



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## SUBMISSION ON 'TRANSFER 2010'

### Post-Primary Schools Admissions for 2010-11

#### **Summary**

The Department of Education issued *Transfer 2010 Guidance on Post-Primary School Admissions for the 2010/2011 School Year* for consultation from 2 February to 27 April 2009. The Transfer 2010 policy document sets out guidance criteria for admissions to schools. The primary criterion is eligibility for free school meals.

The Commission had welcomed the abolition of the 11+ transfer test which had been criticised by the UN Committee on the Rights of the Child and the UN Special Rapporteur on the right to education. As well as a number of specific comments on elements of the proposals, the Commission's submission provides an overview of human rights instruments relevant to the reforms. This includes covering provisions for non-discrimination, equality of opportunity and reducing socio-economic disadvantage. The submission also addresses the question of the relevance of the right to education in accordance with philosophical convictions in relation to the move away from academic selection.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid.*, s.69(3).

compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.

2. The Commission welcomes the opportunity to comment on Transfer 2010. The Commission has contributed to the debate on the reform of the selection system on a number of occasions and has a range of established positions founded in internationally accepted rules and principles for the protection of human rights.<sup>5</sup>

## **Human rights context of reforms to admission**

3. The Commission welcomed the abolition of the 11+ test which it regarded as a stigmatising and humiliating test. In addition to the stress placed on children in preparing for it, and the extra stress and lasting psychological impact on those who failed it, it also impacted negatively on the teaching of children not put forward for the test, and on the delivery of the broader curriculum and hence on the right of all children to an effective education. The importance of access to effective education being based on the human rights of all children, and not on investment in the perpetuation of privilege, cannot be understated. The significant differences in educational attainment and the clear link between social disadvantage and non-grammar school participation had been highlighted by the Commission in the past and are well documented. The Commission has consistently argued that academic selection particularly adversely affects children from disadvantaged socio-economic backgrounds and is therefore contrary to the human rights principles of non-discrimination and equality of opportunity.

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<sup>3</sup> *Ibid.*, s.69(4).

<sup>4</sup> *Ibid.*, s.69(6).

<sup>5</sup> The Commission met with the Post Primary Review Body twice and produced a written submission in 2001, responded to the Review Body's report (the 'Burns Report') in 2002 and hosted a seminar on the same topic in April of the same year. The Commission produced a short guide to human rights and the Review of Post-Primary Education, met with the (Costello) Post-Primary Working Group in 2004 and produced a further detailed submission to the consultation on the New Admission Arrangements for Post-Primary Schools in 2005. The present briefing builds on these submissions, which are available on our website.

4. In interpreting compliance with the UK's human rights commitments, experts at the United Nations have also raised concerns regarding academic selection in Northern Ireland. In its most recent assessment of the UK's compliance with the UN Convention on the Rights of the Child, the treaty body reiterated its concerns that academic selection at 11 was continuing in Northern Ireland. It recommended that the UK:

[generally] continue and strengthen its efforts to reduce the effects of the social background of children on their achievement in school; [and] put an end to the two-tier culture in Northern Ireland by abolishing the 11+ transfer test and ensure that all children are included in admission arrangements in post-primary schools.<sup>6</sup>

5. In 2003, in examining the right to education in Northern Ireland, the UN Special Rapporteur on the Right to Education addressed post-primary reform. She noted, particularly in the context of education being compulsory until 16, that:

Northern Ireland has preserved segregation at the age of 11, [by retaining] the 11 plus transfer test... The two-thirds of the children who do not perform well enough to qualify for a grammar school tend to perceive themselves as educational failures, relegated to inferior schools.<sup>7</sup>

The Special Rapporteur further observed:

Because grammar schools are vastly oversubscribed, the consequence is that parents may express their preference but, in practice, it is the schools that choose children rather than the reverse, reinforcing inter-generational transmission of privilege.<sup>8</sup>

Citing OECD guidance and emphasising education as a long-term solution to employability, she recommended that:

Preventing schools from "reproducing the existing patterns of privilege rather than delivering equal opportunities" seems to the Special Rapporteur a particularly important guidepost for ongoing education reforms.<sup>9</sup>

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<sup>6</sup> UN Committee on the Rights of the Child (20 October 2008) Concluding Observations on the United Kingdom, UN Doc CRC/C/GBR/CO/4 [66-67(a)(j)].

<sup>7</sup> UN Commission on Human Rights, Report submitted by Katarina Tomaševski, Special Rapporteur (5 February 2003) UN Doc. E/CN.4/2003/9/Add.2 [22].

<sup>8</sup> *Ibid.*, [25].

<sup>9</sup> *Ibid.*, [27] citing Organisation for Economic Cooperation and Development (2000) *Knowledge and Skills for Life: First Results from PISA*, OECD, Paris, p 210.

## **Transfer 2010: aims, human rights and the legal framework**

6. The Transfer 2010 proposals include aims regarding the treatment of children fairly, ensuring equal opportunities and reducing inequality. The document links this to its rationale for not including academic selection within its recommended criteria:

...it is the Department's policy not to include academic admissions criteria in its menu of recommended admissions criteria. This is because the Department does not consider academic selection to be consistent with the objective of treating children fairly and giving each child the opportunity to reach his/her full potential. The Department has withdrawn the Transfer Test and has not replaced it because it believes that such ability-based admissions maintain and support inequality. For example, under the previous operation of academic selection, 1 in 17 children in academically-selective schools were FSME [entitled to Free School Meals] whilst 1 in 4 children in other schools were FSME...<sup>10</sup>

7. The document sets out the legal framework in relation to the Education Orders and makes some reference to equality and anti-discrimination legislation. While human rights considerations are implicit in the document, the Commission would prefer their explicit statement as part of the legal framework within which admissions decisions should be based. The following is a non-exhaustive outline of a number of key standards and their status.

### **European Convention on Human Rights**

8. The main provisions of the European Convention on Human Rights (ECHR) are given further effect in domestic law by the Human Rights Act 1998 and hence are directly legally binding on the Department of Education and its subordinate bodies. Article 2 of Protocol 1 of the ECHR covers the Right to Education:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of

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<sup>10</sup> Department of Education (2009) *Transfer 2010: Post-Primary Admissions for 2010/2011 School Year* [18].

parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.<sup>11</sup>

9. Notably, it has been determined that the right to education in the ECHR means a right to an *effective* education.<sup>12</sup>
10. The UK has entered a reservation to this Article to the effect that provision should only be made if it is compatible with the avoidance of unreasonable public expenditure. The Protocol and the limitation placed by the reservation are both enshrined in domestic human rights and education law.<sup>13</sup>
11. Also relevant is Article 14 of the ECHR which prohibits discrimination on any ground in relation to the exercise of Convention rights.
12. The scope of the assertion in the Article that “the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions” has been raised in discussion on post-primary reform. A view that has been put to the Commission is that the right to education in accordance with “religious and philosophical convictions” incorporates the right to a grammar school education and, by extension, the need to retain academic selection. However, the jurisprudence of the European Court of Human Rights (ECtHR) provides no support for an interpretation that would favour inequalities in access to education, so that such an assertion is highly unlikely to be entertained either by Strasbourg or by domestic courts applying the Human Rights Act 1998.
13. Nothing in the Article is particularly relevant to the question of whether or not public funds should be used to support grammar schools. The Article merely protects the rights of parents to have their children educated in conformity with the religious and philosophical convictions of the parents, and in the vast majority of cases there are many settings capable of offering education that conforms. The right is for their children to be educated in a setting that does not disrespect, or indoctrinate against, the parent’s convictions. The

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<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), as amended by Protocol No.11 (ETS No. 155) Protocol 1 Art. 2.

<sup>12</sup> European Court of Human Rights, *Belgian Linguistic Case* No.1 (1967), Series A, No.5 (1979-80) 1 EHRR 241; and No.2 (1968), Series A, No.6 (1979-80) 1 EHRR 252.

<sup>13</sup> Human Rights Act 1998 Schedule 3, Part II; and Education and Libraries (Northern Ireland) Order 1986 (as amended) SR1986/594, art. 44.

Convention does not enshrine the principle of parental choice of education provision to the extent of creating a right for parents to choose a particular school, or type of school, from among a number of schools, or types of school, that are capable of offering education that conforms with those convictions. Unless it could be shown that the parents of a particular child had religious or philosophical convictions of a nature that could only be catered for in a grammar school, a right cannot be asserted under the Convention for their child to be educated in such a school as opposed to in other schools capable of educating the child in conformity with those convictions.

14. Relevant ECtHR jurisprudence on the obligations arising from the second sentence of Protocol 1 Art. 2 include a Northern Ireland case on integrated education. The Court, after rehearsing its conclusions about the extent of the state's obligations to fund education in the *Belgian Linguistic* and *Kjeldsen* cases, concluded:

...there is no positive obligation on the State in relation to the second sentence..., to subsidise any particular form of education in order to respect the religions and philosophical beliefs of parents. It is sufficient for the State, in order to comply with its obligations under Article 2, to evidence respect for the religions and philosophical beliefs of parents within the existing and developing system of education.<sup>14</sup>

15. In any case, the right to have one's child taught in conformity with one's convictions does not contain within it an automatic right to have that education delivered at public expense, least of all where to do so could imply spending public funds disproportionately on that child's education as opposed to that of children whose parents held different religious or philosophical convictions, or who held the same convictions but were having their child's education delivered in a setting other than a grammar school.<sup>15</sup>
16. A case heard by the Court of Appeal in England in relation to assisted places in a fee paying school found no breach of the

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<sup>14</sup> *X v UK* (app no. 7782/77) (1978) ECHR 14 DR 179.

<sup>15</sup> Parents who hold religious views that cannot adequately be catered for in any publicly funded school may be able to assert a right under the Convention to create their own school (or to home-school), but the state would be entitled to apply (fair and proper) criteria in deciding to fund or not to fund the alternative provision.

ECHR.<sup>16</sup> This judgment drew on *X v UK* and the *Belgian Linguistic* case in which the Court held:

...the [ECHR] Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2... [The obligation is that] of guaranteeing... the right, in principle, to avail themselves of the means of instruction existing at a given time.<sup>17</sup>

17. The Commission is not aware of any standards or principles of human rights law that could be used to assert a duty on the state to fund grammar schools or to retain academic selection. Any rationale governing school funding decisions must be non-discriminatory, and overall, the state's involvement in funding education should ensure that every child has access to the right to an effective education. If a parent were to argue that a grammar school offered their child a more effective education than they might get somewhere else, or a personal advantage such as better career prospects than a child denied a grammar school place, that argument is not a human rights argument. A human right is universal, so that no child can be said to have a human right to a better education or better life chances than those available to the other children.

### **Convention on the Rights of the Child and other UN treaties**

18. There are a number of other treaty obligations to which the UK has entered which are legally binding. While there is no direct enforceability in the courts, in the manner of ECHR rights protected by the Human Rights Act 1998, the Department (and its subordinate bodies) as the organ through which the State delivers specific services in respect of which it has accepted human rights obligations, also has to ensure that its policies and practices are in conformity with the standards the UK has signed up to in such instruments. These treaties are not only binding in international law, but can be and have been drawn upon by the Courts in Northern

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<sup>16</sup> *R v Department for Education and Employment ex parte Begbie* [1999] EWCA Civ 2100.

<sup>17</sup> *Belgian Linguistic case* (No.2) (1968) 1 EHRR 252 [ 281-282].

Ireland as an interpretive aid in assessing how domestic legislation is operated.<sup>18</sup>

19. The UN Convention on the Rights of the Child (CRC) contains a number of relevant provisions relating to non-discrimination (Art. 2); the best interests of the child being a primary consideration in all actions concerning children (Art. 3); the views of the child being given due weight in accordance with the age and maturity of the child in all matters affecting the child (Art. 12); and specifically the right to education “on the basis of equal opportunity”. States party to the CRC are in particular, committed to:

Encourage the development of different forms of secondary education, including general and vocational education, [and] make them available and accessible to every child.<sup>19</sup>

20. The right to education is similarly set out in the UN International Covenant on Economic, Social and Cultural Rights, which states:

Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means...<sup>20</sup>

21. There are also a number of relevant soft law declarations. While, unlike treaty commitments, these are not binding, they nevertheless provide authoritative interpretation of international standards. For example, the UNESCO Convention Against Discrimination in Education uses a definition of discrimination that, subject to some exemptions:<sup>21</sup>

...includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) Of depriving any person or group of persons of

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<sup>18</sup> In addition, the UK (including its devolved departments) is periodically assessed by the supervisory bodies for UN and European human rights treaties to ensure that its legislation, policy and practice are in compliance with its international commitments.

<sup>19</sup> Convention on the Rights of the Child, Art. 28(1)(b).

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights, Art. 13(2)(b); note that this is subject to a clause prohibiting “discrimination of any kind”, Art. 2(2).

<sup>21</sup> Including single sex schools (provided standards are the same) and separate systems for religious or linguistic reasons (Art. 2).

access to education of any type or at any level; (b) Of limiting any person or group of persons to education of an inferior standard...etc<sup>22</sup>

22. The parties to the Belfast (Good Friday) Agreement also affirmed, in the human rights section of the treaty, their commitment to, in particular:

...the right to equal opportunity in all social and economic activity, regardless of **class**, creed, disability, gender or ethnicity; [emphasis added]

## Legal Framework Transfer 2010

23. The Transfer 2010 document sets out that the pre-2010 selection system was governed by legislation and its accompanying regulations.<sup>23</sup> From 2010 this legislation ceases to have effect. The criteria set out in Transfer 2010 are made as guidance under the same legislation.<sup>24</sup> Hence, as guidance, the criteria are not directly legally binding in the same manner but decisions on admission to grant-aided schools must 'have regard' to them.
24. As the Department will be aware, there would be a much greater lever to reduce inequality if the criteria were set out in legislation, provided of course the criteria were aimed at achieving this objective. While this may not have been possible on this occasion, the Department could clarify whether this remains the long-term objective.
25. Notwithstanding the duty to have regard to the guidance, the Transfer 2010 document indicates that while this is not recommended, post-primary schools would not be breaking the law if they used alternative criteria provided those were not generally prohibited by equality legislation. The Commission would urge that any alternative criteria adopted for post-primary admission should also avoid conflict with the fulfilment of the human rights obligations set out above. In particular, any system that effectively reintroduces the 11+ or a near equivalent would be a regressive step.
26. The Transfer 2010 document states that alternative arrangements involving academic criteria by schools will need

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<sup>22</sup> UNESCO Convention Against Discrimination in Education, Art. 1(1).

<sup>23</sup> Education (Northern Ireland) Order 1997 Art 16.

<sup>24</sup> Education (Northern Ireland) Order 1997, art. 16B (as inserted by the Education (Northern Ireland) Order 2006).

to be robust and communicated to all parents. There has to be a 'special circumstances' procedure, procedures for those who cannot sit the test, compliance with the Disability Discrimination Act and special provisions for persons who have moved from abroad. The Commission stresses the need for clarity, due process and non-discrimination in any admission arrangements. The need to communicate to all parents and children should pay particular regard to reaching socially disadvantaged groups and groups with particular communication needs, including issues in relation to literacy, disability, and speakers of languages other than English.

27. Further, in general, the Commission recommends that all procedures and processes should maximise the opportunity for children to express their views on their admission to particular forms of education, with such views being given due weight in accordance with the age and maturity of the child, as set out in the Convention for the Rights of the Child.

### **Recommended Admissions Criteria**

28. The Transfer 2010 document sets out the recommended admissions criteria as follows:

*First Criterion:* Eligibility for Free School Meals (FSME) (proportion of FSME children admitted not lower than overall proportion of FSME applicants)

*Other Criterion* (in no order): Sibling; Eldest Child; feeder/named primary school; Parish (nearest suitable school) catchment area (with nearest suitable school) nearest suitable school<sup>25</sup> and random selection (tie breaker).

### ***Primary criterion: Free School Meals Eligibility***

29. Transfer 2010 sets out the inclusion of an equitable representation of applicants eligible for FSME as the primary criterion for selection. The Commission has, in the past, suggested that FSME should be used as an indicator of disadvantage for post-primary admissions to assist in reducing inequality.
30. The Commission is aware that the Department is presently revising the eligibility criteria for Free School Meals. The

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<sup>25</sup> Nearest suitable school continues to be defined "denominational grammar", "non-denominational grammar", "maintained secondary", "controlled secondary", "Irish-medium" and "Integrated".

Commission provided advice in relation to this matter at the request of the Department. The revision is to ensure the eligibility for free school meals of those who would meet the proxy indicator for income levels in the eligibility test, except for the fact they are not eligible for benefits due to parental migration status. The Commission would urge the Department to ensure that the amended FSME is in place to cover children in this category.

### ***Other criteria***

31. The Commission has in the past recommended that the inclusion of sibling as a criterion should be a consideration, but not the determinant one. Such a measure promotes family life and has clear practical advantages. However, there is a risk of the perpetuation of disadvantage in the short to medium term, as children from socially deprived backgrounds will be much less likely to have elder siblings in oversubscribed schools. Other children likely to be disadvantaged are those whose elder sibling did not attend the school of their choice. It is therefore welcome that this criterion is not proposed as a primary determinant, and that this stipulation is limited to siblings currently at the school.
32. From a cost perspective, it is best that schools serve the nearest geographical catchment areas where possible. The economic (and environmental) considerations relate not only to school provision but to associated issues such as home to school transport. However, in terms of the promotion of equality it would be beneficial to ensure, as far as possible, that catchment areas were so drawn as to ensure a social mix. The Commission has contended in the past that catchment areas should be determined by an independent body, a process which could be instigated in the longer term.
33. In relation to the random selection tie-breaker criterion, the Commission suggests this could be further teased out to specify random selection from within geographical catchment areas drawn so as to contain a mixed social base, to reduce the likelihood of selection by postcode and thus promote equality of opportunity for all children.

### **Appeals mechanisms**

34. The Commission welcomes and stresses the importance of the maintenance of the independent appeals tribunals run by the

Boards or successor authority to make decisions on the correct application of admissions decisions.

35. The Transfer 2010 proposals also envisage the establishment of a new Exceptional Circumstances Body for admissions to specific schools. The Department indicates that guidance on the grounds of exceptional circumstances is yet to be completed but it intends to include looked-after children, children for whom social services present a strong case (e.g. where a child has been abused) and medical circumstances. In addition to this, the Commission would urge consideration of grounds relating to victims of bullying, families forced to move as victims of violence and intimidation, and nomadic Travellers.

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