

CHAPTER 1:

Non-Discrimination and Equality

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1.1 INTRODUCTION

Equality is a highly contested and controversial concept, '[t]here are different shades of equality',¹ it can mean widely different things, whether it is viewed as the most fundamental of human rights, the 'sovereign virtue' or a vague nebulous concept.² It can be linked to a minimalist equality of opportunity or a more substantive equality of outcome.

The issue of equality and the rights of children is very wide ranging. The language of equality and children featured famously in the promises contained in the Proclamation of 1916 to '[guarantee] religious and civil liberty, equal rights and equal opportunities to all its citizens' and to '[cherish] all of the children of the nation equally'. It also features in Article 2 of the UN Convention on the Rights of The Child (hereinafter the CRC) which provides that State Parties shall respect and ensure the rights set forth in the Convention 'without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

There is a complex web of regulation in relation to equality and protection against discrimination in Irish law. The panoply of legal instruments include but are not limited to Bunreacht na hÉireann, EC law, including treaty provisions, the EU Charter of Fundamental Rights, and EU anti-discrimination Directives. It further includes the domestic equality legislation in the form of the Employment Equality Acts 1998 to 2011 (hereinafter referred to as the EEA), the Equal Status Acts 2000 to 2012 (hereinafter referred to as the ESA).³ There are also anti-discrimination provisions in other domestic legislation such as the Education Acts.⁴

While children are largely absent from these overlapping and intersecting legal instruments, they nonetheless benefit to varying extents from the provisions that are of general application.

There will be a particular focus in this chapter on the provisions of the ESA, which apply generally and are not explicitly aimed at children. A striking feature of the ESA is that it is one of the few pieces of domestic legislation that provides legally enforceable rights for children, in areas such as education, housing and services for children with disabilities. These rights are comparatively easy to enforce at least at first instance before the

1 Colin Harvey, 'The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland', in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford Hart 2001).

2 See further, Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) See further, Margurete Bolger, Claire Bruton and Cliona Kimber, *Employment Equality Law* (Roundhall 2012) Chapter 1 and O Cinnéide, 'Aspirations Unfulfilled: The Equality Right in Irish law' (2010) IHRLR 41.

3 And also the discrimination provisions in s 19 of the Intoxicating Liquor Act 2003.

4 For example s6(c) of the Education Act 1998 provides that every person concerned in the implementation of the Act shall have regard to a number of objects including 'to promote equality of access to and participation in education.'

Equality Tribunal, which was the quasi-judicial body established to investigate hear and decide the majority of claims under the equality legislation. The chapter will highlight provisions that have particular relevance to Traveller and Roma children and children with disabilities. The significant exemptions and other provisions in the ESA, which limit the potential of the ESA in the area of equality rights for children, will be highlighted. There will also be a reference to the new positive duty imposed on public bodies by section 42 of the Irish Human Rights and Equality Commission Act 2014.

1.2 THE IRISH CONSTITUTIONAL CONCEPT OF EQUALITY

The natural starting point for any discussion on equality is the guarantee in Article 40.1 of Bunreacht na hÉireann that 'all citizens shall, as human persons, be held equal before the law'.⁵ Article 40.1 may in theory grant a high level of protection to the right to equality of treatment, but in actuality its interpretation and application by the Courts does not afford much potential for the enforcement of equality rights in the realm of economic, social and cultural rights that may have particular relevance to children. Ó Cinnéide has commented that:

Irish constitutional law has rarely benefited disadvantaged or unpopular minority groups in society. Homosexuals, non-nationals, members of the Traveller community and the disabled have found it difficult to secure any constitutional foothold to challenge discriminatory legislation or policy.⁶

Doyle argues that in interpreting Article 40.1 the courts have adopted a restrictive concept of equality and that they have interpreted that conception in a restrictive way.⁷ They have regularly adopted an interpretation of the phrase 'as human persons' which practically foreclosed all equality arguments. The courts consistently subordinated the equality guarantee to other norms in the Constitution. Finally, the courts evolved tests for the infringement of Article 40.1 which required deference to legislative judgment, for instance, not only as to whether there was a good reason to derogate from equality.

The elevation of property rights over the equality principle can be seen in the Employment Equality Bill reference, where the Supreme Court found that private employers could not be required to bear 'excessive burdens' by the legislative requirement to make reasonable accommodation for disabled persons.⁸ The absence of any consideration of the right to equality and the State interest in preventing

discrimination is striking in the majority judgments in the *Portmarnock Golf Club case*.⁹ The marginal role afforded to equality is most evident in the recent judgment in *Fleming v Ireland*,¹⁰ where the Supreme Court found rather starkly, that as there is no right to commit suicide, 'so issues, such as discrimination do not arise; nor do values such as dignity, equality or any other principle under the Constitution, apply to the situation'. Indeed it would appear from the Supreme Court judgment in *Fleming* that there are substantial difficulties in interpreting Article 40.1 in a way that would extend the principle of equal treatment before the law to indirect discrimination.

This is in stark contrast to the EU Anti-Discrimination Directives, which contain provisions on discrimination, including explicit provisions on indirect discrimination. They also contain provisions on harassment, victimisation and a shifting onus of proof and positive action. These provisions are mirrored in the implementation of domestic equality legislation.

The differences between the Irish Constitutional model and the European concept of equality can also be seen in their scope, content, the extent and level of available defences, allowable exemptions and justifications. There is a notable emphasis on effective remedies and enforcement in the case law of the Court of Justice of the European Union (CJEU), which is very evident in the case law of the Equality Tribunal and the Labour Court in decisions on claims under the domestic equality legislation. These differences mean that it may be preferable to give some consideration to constructing an equality claim in respect of children as a claim under the ESA.

This difference between the Irish Constitutional model of equality and the European concept of anti-discrimination is most stark when the superior courts interpret statutory definitions contained in the provisions of the ESA. This is evident in the recent judgment of the Supreme Court in *Stokes v Christian Brothers High School Clonmel*,¹¹ which considered a claim of indirect discrimination on the Traveller ground under the ESA, concerning the controversial issue of schools admissions policies. It is noticeable that the judgment, which sets a high bar for proving indirect discrimination, makes no reference to the considerable case law of the CJEU on indirect discrimination.

In formulating an equality claim in respect of children, the concern would be that the Constitution is less used as a sword to successfully fight anti-discrimination claims, but more as a shield to defend anti-discrimination claims. It is a cause of concern for the discourse of equality and children that such a marginal and subordinated role is allocated to equality in the Constitutional order of values.

5 The equality guarantee in Article 40.1° of Bunreacht na hÉireann muted than the for example the Article 9(3) of the South African Constitution and s15 of the Canadian Charter for Rights and Freedoms.

6 Ó Cinnéide (n2) 55-56.

7 Oran Doyle, *Constitutional Equality Law* (Roundhall 2004).

8 *In Re Employment Equality Bill 1996* [1997] 2 IR 321.

9 *Equality Authority v Portmarnock Golf Club & ors* [2009] IESC 73.

10 *Fleming v Ireland* [2013] IESC 19.

11 *Stokes v Christian Brothers High Scholl Clonmel* [2015] ELR113.

There have not been a large number of cases involving the equality guarantee and the rights of a child per se. In her dissenting judgment in *DG v Eastern Health Board*,¹² Denham noted that the Constitution clearly envisages equality being affected by differences in capacity. Thus, the mere fact that an order for detention made in respect of the applicant could not be made in respect of an adult does not per se render it unconstitutional. However, she went on to hold that the detention of a child for his own protection in a penal as opposed to a childcare institution did violate the child's right to equality.¹³

Deference to the legislative judgment is evident in *Byrne (a minor) v Director of Oberstown School*¹⁴ where Hogan J. invoked Article 40.1 and found that young offenders detained at Oberstown School were entitled to the same remission in their sentences as young offenders detained in St Patrick's Institution. He found that a custodial regime, which brings about such a sharp difference in terms of the release dates of offenders simply because of the location of the place where they served their period of detention, engages the application of the equality guarantee. He stated that such a starkly different treatment of otherwise similarly situated young offenders could be objectively justified if it could be shown that the detention at Oberstown was essentially different and served fundamentally different purposes in terms of criminal justice policy than detention regimes operating elsewhere within the juvenile justice system. He accepted fully the laudable goals, aims and aspirations of Oberstown and accepted further that the applicant could probably personally benefit from an extended stay in such a controlled environment. However, he found that the language and structure of the Act entirely negatives any argument that Oberstown is essentially different in this respect from other detention centres.¹⁵

1.3 THE EU CHARTER OF FUNDAMENTAL RIGHTS

Within the wider EU Framework, the Equality Chapter in the Charter of Fundamental Rights of the European Union (hereinafter the Charter) contains the guarantee of equality before the law in Article 20. The non-discrimination provisions in Article 21.1

prohibit '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'.¹⁶

It is noteworthy that the provisions in relation to the rights of children are included in the Equality Chapter of the Charter. 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. The inclusion of a specific provision on children in the Charter is symbolic and represents a significant new phase in the EU's relations with children. Furthermore, the rights provide an additional framework within which to examine policies and decisions concerning children.

The rights provided for in the Charter should not be overstated as their justiciability may be limited and it will be some time before their full potential is realised. The rights are confined to situations falling within the scope of EU law.¹⁷ However, the Charter is undeniably applicable in areas that come within the scope of the EU anti-discrimination Directives. These Directives are implemented into Irish law by the equality legislation; in particular, the ESA implements the Race Directive and the Gender Goods and Services Directive. Therefore the Charter has resonance in the provisions of the ESA that implement the Race and Gender Goods and Services Directives.

The EU Anti-Discrimination Directives- Pregnancy, Work Life Balance

The Gender Recast Directive, the Race Directive and the Framework Employment Directive prohibit discrimination, harassment and victimisation in employment, self-employment, pay and pensions on the grounds of gender, race and ethnic origin, disability, age, sexual orientation and religion. The scope of the EEA 1998-2004 primarily matches¹⁸ the scope of the Gender Employment Directive and the Framework Directive and the employment-related provisions of the Race Directive.

At first glance the employment-related provisions of the EU directives would not seem to have any relevance in relation to the equality rights of children. However, a number of EU directives are the source of much of the obligations in relation to family friendly rights, such as minimum periods of maternity leave, rights to adequate allowances while on maternity leave, protection for workers who are breastfeeding, parental leave and force majeure entitlement. The Recast Gender Directive and the significant body of case law of the European Court of Justice (ECJ) provide for significant protection against

12 *DG v Eastern Health Board* [1997] IESC 7.

13 *ibid.* 'A deprivation of liberty by placement in a child care institution carries with it the concept of the welfare of the child. A prison does not. Thus the inequality suffered by the child by being placed in a penal institution in such circumstances relative to the position of an adult is unconstitutional, the applicant's right to equality has been breached by this order. The rationale which exempts a child care institution does not apply. Further, approaching the matter as to equality between children, it must be queried whether a child from a different background, who brought a civil action, would find himself ordered to be detained in a penal institution.'

14 *Byrne (a minor) v Director of Oberstown School* [2013] IEHC 562.

15 *ibid.* He emphasised that s96(1) b of the Children Act 2001 prohibits the sentencing court from differentiating between offenders in terms of sentence in order 'to provide any assistance or service needed to care for or protect a child'.

16 There are also significant provision in this chapter on cultural, linguistic and religious diversity in Article 22, equality between men and women in Article 23, and the integration of person with disabilities in Article 26.

17 In *C-617/10 Åklagaren v. Hans Åkerberg Fransson* (7 May 2013) para19 the Court of Justice has made clear that the Charter is 'applicable in all situations governed by European Union law, but not outside such situations'.

18 With the exception of pensions which is dealt with in the Social Welfare (Miscellaneous Provisions) Act 2004.

discrimination for pregnant employees and in relation to maternity leave. The case law of the ECJ has stressed the principle of protecting the special relationship between mothers and babies in the vulnerable period following pregnancy and childbirth.¹⁹ However, this principle was not evident in the recent judgments of the ECJ that surrogate mothers were not entitled to maternity leave.²⁰

The breadth of the protection afforded by Anti-Discrimination Directives can be seen in how discrimination has been interpreted by the CJEU. In *Coleman v Attridge Law*,²¹ the claimant was the mother of a disabled child who claimed that she had been subject to direct disability discrimination by her employer because of treatment that was attributable to the fact that she was the primary carer of her disabled child. The CJEU held that the Framework Directive must be interpreted to protect people subject to discrimination or harassment on grounds of their association with a disabled person.

The *National Policy Framework for Children and Young People* contains commitments to evaluate policy on how families are supported. The Minister for Justice and Equality has noted that in that context maternity, parental and carer's leave are pivotal. She also noted that parental leave is key in supporting early learners.²² It is intended that the proposed Family Leave Bill 2015 will contain provisions on paternity leave and/or shared maternity leave. This is welcome and long overdue though it is important that maternity rights are not diluted in the process. The proposed Bill also provides an opportunity to consider the introduction of maternity leave in the case of surrogate mothers. It also provides a chance to consider a more comprehensive range of family friendly measures, such as a statutory right to request flexible working, equivalent to the rights recently introduced in the UK.²³

Beyond Work-Services, Education and Housing

Two of the EU anti-discrimination Directives extend beyond employment into areas that have particular relevance for children. The scope of the Race Directive is the broadest extending the prohibition of discrimination on race and ethnic origin beyond the employment arena to social protection, social security and healthcare, social advantage, education, goods and services and housing. It would have particular relevance for migrant children, Roma and Traveller children. The Gender Goods and Services Directive is narrower than the Race Directive but extends to the provision of goods and services.

19 C-116/06 *Sari Kiiski v Tampereen kaupunki* (20 September 2007).

20 Case C- 167/12 CD V ST (18 March 2014) and Case C-363/12 Z v A *Government and the Board of Management of a Community School* (18 March 2014).

21 Case C-303/06 *Coleman v Attridge Law* (17 July 2008).

22 Department of Justice and Equality, 'The speech of the Minister for Justice, Equality and Law Reform at the Families and Work: A Chance for Change Conference 25/9/2014' <<http://www.justice.ie/en/JELR/Pages/SP14000255>> accessed 14 July 2015.

23 Children and Families Act 2014 (United Kingdom) Part 9 and the Flexible Working Regulations 2014 SI 1398.

1.4 THE POTENTIAL OF THE ESA FOR THE REALISATION OF EQUALITY RIGHTS FOR CHILDREN

The content scope, onus of proof and remedies contained in the ESA makes it a meaningful first port of call for the enforcement of equality rights concerning children. The scope of the ESA is both broader and in some critical respects narrower than that required by the Race Directive and Gender Goods and Services Directive. The European concept of equality nonetheless shapes the interpretation of these provisions in the ESA and sets the standards for interpretation of concepts such as discrimination and harassment and other general and non-ground specific provisions of the ESA.²⁴

The specified grounds of discrimination in the ESA go beyond the grounds of gender and race to include the grounds of civil status, family status, age, sexual orientation, disability, religion and members of the Traveller community. The ESA prohibits discrimination, harassment and victimisation on all of the nine discriminatory grounds in the provision of goods and services, accommodation and education.²⁵ It requires the reasonable accommodation of people with disabilities. It allows broad positive action measures. The legislation established the Equality Authority, which has now been merged with the Irish Human Rights and Equality Commission. It also established the Equality Tribunal which has recently been merged with the Workplace Relations Commission.²⁶

The Discriminatory Grounds

As above noted, the EEA and the ESA contain nine discriminatory grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of The Traveller community. However a ground that may have most relevance to children, a socio-economic ground is not contained in the legislation. There is no generalist 'other status' ground. The Charter, CRC and European Convention on Human Rights (ECHR) contain a number of additional grounds, which are not contained in the domestic equality legislation, namely, the grounds of language, political or other opinion social origin, property, birth or other status.

24 *Dean v Dublin City Council* (CC, 15 April 2008) concerned a claim under the Equal Status Acts in relation to the reasonable accommodation and the provision of accommodation (s 6) to a person with severe agoraphobia and claustrophobia. Even though the disability ground does not come within the Race Directive, Judge Hunt in the judgment on the appeal to the Circuit stated: 'I adopt the starting point for the construction of this statute, which is a statute intended to confer rights on the citizen, that I should adopt the construction and proceed on the basis of an interpretation which is consistent with the broadest possible application of statutory rights to the citizens, or indeed to give effect to a European directive if necessary.'

25 There are separate provisions in relation to registered clubs (section 8) and the jurisdiction of the Equality Tribunal in relation to licensed premises has been transferred to the District Court pursuant to the Intoxicating Liquor Act 2003.

26 The Workplace Relations Act 2015.

The EEA provided for a review of its operation within two years of its coming into force, with a view to assessing whether there was a need to add additional grounds. The Department of Justice, Equality and Law Reform commissioned a comparative review of the prohibition of discrimination on four grounds, to provide a knowledge base to assess whether to include additional discriminatory grounds in the Employment Equality Act, 1998.²⁷ The Review included the ground of socio-economic status/social origin.²⁸ The Review stated inter alia that:

[...] prohibiting discrimination on the basis of social origin/socio-economic status would serve the objectives underpinning the adoption of equality legislation, namely the pursuit of a more equal and just society. It would also promote a more sophisticated intersectional approach to discrimination, leading to greater recognition of the multiple forms of discrimination that many groups face. It is argued that social origin or socio-economic status is difficult to define with the degree of clarity necessary for a legislative document. However, concerns about problems of definition are not unique to this area of anti-discrimination law.²⁹

In order to achieve more comprehensive protection and coherence between the various instruments, the grounds contained in the domestic equality legislation should be levelled up to include the additional grounds of language, political or other opinion social origin, property, birth or other status, which are named in the Charter, CRC and the ECHR.

1.5 DISCRIMINATORY GROUNDS THAT HAVE PARTICULAR RELEVANCE TO CHILDREN

The Age Ground

Children, with certain exceptions, may seek to rely on any of the discriminatory grounds under the ESA. However, there is a significant exemption in relation to the age ground, which greatly limits the scope of the protection of the ESA in relation to children. Section 3(3) of the ESA provides that treating a person who has not attained the age of 18 years less favourably or more favourably than another, whatever that person's age, shall not be regarded as discrimination under the age ground. This section allows less favourable treatment of under 18s vis-a-vis those over 18 on the age ground but it also allows discrimination as between children of different ages. This exemption allows age to be used as an arbitrary cut off for the provision of services, irrespective of need and no matter how vital these services may be.

27 S Kicommins, E McClean, M Mc Donagh, S Mullaly and D Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* (Stationary Office, 2004).

28 The other grounds reviewed were trade union membership, political opinion, and criminal conviction.

29 S Kicommins, E McClean, M Mc Donagh, S Mullaly and D Whelan (n28) 13.

As noted by Walsh, a health authority could decide that speech therapy will only be afforded to children under 6, introducing an arbitrary cut off for access to a vital service. These decisions could be challenged using the ESA because of section 3(3)a.³⁰

This exemption is overbroad. It may be wholly appropriate to restrict the sale of certain goods and services to those under 18 on health and safety grounds such as alcohol and certain drugs, but health and safety matters can be protected by the use of appropriate exemptions. This significant exemption needs to be reviewed and amended so as not to allow the age of a child to be used as a decisive factor in the denial of key socio-economic rights.

Gender and Family Status Ground

The gender ground may provide protection against discrimination by service providers for mothers who may wish to breastfeed.³¹ The family status ground has the potential of requiring child-friendly facilities. It is defined in the ESA as 'being pregnant or having responsibility – (a) as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years.'³² Much of the case law on this ground has involved access to service providers' premises. *Shanahan v One Pico Restaurant*³³ involved the refusal to admit a family with a baby to a restaurant. In *De Burca and Fernandez v Homelocators*, a viewing appointment had been cancelled and a message had been left on the Complainant's phone that the landlord's wife isn't really pushed about having children in the apartment. The Equality Officer found that the letting agency had discriminated on the family status ground.³⁴

A number of successful cases on the family status ground had involved the admission of people accompanied by children to pubs. However, the Intoxicating Liquor Act 2003 introduced amendments, which allowed discretion to publicans as to whether to permit a

30 Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing 2013) 59.

31 The Equality Officer found in *Flanagan Talbot v Killarney Cineplex Cinema*, DEC-S2008-053 that the Respondent did not operate discriminatory practices against mothers who wished to breastfeed but found that the respondent's ban on children under two, constituted discrimination on the family status ground.

32 'or (b) as a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis.'

33 *Shanahan v One Pico Restaurant* DEC-S2003-056.

34 *De Burca and Fernandez v Homelocators* DEC- S2004-030/031.

person under 15 accompanied by parents or guardians to be on licensed premises.³⁵ The changes may have the consequences of making pubs less family friendly.

The full potential of the family status ground has not been realised in terms of the provision of child friendly services. The new positive duty, which is imposed on public bodies by the Irish Human Rights and Equality Commission Act 2014 to promote equality of opportunity and treatment of the persons to whom they provide services, may act as a stimulus for the creation of child friendly services in the public arena.

Race and the Traveller Community Ground - Traveller Ethnicity

The Traveller community ground is included as a distinct ground in the ESA even though the ground of race includes ethnic origins as well as race, colour, nationality and national origins. The definition of Traveller community in the ESA points to Travellers being an ethnic group – 'the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland'. The Race Directive applies to 'racial or ethnic origin' and Travellers would have the benefit of the protections provided by the Race Directive if they are an ethnic group. The Minister of State for Equality has committed to the formal recognition by the State that Travellers are an ethnic group.³⁶ There are very strong arguments to be made that Travellers are an ethnic group for the purposes of the Race Directive and other human rights instruments.³⁷ Formal State recognition of this reality is overdue and welcome.

Disability and Reasonable Accommodation

The definition of disability in the ESA is very broad and wider than the equivalent definition in the Disability Act 2005 and the definition of special educational needs in the Education for Persons with Special Educational Needs Act 2004.³⁸ Therefore the obligation to provide reasonable accommodation imposed in the ESA applies to a broad range of children with disabilities.

While this provision to provide reasonable accommodation extends to a wide variety of service providers including public service providers, local authorities, schools and other educational authorities, the extent of the obligation is limited. The obligation to provide special treatment or facilities only arises in the first place where it would be impossible or unduly difficult for the person to avail himself or herself of the service, without such special treatment or facilities. No obligation arises where the person with the disability finds it only moderately difficult to obtain the service. There is no obligation to provide the special treatment, even if the person with the disability finds it exceedingly difficult to avail of the service, if the provision of the facility or treatment would give rise to more than a nominal cost. This exemption applies even to the State provision of essential services.

Nonetheless it is clear from the case law of the Equality Tribunal under the ESA that parents seek to use the ESA as a means of securing services for children with disabilities, Traveller children and others.

Specified Course of Action - Schools and Local Authorities

The equality legislation provides for an unusual innovative practical and creative remedy that is relatively unique. In addition to compensation, an Equality Officer in claims under the ESA may order 'that a person or persons specified in the order take a course of action which is so specified'.³⁹ This type of order has potential particularly in cases that have resonances for children in the field of education and housing.

A good example of this is the case of *Mrs X on behalf of her son Mr Y and a Post Primary School*.⁴⁰ The pupil had ADHD, behavioural difficulties and a poor attendance record. It was agreed that the school had taken several steps to accommodate his needs including providing access to a full-time Special Needs Assistant (SNA) and one to one tuition on a number of subjects. The school had concluded that the pupil should not be educated in a mainstream setting. The Equality Officer took into account the school's obligations under other legislative provisions and found that it had failed to activate all of the available supports. In addition to compensation, the Equality Officer ordered:

[...] that the respondent put in place a system that will facilitate the timely compliance with its statutory obligations under the Education (Welfare) Act, 2000 to report to the appropriate educational authorities any issues which may arise in the future in relation to the non-attendance of students at the school.⁴¹

In *Two Complainants (Mrs A and her son M) v A Primary School*,⁴² the Equality Officer, in addition to awarding compensation, also ordered the respondent to put in place a system

35 Intoxicating Liquor Act 2003. Section 14 of that Act prohibits persons under 18 from entering private premises. Under subsection (2), a licensee can permit a child under 15 to be in a bar before 9pm if accompanied by a parent or guardian. Subsection 4 gives licensees discretion to allow a person aged 15 to 17 accompanied by a parent or guardian to be in the bar after 9pm on the occasion of a private function at which a substantial meal is served to persons attending the function.

36 Kitty Holland, 'Traveller ethnicity will be reality in six months, says Ó Riordáin' *The Irish Times* (Dublin, 19 November 2014) < <http://www.irishtimes.com/news/social-affairs/traveller-ethnicity-will-be-reality-in-six-months-says-%C3%B3-riord%C3%A1in-1.2005945>> accessed 14 July 2015.

37 Irish Human Rights Commission and Equality Authority, 'IHRC and Equality Authority call for recognition of Traveller Ethnicity by the State in presentations to Oireachtas Joint Committee on Justice, Defence and Equality' <<http://www.ihrec.ie/news/2013/11/13/ihrc-and-equality-authority-call-for-recognition-of/>> accessed 14 July 2015.

38 Disability Act 2005 (s2) and Education for Persons with Special Educational Needs Act 2004 (s1).

39 Equal Status Acts 2000 to 2012 s 27 (1) b.

40 *Mrs X on behalf of her son Mr Y and a Post Primary School* DEC-S2010-009.

41 *ibid*.

42 *Two Complainants (Mrs A and her son M) v A Primary School* DEC-S2006-028.

facilitating the early identification of students with disabilities or learning difficulties with the aim of directing these students to the appropriate educational services quickly, in order to ensure that they maximise the benefit of their participation in formal education.

In *Ms KN v Department of Education*,⁴³ the Equality Officer found that the respondent's policy, which required students attending special schools to leave the school they attended at the end of the school year in which they turn 18, was discriminatory. The respondent was also directed to review the policy that requires students who are attending special schools to leave the school at the end of the year in which they reach their eighteenth birthday with a view to ensuring that students in special schools who are pursuing courses leading to accreditation (such as the Junior Certificate/Leaving Certificate Applied) be afforded the same duration of time to complete these courses as their counterparts in mainstream education.

A number of claims have been unsuccessful, particularly in the Superior Courts. In *Two Complainants v Minister for Education and Science*, the Equality Officer, in a very strong recommendation, found that the annotation on the leaving certificates of students with dyslexia to the effect that all parts of the subject were assessed except spelling and some grammatical elements, constituted disability discrimination and that there was no evidence that the annotation advanced the integrity of the system. Judge Hunt in the Circuit Court overturned this decision. He found that the disclosure of a disability did not amount to discrimination and that a difference in treatment was not synonymous with less favourable treatment. Even if there had been discrimination, the provisions of section 5(2)(h) provided an exemption. An appeal on a point of law to the High Court was unsuccessful.⁴⁴ The outcome of a further appeal to the Supreme Court is awaited.

There was a similarly strong recommendation by the Director of the Equality Tribunal in the field of education in the case of *Mary Stokes (on behalf of her son John Stokes) v Christian Brothers' High School, Clonmel*.⁴⁵ The Director found that the priority given to the sons of former pupils in the admissions policy of the school puts members of the Traveller community at a particular disadvantage compared with non-Travellers. He ordered the school to immediately offer a place to the complainant. He also ordered the school to review its Admission Policy to ensure that it does not indirectly discriminate against pupils. The school was successful in its appeal to the Circuit Court. Appeals on behalf of the pupil to the High Court and the Supreme Court were unsuccessful. The judgment of the Supreme Court, which does not refer to any case law of the CJEU on

indirect discrimination, sets an almost impossibly high standard for proving indirect discrimination. The level of analysis required will be beyond the capacity of most litigants.

In *Clare v Minister for Education and Science*,⁴⁶ the High Court found that the provision of separate tuition for a student with ADHD did not amount to discrimination, having regard to section 4(4). The Court also upheld the decision to expel the student, whose conduct was disruptive, having regard to section 7(4) b.

Some very significant orders have been made in housing cases under the ESA in relation to children. For example in *A Complainant v A Local Authority*,⁴⁷ a local authority was ordered to pay the maximum compensation of €6,350 for the distress and hardship caused to the Complainant by the discrimination. It was ordered to construct an extension suitable to the needs of a child with autism or to rehouse the family in alternative accommodation suitable to the needs of the child with autism.

Religious Ethos Exemption

One provision in the ESA which has attracted considerable publicity but surprisingly little litigation, is the religious ethos exemption in section 7(3)c of the ESA. This provides that denominational schools do not discriminate where 'it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school.' The provisions are somewhat unclear and a restricted interpretation would be expected. The constitutionality of this provision has never been tested. It is questionable whether 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.

However, in one of the few cases on this controversial area, the Equality Tribunal has found in *Ms A (on behalf of her son X - A Minor) v A Secondary School*,⁴⁸ that the action of a Roman Catholic secondary school in giving preference to Roman Catholic applicants in respect of allocation of places for the 2014 academic year was permitted by section 7(3)c. The case was taken on behalf of a potential pupil who was a member of the Christian Orthodox Church.

43 *Ms KN v Department of Education* DEC- S 2009-050.

44 *Two Complainants v Minister for Education and Science* DEC-S2006- 077, *The Minister for Education and Science V Hollingsworth*, (CC 10 October 2007) and *Cahill v Minister for Education and Science* [2010] IEHC 227.

45 *Mary Stokes (on behalf of her son John Stokes) v Christian Brothers' High School, Clonmel* DEC-S2010-056.

46 *Clare v Minister for Education and Science* [2004] IEHC 350.

47 *A Complainant v A Local Authority* DEC-S2007-049.

48 *Ms A on behalf of her son X - A Minor v A Secondary School* DEC-s2014-010.

The United Nations Committee on the Elimination of Racial Discrimination has requested Ireland to revise the legislative exemption in the light of the dominance of Catholic schools in the provision of education at primary school level.⁴⁹

1.6 EDUCATION (ADMISSION TO SCHOOLS) BILL 2015

It was anticipated that the provisions of this Bill would in some way ameliorate the situation. However, the provision of the Bill as currently drafted would appear to weaken the provisions contained in the ESA and to copper fasten the entitlement of denominational schools to give preference to potential students belonging to the denomination.⁵⁰

1.7 POSITIVE DUTY

The most significant amendment to the equality legislation, which has potential for children, is contained in section 42 of the Irish Human Rights and Equality Commission Act. This requires a broad range of public bodies in the performance of their functions to have regard to the need to eliminate discrimination, promote equality of opportunity and protect human rights. The implications of this duty should not be underestimated. Compliance with the duty is likely to require on-going impact assessment. Guidance from the Commission in the form of guidelines or a code of practice will breathe life into this new obligation. It has the potential to assist in the realisation of some of the rights set out in the CRC.

1.8 Limitations of the ESA

There are a number of limitations in the ESA, which restrict the potential to realise equality rights generally and for children in particular.

Services v Functions

Section 5 of the ESA applies the prohibition of discrimination to the provision of goods and services. The definition of services in section 2 is broad enough to include the services provided by public bodies. However, the scope of the ESA does not extend explicitly to the performance of the functions of public bodies generally. Therefore it is unclear to what extent the ESA applies to public authorities performing public functions which may not

come within the definition of service but which may nonetheless have a great impact on lives, including the lives of children. These areas of legal uncertainty are likely to include immigration, certain aspects of direct provision, citizenship, police powers, defence and prisons. This is a significant limitation.⁵¹

It is increasingly accepted particularly in the UK and Northern Ireland, that public authorities should conduct their activities without the use of discriminatory distinctions, and should be subject to enforceable and clear anti-discrimination controls. Section 29 of the UK Equality Act 2010 prohibits discrimination in the exercise of public functions. In Northern Ireland, the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 and the Disability Discrimination Act 1995 prohibit discrimination in the performance of public functions. Further, the Race Directive requires the inclusion of any functions that could come within the definition of social advantages, social protection, social security, healthcare, education and housing.⁵²

It is likely that the investigation and prosecution of offences⁵³ and matters such as ethnic profiling in the exercise of the powers of the Garda Síochána to remove a child to safety, would not be found to come within the remit of the ESA. The Special Inquiry in relation to the removal by the Gardaí of two Roma children into care, referred to the extent to which ethnicity was a feature in the decision to remove both children and concluded that the actions of the Garda Síochána conformed to the definition of ethnic profiling.⁵⁴

Direct Provision and the Non-National Exemption

A third limitation in the scope of the ESA is the exemption on grounds of nationality in section 14(aa). It would appear that the primary intention behind the exemption was to ensure that the ESA could not be used to challenge the direct provision system. The

49 UN Committee on the Elimination of Racial Discrimination (CERD), 'UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Ireland' (14 April 2005) CERD/C/IRL/CO/2 para 18.

50 Education (Admission to Schools) Bill 2015 s 62(6) c (iv).

51 The text of the Race Directive does not distinguish between services and functions and some commentators argue that the directive can and should be read to include the activities of public bodies like the police. (See Chris Brown 'The Race Directive: Towards Equality For All the Peoples of Europe?' (2001) 21 Yearbook of European Law 195-227.

52 Disability Discrimination Act 2005 (UK and Northern Ireland) Article 3(e)(f) (g) and (h).

53 *Donovan v Garda Donnellan* DEC-S2001- the Equality Officer held that the investigation and prosecution of a crime by the Gardaí did not come within the remit of the ESA.

54 Department of Justice, 'Garda Síochána Act 2005 (Section 42) (Special Inquiries relating to Garda Síochána) Order 2013, Report of Ms Emily Logan' (2014) <<http://www.justice.ie/en/JELR/Emily%20Logan%20report.pdf/Files/Emily%20Logan%20report.pdf>> accessed 14 July 2015. It found at paragraph 2.10.66 that '... To the extent that Child A's ethnicity was so influential in determining the decision to remove him from the care of his parents, with no objective or reasonable justification, the inquiry concludes that the actions of the Garda Síochána in this case conformed to the definition of ethnic profiling' It also found at paragraph 3.9.56 that 'given that the Inquiry believes that Child T's ethnicity and appearance played a role in the decision to invoke section 12 of the 1991 Act, the Inquiry concludes that the actions of Garda Síochána in this case conformed to the definition of ethnic profiling.'

exemption appears to afford a very wide range of public bodies discretion to discriminate on grounds of nationality in relation to certain non-nationals. Discrimination on other grounds such as gender, sexual orientation and the other elements of the ground of race such as 'colour' is not permissible, at least in relation to the provision of goods and services that could not be described as a function of the State. However, a potential claimant may have difficulties in establishing a comparator in similar circumstances.

An amendment to the ESA to explicitly include the function of public bodies, would bring areas such as immigration, police powers and certain aspects of direct provision within the remit of the ESA, would assist with compliance with the Race Directive and would provide equivalence with Northern Ireland and the UK in this regard.

Statutory Exemption

A third major limitation to the scope of the ESA is the blanket exemption contained in section 14(1)a for any action that is required by or under 'any enactment'. This exemption limits the scope of the protection by exempting action required by other legislative provisions. This would include legislative requirements involving the areas explicitly concerned by the Race Directive such as education, goods and services, and housing.

It means that the ESA cannot be used to challenge other laws and so limits the scope of the anti-discrimination provisions significantly. The exemption also means that successful equal status challenges can be reversed by simply amending the ESA or by bringing in another law.⁵⁵

Legislation in a particular area may take the area outside of the remit of the ESA. For example, surrogacy currently comes within the remit of the ESA in that service providers cannot discriminate on grounds of sexual orientation, family status or civil status for instance, but it is likely that legislative provision governing the issue will result in the area being removed from the scope of the ESA because of the exemption in section 14.

The statutory exemption only relates to discriminatory treatment required by law and therefore does not apply where some element of discretion exists in the provision of the benefit or service. It is difficult to understand the logic behind this distinction as to when the prohibition on discrimination applies and is exempted. In any event neither the Race Directive or the Gender Goods and Services Directive allow for any blanket exemption for discriminatory measures required by law. A significant way of improving the scope of the ESA would be to delete the statutory exemption. This would also assist in compliance with the Race Directive and the Gender Goods and Services Directive.

1.9 Recommendations for improving the scope of protection for children in the ESA and other protective measures

- > The scope of the ESA should be broadened to include the functions of public bodies.
- > The statutory exemption in section 14 should be deleted and the exemption on grounds of nationality should be reviewed.
- > The grounds contained in the domestic equality legislation should be levelled up to include the grounds of language, political or other opinion social origin, property, birth or other status which are named in the it the Charter, CRC and the ECHR.
- > Given the importance of parental leave to early child development, it is important that the proposed Family Leave Bill 2015, contains comprehensive provisions on paternity leave and maternity leave for surrogate mothers and that consideration should be given to introducing a statutory right to request flexible working.
- > The potential of the new positive duty, which is imposed on public bodies by the Irish Human Rights and Equality Commission Act 2014, to promote equality of opportunity and treatment of the persons to whom they provide services, should be explored in relation to the creation of child friendly services in the public arena.
- > The non-application of the age ground to people under 18, as provided for in section 3(3) of the ESA should be reviewed and amended.
- > The Education (Admissions to Schools) Bill 2015 needs significant amendment to improve the accessibility of local national schools to children with no religion or who belong to minority religions.
- > The reasonable accommodation provision in section 4 need to be broadened and the nominal cost exemption should be reviewed and amended at least in relation to public and State bodies.

55 Judy Walsh (n 30) 50-51.