's Connection Criterion

32 As outlined, the new section 64(3)(f) to be inserted into the Education Act allows for the granting of a derogation from the prohibition on schools from using the student's connection to the school by virtue of his or her relationship with a specific category or categories of person as one of its admission criteria. The Commission notes the statement of Minister for Education and Skills in the Dáil that she considers that the proposal that 25 per cent of places in a school reserved for children

¹⁰⁹ See: *Equality Authority Annual Report 2007*, p. 41.

¹¹⁰ See sections 10(1) and 10(3) of the 2014 Act.

of past pupils should be changed and the amount reduced to ten per cent.¹¹¹ The Commission also notes that this derogation will be determined in regulations following the enactment of the legislation. Similarly, by regulation the Minister shall prescribe the circumstances under which the derogation shall be permitted, the manner in which it will be applied, the period of time for which it shall apply and any conditions that may be attached to it. In formulating the regulations the Minister is required to have regard to the principles of inclusion and equality of access to and participation in education.

33 The Commission is concerned that allowing schools to admit students on the basis that a student has a connection to the school by virtue of his or her relationship with a specified category or categories of person including, for example, his or her parent could potentially give rise to diverse forms of particular disadvantage that may amount to indirect discrimination in contravention of the jurisprudence arising from the Race Equality Directive and some of the jurisprudence of the European Court of Human Rights. This is particularly the case where a school can stipulate that a child will be given preferential treatment where his or her parent attended the school and in relation to a range of further persons that remain unspecified in the 2015 Bill. The Commission considers that it is questionable whether a derogation of this kind pursues a legitimate aim as required under the ECHR in that it is aimed at providing an intergenerational preference to those who can attend a school, often in contexts where there are limited school places in particular catchment areas.¹¹²

34 Specifically, the Commission notes that the relevant derogation could have potentially negative implications for members of new migrant communities in respect of their admission to specific schools where their parents or other relatives have a lower statistical chance of having attended such schools and therefore satisfying the so-called 'parent rule'. For example, a Department of Education and Skills census carried out in the 2013–2014 academic year revealed that 80 per cent of migrant children attended only 25 per cent of schools.¹¹³ Similarly, data published by the Department of Children and Youth Affairs in 2012 demonstrated that in 18 per cent of schools established under the Delivering Equality of Opportunity in Schools (DEIS) programme, more than 20 per cent of the pupils enrolled were migrant children, compared with only seven per cent in non-DEIS schools.¹¹⁴ This research also indicated that 94 per cent of DEIS schools accepted all children who applied to be enrolled while only 79 per cent of non-DEIS schools admitted all applicants.¹¹⁵ Additionally, the Commission notes that the relevant derogation could place groups that have

¹¹¹ Minister for Education and Skills, Jan O'Sullivan TD, 'Other Questions: School Enrolments' (oral question no. 7), *Dáil Éireann Debates*, 22 April 2015.

¹¹² Another Council of Europe body; the European Commission against Racism and Intolerance (ECRI) has also commented negatively in relation to admission policies that favour filiation links with schools, and while accepting that preference for siblings may be understandable, parental attendance is not, and points out that such policies may be discriminatory against children coming from an immigrant background or Travellers, whether Catholic or not. The ECRI goes on to recommend that: 'the Irish authorities pursue and step up their efforts to ensure that the education system guarantees all children of immigrant origin equality of opportunity in access to education, including higher education'. *ECRI Report on Ireland*, December 2012, CRI(2013)1, at pp 23–24.

¹¹³ P. Duncan, 'We have allowed segregation to happen', *The Irish Times*, 24 February 2015.

¹¹⁴ Merike Darmody, Emer Smyth and Selina McCoy, *School Sector Variation among Primary Schools in Ireland*, (Dublin: Department of Children and Youth Affairs, 2012), p. 38.

¹¹⁵ *Ibid.*, p. 30.

experienced historical disadvantage in accessing education, including members of the Traveller community and persons with disabilities, at a particular disadvantage in a manner that could amount to indirect discrimination. The Commission notes that there is a higher concentration of Traveller children, children with special educational needs and non-English speaking children in DEIS schools.¹¹⁶ In research in this area the Economic and Social Research Institute states that this ‘concentration reflects not only patterns of residential segregation but also school choice on the part of parents and admissions policies on the part of schools’.¹¹⁷

35 The Commission notes that in the case of *Stokes v Christian Brothers High School Clonmel & anor*¹¹⁸ (‘the Stokes case’), the Supreme Court held that on the facts of the case there was insufficient evidence to suggest that a Traveller child had experienced a ‘particular disadvantage’ in accessing the school on the basis of his membership of the Traveller community. In this case, the secondary school used three admission criteria to prioritise applications including being a Roman Catholic, attending a feeder primary school and a requirement that a parent or sibling had attended the school prior to the applicant. The applicant claimed that while he satisfied the first two criteria, as a Traveller it was more difficult for him to satisfy the third criterion given the lower educational attainment and school completion rates of members of the Traveller community¹¹⁹ and he claimed that the parent rule therefore constituted indirect discrimination. The Equality Tribunal held in his favour but this decision was subsequently overturned by the Supreme Court following a series of appeals. The Supreme Court held that ‘the absence of sufficiently robust statistical materials or analysis in this case means that the decision of the Circuit Judge to find that there was particular disadvantage was wrong in law due to an absence of sufficient evidence’.¹²⁰ Notably, the Supreme Court did not reject the premise that indirect discrimination could be an unforeseen consequence of admission policies, and it provided some important clarification in relation to the assessment of indirect discrimination under Irish law.

36 The Commission notes the statement by the Ombudsman for Children’s Office (OCO), that even though such a criterion should only operate in cases of oversubscription, ‘[p]utting children without an intergenerational connection with a school at a disadvantage vis-à-vis those with such a connection when there is high demand on limited spaces is not justifiable’.¹²¹ The Commission also notes the view of the Joint Oireachtas Committee on Education and Social Protection that the draft regulations accompanying the proposed legislation should not contain a derogation for applicants

¹¹⁶ E. Smyth, S. McCoy and G. Kingston, *Learning from the Evaluation of DEIS*, (Dublin: Economic and Social Research Institute, 2015) p. vii.

¹¹⁷ *Ibid.* at p. 79.

¹¹⁸ *Stokes v Christian Brothers High School Clonmel & anor* [2015] IESC 13.

¹¹⁹ According to the 2011 Census, 69 per cent of Travellers were educated to primary school level or lower and Irish Travellers on average completed their full-time formal education 4.7 years earlier than the general population. Central Statistics Office, *Profile 7: Religion, Ethnicity and Irish Travellers*, (Dublin: Stationery Office, 2012), at p. 32.

¹²⁰ *Stokes v Christian Brothers High School Clonmel & anor* [2015] IESC 13, per Clarke J at para. 12.9 (Murray and O’Donnell JJ concurring). See further *IHREC Calls for admission to schools legislation to address equity of access following Supreme Court judgment*, 24 February 2015 (<http://www.ihrec.ie/news/2015/02/24/ihrec-calls-for-admission-to-schools-legislation-t/>) (<http://www.ihrec.ie/news/2015/02/24/ihrec-calls-for-admission-to-schools-legislation-t/>).

¹²¹ Ombudsman for Children’s Office (2013) *Advice on Education (School Admission) Bill 2013*

who are children of a past pupil, but that a derogation could be allowed where a student has a sibling that is currently in the school.¹²²

37 There is a clear line of ECtHR jurisprudence which deems the segregation in education of different groups of children, regardless of whether or not the State intends to discriminate, is a violation of Article 14 of the ECHR and of Article 2 of Protocol No. 1 to the ECHR. In the case of *D.H. v Czech Republic*, the ECtHR found that statistical evidence could be presented in order to demonstrate discrimination.¹²³ In this case, it found that a disproportionate number of Roma children were placed in special schools for children with intellectual disabilities resulting in segregation and this constituted a 'disproportionately prejudicial effect on the Roma community' who did not have the same educational opportunities as children of other communities.¹²⁴ In the case of *Lavida and Others v Greece*,¹²⁵ which concerned the placement of Roma children in one school in a particular locality, a press release issued by the ECtHR clarified that:

'Even in the absence of any discriminatory intention on the State's part, the Court held that a position which consisted in continuing the education of Roma children in a state school attended exclusively by children belonging to the Roma community and deciding against effective anti-segregation measures could not be considered as objectively justified by a legitimate aim'.¹²⁶

IHREC Recommendation in relation to the Student Connection Criteria

The Commission recommends that the possibility of obtaining a derogation from the prohibition on schools from using the student's connection to the school by virtue of his or her relationship with a specific category or categories of person should be limited to where a sibling is currently attending the school.

4.4 Best Interests of the Child and the Views of the Child in Decision Making and Appeals

38 The 2015 Bill integrates the best interests of the child standard at different points, in particular in the context of the designation by the National Council for Special Education (NCSE) or the Child and Family Agency (the Agency) of a school for an individual child.¹²⁷ Article 3(1) of the UN

¹²² Conclusion 7 of the Joint Committee on Education and Social Protection, *Report on the Draft General School of the Education (Admission to Schools) Bill*, March 2014 (<http://www.oireachtas.ie/parliament/media/Report-on-Schools-Admissions-Bill.pdf>).

¹²³ *D.H. and others v the Czech Republic*, (Application No. 57325/00) Judgment of 13 November 2007.

¹²⁴ *D.H. and others v the Czech Republic*, para. 209.

¹²⁵ *Lavida and Others v Greece*, (Application No. 7973/10), Judgment of 28 May 2013.

¹²⁶ European Court of Human Rights, 'School placements for Roma children must not amount to ethnic or racial segregation' [press release], 30 May 2013.

¹²⁷ The new section 66(2) includes, among others, the following as two of the criteria that shall apply to the making of a designation by the NCSE:

Convention on the Rights of the Child (UNCRC) provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. In addition, Article 12(1) of the UNCRC provides

'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.

39 The Commission welcomes the inclusion of this standard in the context of the designation of a school for children with special educational needs and for other children where a school placement is not forthcoming. However, the Commission considers that in line with the UNCRC the relevant provisions could be enhanced by providing that the best interest of the child is the *primary* concern that the NCSE or Agency is to use in making its decisions on designation (including a decision not to make any designation).¹²⁸

40 The new section 66 provides for appeals by a school against a designation by the Agency or NCSE where the school has been designated, and for appeals by a parent where the NCSE or Agency has not made a designation that the parents requested.¹²⁹ The 2015 Bill does not provide that an appeal may be made by a parent where a school has been designated but the parent is of the view that the designation is not in the best interest of the child or that the wishes of the child were not considered where this would have been appropriate.¹³⁰ Furthermore, the 2015 Bill does not set out any criteria that the appeals committee is to apply in deciding on an appeal by a parent. In light of the fact that the appeals committee will be a quasi-judicial or administrative body making decisions regarding children, the 2015 Bill should ensure that the human rights standards set out in the UN Convention on the Rights of the Child should be applied in its decision making. For example, section 67 does not oblige the appeals committee itself in deciding an appeal to take account of the wishes of the child or to take account of the best interest of the child in considering an appeal.

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

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

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

¹²⁸ Article 42A of the Constitution provides as follows: 'The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable by its laws protect and vindicate those rights.' This Article provides a robust foundation on which legislative measures can prioritise the best interests of the child within the present legal framework.

¹²⁹ Section 66(5)–(19).

¹³⁰ Section 66(8) sets out that a parent may make an appeal when the Agency or NCSE fails or refuses to designate a school, and section 88(9) provides only that the appeals committee may either require the Agency or NCSE to designate a school or dismiss the appeal.

IHREC Recommendations in relation to the Best Interests of the Child and Appeals

The Commission recommends that the wording of the new sections 66(2) and 66(4) that are to be inserted into the Education Act be amended to ensure that the best interest of the child is the *primary* standard to which the National Council for Special Education or Child and Family Agency, as the case may be, shall have regard to in both making a designation and making a decision not to designate a school.

The Commission recommends that the new Section 66 be amended to permit a parent to make an appeal when a school has been designated by the Child and Family Agency or NCSE when the parent believes that the designation is not in the best interest of the child or that the Agency or NCSE failed to take account of the wishes of the child.