

Ombudsman for Children’s Office submission to the Joint Oireachtas Committee on Education in relation to the General Scheme of the Education (Parent and Student Charter) Bill 2016 and the Education (Amendment) Bill 2015

7 March 2017

1. Introduction

The OCO welcomes the General Scheme of the Education (Parent and Student Charter) Bill, published on 5 December, 2015. The complaints-handling structures in the education sector are currently incomplete.¹ This has been a matter of concern to the Ombudsman for Children’s Office for many years, as many of the education-related complaints examined by the Office highlight difficulties with the handling of complaints in individual schools.

The General Scheme sets a legislative framework to improve engagement between schools, students and parents, and will increase the consistency in schools’ complaints handling practice. The Bill also seeks to strengthen the role of the Ombudsman for Children’s Office when dealing with complaints about schools. Crucially, this legislation also presents an opportunity to promote and support a child-centred, rights based culture in school-based decision making.

The implementation of Parent and Student Charters will see a cultural shift in how schools operate. The provisions contained in Head 3 will see a move away from reacting to and dealing with grievances after they occur. Instead, schools will have to engage with parents and students in order to establish their views, to positively invite feedback, and to be open to concerns and negative comments.

¹ It was originally envisaged that in order to bring about higher standards and consistency in schools’ complaints handling practice, the Minister for Education and Skills would prescribe procedures for schools to deal with grievances raised by students or their parents, as well as the remedial action to be taken in response to those grievances. These provisions (existing section 28 of the Education Act 1998) never came into operation.

The General Scheme states that the principles of the Charter will operate by “positively seeking to address parent and student concerns and electively providing redress as appropriate in order to obviate as far as possible the need for a parent or student to rely on grievance and complaint processes.”

The early identification of concerns will allow problems to be considered and dealt with by the school, and will minimise or avoid reliance on formal complaint procedures. The Guidelines on the Charter will also include procedures to deal with any grievances that do occur even with the Charter in place.

It will be a requirement for schools to promote the involvement of parents and students in the education they provide. Active participation by students and parents in the development of a school Charter will lead to a sense of community and ownership which will undoubtedly reduce the likelihood of conflict and complaints.

The Education (Parent and Student Charter) Bill is a valuable opportunity for the Department of Education to meet its obligations at both a national and international level and to fully embed a children’s rights approach within school policies and practices.

2. Ireland’s obligations under the UN Convention on the Rights of the Child

Article 4 of the Convention on the Rights of the Child (UNCRC) requires states to undertake ‘all appropriate legislative, administrative, and other measures’ for the implementation of children’s rights. The Committee on the Rights of the Child has made it clear that rights are not effective without measures being taken to enforce them and to offer redress where they have been violated. In particular, it has recommended that States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives to challenge rights violations. According to the CRC Committee, these should include the provision of “child-friendly information, advice, advocacy ... and access to independent complaints procedures ... with necessary legal and other assistance.”

The Education (Parent and Student Charter) Bill provides an opportunity for the general principles of the CRC to be incorporated in legislation, both through specific provisions and at a more general level. The OCO is of the view that amendments should be made to ensure that this legislation fully incorporates a child rights-based approach. The full implementation of Article 12 in the education context is of particular importance and all legislative proposals should be based on the clear guidance provided by the UNCRC and the CRC Committee in this regard.

In its Concluding Observations on the combined third and fourth periodic reports of Ireland, the UN Committee on the Rights of the Child raised concerns about Ireland's "incomplete structures in the education sector for the handling of complaints" and recommended that the State party should "establish an effective complaints mechanism for students in schools".

2.1 Relevant Children's Rights Standards under the UNCRC

The CRC Committee monitors the implementation of the Convention and has identified four general principles², integral to the implementation of all other children's rights:

- a. **Article 2** provides that all children must be able to enjoy their rights without discrimination of any kind, irrespective of their circumstances or those of their parents/guardians;
- b. **Article 3** requires that the child's best interests are a primary consideration in all actions concerning them. The Committee has established that this is a three-fold concept – it is a substantive right, an interpretive legal principle and a rule of procedure;³
- c. **Article 6** recognises the child's right to life, survival and development. This obliges states to provide optimal conditions for childhood⁴ and according to the Committee can only be implemented in a holistic manner, by the

² *Committee on the Rights of the Child (1991), General Guidelines Regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44, paragraph 1(a) of the Convention.*

³ *Committee on the Rights of the Child, General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) UN Doc. CRC/C/GC/14 at p. 4.*

⁴ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Geneva: UNICEF, 2007) at p. 93.

enforcement of all other children's rights, as well as through respect for the responsibilities of parents and the provision of quality services;⁵ and

- d. **Article 12** enshrines children's right to freely express their views in all matters involving or affecting them, and for these views to be given due weight in line with their age and maturity. The child's capacity to form his/her own views must be assessed on a case by case basis.⁶

As the proposed Charter is largely focused on improving engagement, participation and consultation procedures, Article 12 of the UNCRC is particularly relevant. Notably, expressing views is a choice for each child and not an obligation. However, where a child chooses to exercise their rights under Article 12, all State actors have a responsibility to make such participation meaningful and effective.⁷

The way in which young people's views are expressed and heard should be adapted to each child's level of understanding and ability to communicate. The Education (Parent and Student Charter) Bill is a valuable opportunity for the Department of Education to meet its obligations in this regard and to fully embed a children's rights approach within school policies and practices and also take into account his/her individual circumstances. Furthermore, the child has a right to receive an explanation of how his/her views were considered and if they were disregarded or violated, the child should have access to an effective remedy⁸.

It is important to note that the assessment and determination of a child's best interests must include respect for the child's right to express his/her views freely and due weight given to these views. The CRC Committee has clearly set out that establishing 'best interests' in consultation with a child/group of children is a key part of ensuring that the CRC is correctly applied at a national level⁹.

⁵ Committee on the Rights of the Child, *General Comment No. 7: Implementing Child Rights in Early Childhood* (2005) UN Doc. CRC/C/GC/7 at p. 6.

⁶ Committee on the Rights of the Child, *General Comment No 12: The Child's Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at p. 11.

⁷ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) at pp. 17, 28.

⁸ Committee on the Rights of the Child, *General Comment No 12: The Child's Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at p. 11

⁹ Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN Doc. CRC/C/GC/14 at pp. 11, 13.

Article 12 of the UNCRC also supports the participation of children in decisions about the provision and improvement of services, reflecting increasing recognition of children as ‘co-partners’ in these processes¹⁰. The CRC Committee has also clearly advised that states must adopt special measures to ensure that vulnerable or marginalised groups of children are enabled to participate in all matters affecting them on an equal basis with all other children¹¹.

Overall, all child participation processes should be transparent, accessible and relevant to the child, respectful, safe and sensitive to risk, child-friendly, inclusive and accountable¹². They should also be supported by the ongoing and systematic training of the adults involved, including training on children’s rights and skills-based training on communicating with children at their level of understanding¹³.

3. National Policy Framework

3.1 Better Outcomes, Brighter Futures

Better Outcomes, Brighter Futures (BOBF)¹⁴ sets the Government’s key commitments to children and young people up to the age of 24 from 2014 to 2020. The Strategy (Goal 3) articulates the importance of listening to and involving young people as a fundamental social inclusion process through which children and young people are empowered to become actors in the decisions that affect their lives and to be socially included, active citizens in their own right. As part of this, Goal 3 states that Government recognises the right of children and young people to have a voice in decisions that affect them, both individually and collectively, and particularly stresses the importance of having a voice in decisions made in their local communities, schools and in the wider formal and non-formal

¹⁰ Committee on the Rights of the Child, *General Day of Discussion: The Private Sector as Service Provider and its Role in Implementing Child Rights* (2002) available at <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2002.pdf> at pp. 8-9

¹¹ Committee on the Rights of the Child, *General Comment No 12: The Child’s Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at p. 16.

¹² Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN Doc. CRC/C/GC/14 at pp. 9, 26-27.

¹³ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies) at p. 27.

¹⁴ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf.

education system. The Strategy acknowledges the evolving capacity of children and young people to participate in the decisions that affect them and highlights that adults have a key role in enabling and facilitating their voice to be heard.¹⁵

As highlighted in the Strategy, “failure to listen to children and young people in the past has resulted in a failure to protect them from abuse and neglect”. The Strategy acknowledges the importance of supporting children to express themselves in order to develop, from an early age, the child’s capacity to be reflective, critical citizens. It also notes that participation is a process, both collectively and individually which in itself is respectful of the dignity of children and young people and the contribution they have to make, based on their unique experiences and perspectives. The process involves taking their views and opinions seriously and acknowledging and responding to them appropriately. The Strategy also stresses that accommodations and supports are required to ensure that the voices of ‘seldom-heard’ children are heard (e.g. children with disabilities, stressing that while their voices may be harder to reach and hear, they are no less important).¹⁶

It is worth highlighting the commitments made by Government in this National Strategy in the context of the General Scheme as this piece of legislation presents a crucial opportunity to ensure that many of the core commitments made are implemented.

Consultative initiatives with children in education

The government has committed to a number of consultative initiatives with children in order to realise the goals set out in the Strategy. Relevant to the area of education are commitments to consult with children and young people on policies and issues that affect their lives, and in particular, to create mechanisms to provide children and young people

¹⁵ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at p. 31.

¹⁶ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at p. 31.

with the opportunity to be heard in primary and post-primary schools and centres for education through Student Councils or other age-appropriate mechanisms.¹⁷

In relation to participation of children and young people in political and policy making processes, Government committed to developing and implementing a National Policy on Children and Young People's Participation in Decision-making (published 2016 – see below) and to establish a Children and Young People's Participation Hub to support Government departments and agencies in the implementation of the National Policy on Children and Young People's Participation in Decision-making.¹⁸

Achieving full potential in learning and education

Of particular relevance to the General Scheme is Outcome 2 of Better Outcomes, Brighter Futures: "Achieving full potential in learning and education".¹⁹ As part of this, Government recognised the importance of engaging and inspiring children and young people in learning early on, and for school itself to instil a love of learning, to achieve good educational outcomes. Outcome 2 states that "true student participation, with real influence over strategic decision-making, has been shown to improve engagement and attainment, while also fostering important attributes such as social responsibility, cross-cultural sensitivity and emotional intelligence". It highlights the benefits of strengthening the relationships between schools, parents and communities. This enhances student engagement, behaviour and achievement and the sense of belonging within school and the community for the child or young person. It also enhances the invaluable role schools play in building inclusion and creating stability in their lives.²⁰

In order to improve school engagement, foster inclusive school environments and ensure equal treatment and equality, Government has committed to implementing strategies to

¹⁷ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at p. 32.

¹⁸ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at p. 32.

¹⁹ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at p. 63.

²⁰ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at pp. 67, 68.

improve school engagement and reduce incidences of suspensions and expulsions and early school-leaving through engaging parents in schooling. Importantly, the Strategy has committed to fostering inclusive school environments where all pupils flourish, irrespective of social and ethnic background or disability, which will include ensuring that equal treatment and equality are embedded into the Whole School Planning Development Process.²¹

3.2 National Strategy on Children and Young People’s Participation in Decision Making

The National Strategy on Children and Young People’s Participation in Decision-making was published in June 2015 with a goal of ensuring “that children and young people will have a voice in their individual and collective everyday lives across the five national outcome areas.”²² Education and schools are identified as one of four objectives and priority areas for action: “Children and young people will have a voice in decision-making in early education, schools and the wide formal and non-formal education system”.²³

According to the National Strategy on Children and Young People’s Participation in Decision-making, “effective and meaningful participation of children and young people [in education] has been shown to be beneficial to children and young people, and to schools. Students’ participation generally, and in student councils more particularly, can improve academic standards, reduce rates of early school-leaving, improve discipline and facilitate students in acquiring communication, planning and organisational skills. A 2013 review of literature on school engagement shows that, among older students, strong feelings of attachment to the school and involvement in school life are associated with greater self-esteem and lower

²¹ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at p. 69.

²² Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at <http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at p. 3.

²³ Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at <http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at p. 3.

levels of anti-social behaviour and substance abuse, as well as superior academic performance.”²⁴

Ensuring children have a voice in decision-making throughout the education system

Objective 2 of the Strategy refers to children and young people having a voice in decision-making in early education, schools and the wider formal and non-formal education systems and highlights “the importance of children and young people’s involvement in decision-making in education policy, in the running of schools and services, in school inspections, in schools’ self-evaluations, in the curriculum, in behaviour and bullying policies, in support services and other areas, as outlined in the Action Plan. In addition, the Strategy notes the need for improvement in the effectiveness of student councils in second-level schools, in accordance with the Education Act 1998 and the establishment of student councils in primary schools”.²⁵

Taking children’s views into account

As stated in the Strategy, according to the UN Committee on the Rights of the Child and in line with its General Comment on Article 12 of the UNCRC, “the duty to take account of what children say applies in a variety of contexts. For example, at macro level, children’s views should be taken into account in the development of national policies and in the design of services. At micro level, children’s views should be taken into account in the individual decision-making that affects their daily lives. The UN Committee has highlighted the relevance of children’s involvement in decision-making in schools and local communities, given that these are the spaces where many important decisions are taken that directly affect their lives. These are two of the priorities of the present strategy.”²⁶

²⁴ Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at <http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at p. 7.

²⁵ Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at <http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at pp. 13-14.

²⁶ Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at

This statement supports our view, that children and young people should be consulted at a policy level when developing the statutory guidelines in accordance with the legislation. The legislation should also provide for children’s views to be taken into account when developing individual school charters.

Commitments in relation to student participation

Commitments made in the area of student participation in the National Strategy on Children and Young People’s Participation in Decision-making include:

- Government departments and agencies that provide services for children and young people will develop child- and youth-friendly feedback and complaints mechanisms.²⁷
- The Department of Education and Skills will encourage more primary schools and all post-primary schools to establish student councils.
- The Department of Education and Skills Schools Inspectorate will review its current practices on student participation in the inspection process with a view to enhancing the level and quality of student participation.
- The DCYA will engage proactively with the National Association of Principals and Deputy Principals to build a stronger role for student councils to promote the value of the student voice in schools.²⁸

4. Barriers to the participation of children and young people in decision making

Research conducted by the Department of Children and Youth Affairs on children and young people’s experiences of participation in decision-making at home, in schools and in their communities states that “most children and young people who participated in this research

<http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at p. 20.

²⁷ Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at

<http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at pp. 46, 49-50.

²⁸ Department of Children and Youth Affairs, *National Strategy on Children and Young People’s Participation in Decision-making 2015-2020* (2015) at

<http://www.dcy.gov.ie/documents/playandrec/20150617NatStratonChildrenandYoungPeoplesParticipationinDecisionMaking2015-2020.pdf> at pp. 49-50.

were dissatisfied with their level of input into decision-making processes in school.”²⁹ This small but significant piece of research showed that children had very low expectations of schools being participatory sites and recognised that they had little say in anything apart from peripheral matters in school.³⁰ Key barriers included adult recognition of their agency with increasing age and maturity, the autocratic and hierarchical nature of the school system, the lack of opportunities and space in the school week for their voice to be heard and poor information systems in schools, whereby policy changes or decisions regarding disciplinary procedures are not communicated effectively. Key enablers included increasing age and maturity, the availability of and access to scheduled and unscheduled structures for participation, appropriate spaces in the school timetable and a school culture that is facilitative of voice.³¹

The statements and commitments made in BOBF and the National Strategy on Children and Young People’s Participation in Decision-making show that the government has recognised the importance of engaging with children and young people and taking their views into account. The government has recognised the importance of the participation of young people in decision making of policies that affect them, both at a national and local level, including their school community.

The findings of the report on children and young people’s experiences of participation in decision-making at home, in schools and in their communities indicate that it in the opinion of children and young people, there is vast scope for improvement in their participation in school decision making structures.³² Therefore, while the establishment of Parent and Student Charters is a welcome development in this area, care must be taken to ensure that

²⁹ Department of Children and Youth Affairs, *Children and young people’s experiences of participation in decision-making at home, in schools and in their communities* (2015) at <http://www.dcy.gov.ie/documents/publications/20161110ChildandYoungExperienceDecisionMakingHomeSchoolCommunity.pdf> at p. 4.

³⁰ Department of Children and Youth Affairs, *Children and young people’s experiences of participation in decision-making at home, in schools and in their communities* (2015) at <http://www.dcy.gov.ie/documents/publications/20161110ChildandYoungExperienceDecisionMakingHomeSchoolCommunity.pdf> at p. 4.

³¹ Department of Children and Youth Affairs, *Children and young people’s experiences of participation in decision-making at home, in schools and in their communities* (2015) at <http://www.dcy.gov.ie/documents/publications/20161110ChildandYoungExperienceDecisionMakingHomeSchoolCommunity.pdf> at pp. 106-110.

³² Department of Children and Youth Affairs, *Children and young people’s experiences of participation in decision-making at home, in schools and in their communities* (2015) at <http://www.dcy.gov.ie/documents/publications/20161110ChildandYoungExperienceDecisionMakingHomeSchoolCommunity.pdf> at pp. 106-110.

children and young people are given child-friendly and democratic opportunities to give their views. Care must also be taken to ensure that these views are listened to and given due weight when developing a school's Parent and Student Charter.

5. Grievance and Complaint Procedures

Section 12(2)(xii) of the General Scheme states that the principles of the Charter will operate by "Positively seeking to address parent and student concerns and electively providing redress as appropriate in order to obviate as far as possible the need for a parent or student to rely on grievance and complaint processes."

The implementation of Parent and Student Charters will see a cultural shift in how schools operate. The provisions contained in Head 3 will see a move away from reacting to and dealing with grievances after they occur. Instead, schools will have to engage with parents and students in order to establish their views, to positively invite feedback to be open to concerns and negative comments.³³

The early identification of concerns will allow problems to be considered and dealt with by the school will minimize or avoid reliance on formal compliant procedures.³⁴ Sections 12(2)(xiii) and 12(2)(xiv) of the General Scheme make provision for processes and procedures for complaint resolution and accounting for the outcome of a complaint. The Guidelines on the Charter will include procedures to deal with any grievances that do occur even with the Charter in place.³⁵

OCO recommendation in relation to complaints:

The guidelines should outline best practice in relation to developing child-friendly complaints processes within schools that are fully accessible to children and young people.

³³ Students, Parents and Schools - Developing a Parent and Student Charter for Schools <https://www.education.ie/en/Parents/Information/Parent-and-Student-Charter/Charter-Briefing-Note.pdf> at p. 14.

³⁴ Students, Parents and Schools - Developing a Parent and Student Charter for Schools <https://www.education.ie/en/Parents/Information/Parent-and-Student-Charter/Charter-Briefing-Note.pdf> at p. 14.

³⁵ Students, Parents and Schools - Developing a Parent and Student Charter for Schools <https://www.education.ie/en/Parents/Information/Parent-and-Student-Charter/Charter-Briefing-Note.pdf> at p. 16.

5.1 Strengthening the Role of the Ombudsman for Children's Office

In 2016, 45% of the complaints received by the OCO were about education and of those, three quarters related to individual schools. It is the experience of the OCO that local resolution involving children, parents and boards of management leads to fast and effective conclusions. However, there are cases where more difficult complaints arise and it is important that there is a robust system in place.

Heads 6 and 7 will affect the role of the Ombudsman for Children and the role of the Office. Subsection 16 which is being added to the new Section 28 of the 1998 Act will give additional powers to the Ombudsman for Children's Office. Under Ss 16(i) there will now be a requirement for boards to consider any suggestions, guidance or recommendations issued to them by the OCO. Under Ss16(ii), the Minister may give direction to a board if the Ombudsman for Children advises him or her of any suggestions, guidance or recommendations made to a board. Ss16(iii) allows the Minister to inform a board that he or she proposes to give direction under Ss16(ii) while Ss16(iv) allows the board to make representations to the Minister in relation to the proposed direction. Ss16(v) provides that the Minister shall consider any representations made by a board and Ss16(vi) states that a board shall comply with any direction given to them by the Minister.

This amendment would provide the Minister for Education with a power of direction in relation to encouragements/recommendations of the Ombudsman for Children's Office. It should be noted that this is likely to be used sparingly. This does not stray into binding decisions as it stems from a Ministerial power in the Education Act and not from a power of the Ombudsman for Children pursuant to the 2002 Act.

This proposed legislation also gives greater weight to encouragements following preliminary examinations at 13(1). Currently we make encouragements to schools because (1) our preliminary examinations cannot establish that the actions or inactions administrative actions by the school adversely affected the child and (2) during the course of our examination we identify ways that administration could be improved.

Currently the Ombudsman issues an investigation statement to the Department of Education under 13(2)(ii) where the investigation relates to an action taken by or on behalf of a school. This does not include preliminary examination reports at 13(1). This new addition permits the Minister to issue directives to the school to implement recommendations made to the school by the OCO. However, this would not preclude the Ombudsman for Children in issuing a special report under section 13(5) if he is not satisfied with the measures taken or proposed to be taken in response to recommendations.

Head 7 provides for the amendment of Section 9 of the Ombudsman for Children Act, 2002 which will allow the Ombudsman for Children to investigate (subject to the powers and provisions of the Ombudsman for Children Act, 2002), the additional functions being placed on schools, in relation to the Parent and Student Charters. It also deletes a provision which requires the OCO to investigate an action by the school only where the procedures under Section 28 have been resorted to and exhausted in relation to the action. While this legislation will strengthen the work the office can do with schools, the statutory role and independence of the OCO will in no way be compromised. In this regard, the OCO suggests amendments to clarify this – see APPENDIX 1 below.

6. OCO Recommendations

The OCO makes the following recommendations:

- **Children and young people should be consulted at a policy level when developing the legislation and guidelines that will provide for the establishment of Parent and Student Charters. They should also have their views taken into account when developing individual school Charters.**
- **In order to ensure full participation, the voices of children and young people must be heard by the Department of Education and Skills when deciding on what issues will, or will not, be included in a school's Parent and Student Charter.**
- **It is important that the Charter promotes an inclusive, non-discriminatory approach in line with Articles 2 and 12 of the UNCRC. The voices of all student**

types must be heard, including children with special needs, those who have experienced poverty and social exclusion, children for whom English is not their first language, as well as children absent from school due to ill health.

- The legislation should provide for schools to employ a range of formal and informal mechanisms to facilitate children and young people's views to be heard individually and collectively, and for feedback to be provided on the weight given to their views.
- A range of structures and mechanisms, including student councils, should be available to allow children and young people to comment on the diverse issues affecting them in school and to account for the individual circumstances of the student or group of students.
- Schools must be required to facilitate their students' participation in the development of the schools' Charter, in accordance with the statutory guidelines, once developed.
- The guidelines should outline best practice in relation to developing child-friendly complaints processes within schools that are fully accessible to children and young people.

Specific recommendations for amendments are included in APPENDIX 1 below.

7. The Education (Amendment) Bill 2015 March 2017

The Bill, which was referred to the Oireachtas Select Committee on the 21st July 2016, proposes to amend the Education Act 1998 ('the 1998 Act') through the inclusion of Part X entitled 'Ombudsman for Education'. The title 'Ombudsman for Education' is a misnomer on two counts, as what is proposed – as stated in the Bill's preamble - is 'an appeal mechanism' from the decisions of school boards of management rather than an office for reviewing

Sections 62–65 of Part X are almost an exact replica of sections 4-7 of the Ombudsman for Children's Act 2002 ('the 2002 Act'), except that reference to 'public bodies, schools and voluntary hospitals' and 'children' in the latter, are substituted for 'schools' and 'children in

education' in the former. The drafters of the Bill, therefore, envisage that the Ombudsman for Children's function to promote the rights and welfare of children is duplicated by the 'Ombudsman for Education' where those rights relate to a subset of children in education.

The largest category of complaints dealt with by the OCO are in relation to education (45% in 2015). These queries do not solely relate to schools but include the entire education sector, including for example the National Council for Special Education and the State Examinations Commission. In addition to examining and investigating complaints, the Ombudsman for Children has a complimentary statutory remit which is broadly concerned with promoting and monitoring the rights and welfare of children. The different statutory functions of the OCO inform and support each other. Work in accordance with one particular function may trigger complimentary work under a different function. Some complaints can involve a number of different issues, including education, across a number of different agencies. The establishment of an Education Ombudsman would undermine the ability of the OCO to work strategically across the different statutory functions. It may also weaken the ability of the OCO to examine complex complaints that often involve a number of issues, of which education is just one component. For example, a complaint may involve Tusla, the HSE and the Department of Education.

Section 66 of Part X of the Bill is entitled 'Appeals'. The drafters propose at s66(1) that a person referred to in section 28(1) of the 1998 Act 'may appeal in writing to the Ombudsman for Education against a decision of the Board in respect of an appeal or grievance to the board'. This section is the departure of the 'Ombudsman for Education' from the role of independent inquirer, investigating and addressing complaints of maladministration, to that of an appellate authority, with the power to substitute its own decision with that of the decision-maker. The distinction between review and appeal is important. The traditional review function of the Ombudsman involves adjudicating the correctness of the administrative decision-making process, whereas an appeal involves adjudicating on the correctness of the administrative decision itself.

An essential element of ombudsman-ship is to work on the element of encouragement and to provide an alternative to court proceedings. Under the classical model, Ombudsman procedures are flexible, informal, and inquisitorial. Investigations take place in private and

the Ombudsman may make such inquiries and invite such responses as they deem fit. Their decisions are non-binding but they may report and make recommendations to remedy administrative wrongs. In contrast, an appeal mechanism is typically prescribed by statute, formal and adversarial, and the appellate authority's determinations are enforceable in law.

Sections 66(3)-(6) of the Education (Amendment) Bill prescribe that the Ombudsman for Education may 'direct any appropriate remedial action' be taken as a consequence of the appeal, may 'specify' the action and time to comply, and provides that the obligation may 'be enforced by any person by way of application to the District Court for an Order of the Court compelling compliance'. The proposed legally-binding nature of decisions, and the power to seek an Order of the Court compelling compliance, goes against the general approach, spirit, and authority of Ombudsmen – an office which functions to provide an accessible form of redress to many, by providing an alternative to court proceedings and removing the expense of litigation.

In contrast to s29 of the 1998 Act, which provides for an appeal to the Secretary General of the Department of Education & Skills in respect of a decision by a board of management to permanently exclude, suspend or refuse to enroll a school student, s66 does not set out how appeals will be heard or determined. According to s66, appeals are made in writing, with no provision for hearing the views of the body under appeal, despite the legal enforceability of the Ombudsman's, potentially very specific, determinations. Section 68 simply states that the procedures of the Ombudsman 'shall be determined by the Ombudsman by rules made by the Ombudsman' and does not provide for any Ministerial or Oireachtas oversight. The lack of process, given the potential severity of the penalty, goes against the basic concepts of natural justice and procedural due process.

The OCO is a free alternative to court and offers an impartial and fair assessment and resolution to issues and concerns. We respect local complaints procedures and seek at all times to promote the resolution of complaints at a local level. The Office also endeavours to achieve systemic change through our complaints and investigations function by considering the root causes of complaints we receive. Three quarters of complaints concerning education are in relation to individual schools. In these cases, the office strives for local resolution, working with children, parents and boards of management. In the vast majority

of cases, this leads to fast and effective resolution and this is in the best interests of children. The impartial role of the OCO in dealing with these complaints is a very powerful agent for change and the OCO has been very effective in making encouraging suggestions in relation to changing policies and procedures at school board of management level.

The General Scheme of the Education (Parent and Student Charter) Bill sets a sound legislative framework to improve engagement between schools, students and parents. It also provides directive powers to the Minister for Education where schools do not have a charter in place, or where it does not comply with the statutory guidelines. This is to be welcomed as it will enhance oversight of the implementation of these important provisions and ensure that they are implemented by schools. As outlined above, Subsection 16 provides the Minister for Education with a power of direction in relation to encouragements/recommendations of the Ombudsman for Children's office which will enhance the powers of the OCO with regard to its work in relation to school complaints handling.

APPENDIX 1

Analysis of the Parent and Student Charter aspects of the General Scheme of an Education (Parent and Student Charter) Bill 2016 and suggested amendments

The Department should consider amending the title of the Charter to '***Students and Parents Charter***'. This change in title would more fully reflect the intention of the Bill to place students at the centre of school life.

OCO Specific Recommendations for amendments to Section 28 (Head 3) of the General Scheme of the Parent and Student Charter Bill

Head 3 amends Section 28 of the Education Act 1998 by substituting it with a new section which sets out the principles that will guide how schools engage with parents and students.

This amendment is to be welcomed in that it presents an opportunity to promote a child-centred, rights-based culture in schools.

However, a number of important amendments need to be made to ensure that Head 3 fully incorporates a child rights-based approach, as set out in international law and promoted by *Better Outcomes Better Futures* and the *National Participation Strategy*:

- **Section 28(2)(i):** Further consideration should be given to the aims of education, as set out in Article 29 of the CRC and the guidance provided by the Committee in *General Comment No. 1*.
- **Section 28(2)(iii):** The wording needs to be strengthened to ensure that children's right to freely express their views in all matters involving or affecting them, and for these views to be given due weight in line with their age and maturity, is fully implemented in practice. The phrase '*encouraging their engagement*' should be replaced with '*providing for their active engagement and full participation in decision-making in relation to the planning, implementation and review of school policies and plans*'.
- **Section 28(2)(iv):** Further clarity is needed about the information that schools will provide to students and parents. This provision should also expressly state that all information should be provided to students in a manner adapted to their age and maturity, as well as in a language they can understand and which is gender and culture sensitive. Furthermore, provision of information to the parents should not be an alternative to communicating information to the child.
- **Section 28(2)(vi):** This provision should be amended to state '[i]nviting **and responding to** feedback, comment and observations from students and parents and developing a listening culture in schools'.
- **Section 28(2)(viii):** Additional clarification is needed about when it is appropriate for schools to seek parental consent and what guidelines/policies should inform schools' actions in this regard. Consideration should also be given to the need to seek informed consent from the student/s directly, in addition to the requirement for parental consent.

- **Section 28(2)(xi):** This provision should be amended to state '[a]cknowledging *and addressing* gaps, deficiencies or room for improvement'.
- **Section 28(2)(xii):** The word '*electively*' should be removed from this provision.
- **Section 28(2)(xiii):** This provision should be amended to state '[p]roviding *accessible, impartial, effective, rights-respecting and child-sensitive* processes for grievance and complaint resolution, including mediation and remediation, where appropriate'. Express provision should also be made that children themselves should have unrestricted access to both formal and informal complaint procedures, and should be able to make a complaint at any age.
- **Section 28(5):** The word '*may*' should be replaced with '*shall*'.

Further recommendations:

- The general principles of the CRC should be fully respected and incorporated within Section 28, including the 'best interests' and 'non-discrimination' principles. Furthermore, the full implementation of Article 12 is of particular importance and all legislative proposals should be based on the clear guidance provided by the CRC and the Committee in this regard.

Head 4 provides for the power of the Minister to direct the school board to comply with the guidelines on a Charter. We would like to highlight the following points:

- **Section 28(6):** Clear and appropriate legislative provision should be made for the operation of a central monitoring and oversight mechanism by the Department of Education. This would support the proper implementation of this subsection and strengthen the framework in place for the Department to effectively review the preparation, publication and operation of a Charter by schools.
- **Section 28(12)(i):** In compliance with Article 12, this provision should be amended to state '[i]n preparation of guidelines or directions under this section the Minister will also have regard to: how boards *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*'.

Head 6 provides that Schools must consider suggestions, guidance or recommendations made by the Ombudsman for Children. The OCO suggest the following amendments.

Section(16)(i): Where the Ombudsman for Children makes suggestions to a board, or provides guidance to a board *at the conclusion of a preliminary examination under the Ombudsman for Children Act 2002*, or where following an investigation under the Ombudsman for Children Act 2002, the Ombudsman for Children makes recommendations to a board in relation to the actions of a school, *without prejudice to the investigative powers under the Ombudsman for Children Act 2002*, the board shall consider any such suggestions, guidance or recommendations.

- The proposed subsection 16(i) above draws a distinction between the school and the board. This would be unhelpful from the point of view of the 2002 Act since the OCO have always interpreted the school to include the board. The Ombudsman (Amendment) Act 2012 also brings the performance of functions of a patron within the remit of OCO. However, to put this beyond doubt, the following new subsection could be included after section 9(3): **“The reference to a school in subsection (1) includes reference to the board and patron of that school in connection with the performance by them of their functions in respect of that school under the Act of 1998.”**
- We also suggest an amendment to the Ombudsman for Children Act 2002 to ensure that OCO has absolute privilege for the law of defamation in relation to encouragements/suggestions/guidance. While we would have qualified privilege under common law, given that this amendment is provided for in statute, it would be preferable to seek absolute privilege to provide for situations where we are advising the Minister in relation to encouragements/guidance/suggestions given at a preliminary examination stage.

Head 8 provides for an additional function of a school under Section 9 of the Education Act, 1998 to promote the involvement of parents and students in the education provided to students.

Head 9 provides for a change in the requirement of a student council from one of promoting the interest of the school to a requirement to promote the interests of the students of the school having regard to the characteristic spirit and policies of the school and the principles set out in Section 28.

It is of paramount importance that these provisions fully implement the commitments made by the Department in the area of student participation under Article 12 of the CRC, *Better Outcomes, Brighter Futures* and the *National Participation Strategy*. In particular, children's views should be taken into account in the development of national policies and in the design of services, as well as in the individual decision-making that affects their daily lives.

The OCO recommends that the legislation should:

The legislation should:

- a) provide for schools to employ a range of formal and informal mechanisms to facilitate children and young people's views to be heard individually and collectively, and for feedback to be provided on the weight given to their views; *and*
- b) provide for schools to employ mechanisms that are fit for purpose and account for the individual circumstances of the student or group of students.

Regulations

The guidance document on Developing a Parent and Student Charter for Schools³⁶ states that the statutory guidelines which will be published by the Minister will be designed generally to set a standard across schools for engagement with students and parents.

It is stated that "part of the preparatory work will involve capturing the voice of the child particularly through engagement with student councils and national associations representative of students" and "The Minister also plans to have his Department engage with the Ombudsman for Children's office in relation to the guidelines".³⁷

³⁶ Students, Parents and Schools - Developing a Parent and Student Charter for Schools <https://www.education.ie/en/Parents/Information/Parent-and-Student-Charter/Charter-Briefing-Note.pdf> at p. 5.

³⁷ Students, Parents and Schools - Developing a Parent and Student Charter for Schools <https://www.education.ie/en/Parents/Information/Parent-and-Student-Charter/Charter-Briefing-Note.pdf> at p. 11.

It must be ensured that the international child's rights instruments and national guidelines detailed above must be fully incorporated in any such regulations.