IRISH TRAVELLER MOVEMENT

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Submission to the *Discussion Paper on a Regulatory Framework for School Enrolment* Published by the Department of Education and Skills June 2011

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Overview

This document is written in response to the call for submissions in the *Discussion Paper on a Regulatory Framework for School Enrolment* published by the Department of Education and Skills in June 2011.

The Irish Traveller Movement is an independent law centre under the terms of the Solicitors Acts 1954-2002 (Independent Law Centres) Regulations 2006, SI 103/2006. The Law Centre was established in June 2009 and its aim is to advance the rights of Travellers through strategic litigation, legal education and policy work. The Law Centre is attached to the Irish Traveller Movement, which is a non-governmental organisation and membership organisation seeking full equality for Travellers, established in 1990.

The Law Centre represented Mary Stokes in her complaint to the Equality Tribunal against Christian Brothers' High School Clonmel in November 2010. In her complaint Ms Stokes alleged that the part of the school's admissions policy that gave priority to the sons of past pupils indirectly discriminated against her son as a member of the Traveller community under the Equal Status Act 2000-2008. (Prior to the Law Centre coming on record for the family, the refusal to enrol had been the subject of an unsuccessful

internal appeal to the school and an appeal to the Department of Education under section 29 of the Education Act 1998.)

The complaint was one of indirect discrimination "where an apparently neutral provision puts a person [protected by the Equal Status Act] at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (section 3(c) Equality Act 2004). As a Traveller John Stokes was statistically less likely to have a father who attended secondary school than a member of the non-Traveller community.

Empirical evidence suggests that historically Travellers have suffered "extreme educational deprivation" specifically at second level education.[1] The Report of the Travelling People Review Body from 1983 estimated that 3,500 Traveller children attended school and that this figure represented only half of the Traveller children of school going age and that "very few remained after reaching the age of 12 years"[2] with progress to secondary level education a rarity: "Only 10% of those who finish primary school continue to attend school and most of these drop out after one or two years."[3] The ESRI's Annual School Leavers Survey commissioned by the Department of Education and Science in 1982 reports that 66.4% of all children (from the general population) who enter second level education complete their secondary schooling. This is in stark contrast to the figures outlined above. These reports correspond with the approximate time period in which the complainant's (John's) father and other family members would have been of a school going age. Thus members of the Traveller community today are statistically much less likely to have a parent who attended second level education, which in turn makes it very difficult for them to satisfy the parent as a past pupil criterion.

The Equality Tribunal found in favour of Mary Stokes in December 2010 (see

[1] Report of the Travelling People Review Body 1983 Government Report (hereinafter called "the Report")

[2] At paragraph 2.3 of the Report.

[3] At paragraph 2.6 of the Report.

Attachment A: Equality Tribunal Decision), however the decision was appealed by the School to the Circuit Court where it was overturned in July 2010 (see Attachment B: Circuit Court Judgment). The Circuit Court's decision has been appealed by both parties to the High Court and the Equality Authority has intervened as *amicus curiae*. As at 28th October 2011 we await the judgment of the High Court.[4] These proceedings have been used to inform this submission on school enrolment. This submission is limited to certain sections of the *Discussion Paper* and will use the same headings for ease of reference.

1.2.1 & 2.1.1 Section 29 Appeal Process

The Irish Traveller Movement notes the description of the Section 29 appeal process as "litigious" and "burdensome". We agree with these statements.

Traveller parents have had the support and experience of the Visiting Teacher Service for Travellers over the last number of years in navigating this appeals system. Since that service has ceased these parents will now be left to appeal these cases without support. The Department of Education should consider new supports for Travellers and other vulnerable groups using this appeal process. The Department could also consider actively supporting the diversity agenda by appointing former Visiting Teachers for Travellers to the Section 29 appeals body.

The Irish Traveller Movement welcomes the decision of the Supreme Court in *Board of Management of St Molaga's National School v The Secretary General of the Department of Education and Science and others* (23rd November 2010) (Appendix 3: Supreme Court Judgment *St Molaga's*).

1.2.2. & 2.1.2 Inter-school co-operation

The Irish Traveller Movement is concerned that in particular areas there may be only one or no school that is actively targeting and supporting the inclusion of Travellers and children from other minority groups. It appears that when one school is very active in supporting the inclusion of Travellers it then informally becomes the school that

[4] The author requests permission to provide a supplemental submission upon the decision of the High Court.

Travellers and other minority children are discretely redirected to and it becomes seen as 'the Traveller school'. For example, 70% of the students in one particular school in Tuam are members of the Traveller community and this high numbers of Travellers is not reflected in other schools in the area. The actions of schools actively supporting inclusion is to be commended and, at the same time, there needs to be a responsibility on all schools in an area to develop supportive policies and practice. The Irish Traveller Movement are very concerned to hear from schools who say they feel they have *'taken on their quota of Travellers*'. We know of good practice, for example, in Adamstown where they have developed co-operative admissions policies (similar to the Limerick example in the *Discussion Paper*). However, we have learnt of ad hoc co-operation between local schools that has resulted in a dividing up who will take what minorities in a negative context, for example '*don't be sending me down the Black students, I am already dealing with the Traveller students.'*

The Irish Traveller Movement supports a new regulatory framework giving power to the Minister to direct, if required, particular schools to co-operate in relation to the admission process and to define the terms of any such co-operation process. This is with a view to ensuring that schools in an area are collectively supporting the inclusion in their schools of children with special needs and children from ethnic minorities, including Travellers.

1.2.3. Inability to access any school place

The Irish Traveller Movement proposes the extension of the categories of persons who can appeal to an independent appeal board to Traveller children, who often have extreme difficulty in securing a place for reasons other than oversubscription.

3.2 Content of an enrolment policy

3.2.1 Drafting and publishing requirements

The Irish Traveller Movement supports the suggestion that, as a minimum, the enrolment policy of a school is made available electronically or otherwise, to anyone who requests it.

When a child is refused enrolment in a school their parent may choose to seek legal advice in advance of any appeal or other proceedings relating to the refusal. The turnaround time on this advice is usually extremely short. The availability of the enrolment policy is essential to any legal advisor in this situation and would allow them to meet the statutory deadlines of any appeal.

We also support the introduction of a requirement on all Boards of Management to undertake some level of consultation with their local school community when drafting or changing their admissions policy. We recommend that Travellers be named as one of the groups that must be consulted. While there has been advancements in the educational outcomes for Travellers there continues to be very low attainment and outcomes for Travellers compared to the general population, particularly at second level. Department of Education figures presented in 2010 demonstrate that only 50% of Travellers are completing the Junior Cycle and 13% of Travellers are completing senior cycle.

The Department of Education and Science Guidelines on Traveller Education in Second Level Schools 2002 has categorically stated that "school policies should facilitate Traveller enrolment" and has acknowledged that "some school enrolment policies at second level have not been designed with Travellers in mind and can therefore indirectly act as a barrier to access." To combat this the Department stated that "enrolment policies must therefore take into account the particular needs and lifestyles of Traveller families". However, many schools appear to have paid little or no heed to these Guidelines in their enrolment policy. The inclusion of Travellers in the Regulations as a group to be consulted would finally give 'teeth' to the Guidelines.

3.2.2 Characteristic spirit

The Irish Traveller Movement supports the suggestion that regulations would provide that the enrolment policy should set out the characteristic spirit (also known as the school's ethos) of a school. Also the requirement that pupils "respect" rather than "actively support" the ethos of the school.

The characteristic spirit of a school should be clearly outlined at the outset of a school

enrolment policy in the same manner as, for example, the Mission Statement of a company or organisation. It should be a clearly stated and tangible concept. For example, a 'family ethos' was successfully put forward by the Christian Brothers' High School in the *Stokes* case in the Circuit Court as being the characteristic spirit of the school for the purposes of section 15 of the Education Act 1998. This is despite the fact that the characteristic spirit of the school might more obviously be a Christian ethos or one based on the Edmund Rice tradition. There is only one reference to the family ethos of the School in its enrolment policy and that was a brief reference linking it to the provision of priority admission to the brothers of current pupils. Despite this, it was successfully relied on in evidence put to the Circuit Court in the form of the oral testimony of the school principal as the reason and justification for the parent as a past pupil priority rule. This demonstrates the ability of school to advance an ill-defined and nebulous concept as being the characteristic spirit of the school in order to defend a refusal to enrol. This defence is very difficult to unravel. It is something of a moveable feast and, as our senior counsel described it to the High Court, trying to define it is like "trying to pick mercury with a fork".

Furthermore, compliance with the characteristic spirit of a school should not be based on inherent qualities over which a child has no control. In the Circuit Court it was determined that the parent as a past pupil rule was necessary to uphold the family ethos of the school. It was this rule and ethos that essentially excluded John Stokes and any other Traveller who had applied to the School when it was oversubscribed. (It emerged in evidence that no Traveller child had ever gained admission to the school by virtue of this rule and, in fact, the only Traveller children ever to be admitted were admitted in the two years that the School was not oversubscribed and thus the parent as a past pupil rule did not apply.) In fact what the school was seeking to rely upon was an historical family ethos, ie: the perpetuation of the provision of education to the same families over the generations. John Stokes could not comply with this as his father had never attended any secondary school. This is not something over which the child had any control. If the ethos of the school was truly a 'family ethos' John Stokes could comply with this by having his siblings attend the school after him or by the involvement of his parents on committees and at school events.

3.2.3 Financial contributions to schools

The Irish Traveller Movement supports the suggestion that Regulations could make it clear that while schools precluded from charging fees, may seek voluntary contributions, the key issue is that such a practice must not impact on admission to the school.

We are aware of one incident in County Longford where a Traveller family had gained a place for their child in a local school but ultimately lost that place because they did not pay the contribution on time.

One of the main findings in the Circuit Court in the *Stokes* case was that the father as a past pupil rule was necessary for the financial survival of the school. As a Voluntary Secondary School they argued that they are left with a shortfall of 10% of the funding required to run the school every year and that most of this was made up through fundraising efforts championed by the past pupils of the school. They also stated that past pupils tended to provide mentoring and bursaries as well as work experience. All of these actions are either directly or indirectly linked to the financial abilities of the parents in question. Schools should not be permitted to use capacity of parents to contribute to a funding shortfall as reason to give priority to their children or for any other purpose.

3.2.4 Enrolment of pupils with special educational needs

The Irish Traveller Movement note that Section 15 of the Education Act requires schools to make provision in their enrolment policy for pupils with disabilities or who have other special educational needs.

As a membership organisation for Travellers we have been informed of incidences of Traveller children with special educational needs being refused enrolment on the basis that the school is ‘not equipped’ to deal with them. For example, many Travellers have experienced local secondary schools encouraging them to attend, for example, the local VEC instead of their school as the VEC is in ‘a better position’ to cater to special needs. This detrimentally affects a parent’s right to send their child to a school of their choice and facilitates the cherry-picking of children.

3.2.5 Oversubscription

The Irish Traveller Movement support the view that it may be desirable for all schools to include in their enrolment policy details of how, in the event of oversubscription, places will be allocated. However, we have a number of concerns in relation to the current criteria.

Oversubscription Criteria:

First Come First Served

The first come first served rule gives rise to long waiting lists that are in place for upwards of a decade before the child begins second level education. This puts nomadic members of the Traveller community at a distinct disadvantage. While some enrolment policies make provision for members of the civil service of medical profession that move to an area for work, there is no provision made in any enrolment policy that we are aware of to take into account the central and legally recognized[5] cultural norms of the Traveller community, in this case nomadism.

Distance from Schools, Geographical Boundaries and Feeder Schools

The Irish Traveller Movement agree with the suggestion that the use of feeder schools sometimes prevents access to a post primary school for a child who hasn't attended the feeder school but for whom the post-primary school in question is the child's closest school. Giving priority to pupils on the basis of distance from their school is generally considered to be a fair and transparent method for the allocation of school places.

The feeder school rule similarly detrimentally affects nomadic Traveller families. Nomadic families often choose to stay for long periods in places where their children are enrolled in school. If they have just moved to an area they will not have had their child in a feeder school. This may result in the family having to pay transport costs to send their children to school in another town, which may be prohibitively expensive. For example, John Stokes is currently obliged to travel several miles to attend school as he could not

[5] Section 2.1 of the Equal Status Act 2000 defines the Traveller community as "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.

access his nearest secondary school due to the parent rule.

Language Policy

The Irish Traveller Movement support the proposition that requiring parents to respect the linguistic policy is a more balanced approach than requiring them to attest to support it.

The operation of a criterion requiring parents to demonstrate competence in the language will effectively exclude many Travellers from Gael Scoils. It must be remembered that Travellers with children of school-going age have experienced class segregation and exclusion as their part of their educational history. The numbers of Travellers who can speak the Irish language is extremely low. Travellers were excluded from Irish language classes as a matter of course in some schools on the sole basis of their membership of the Traveller community. Automatic exemptions from Irish for Travellers continue to this day. This practice should be ceased immediately. This has resulted in just 14.4% of Travellers having the ability to speak Irish.[6] This figure may be contrasted with 42.8% of the general population who attest to the ability to speak Irish.[7]

Siblings

There are undeniable practical advantages for parents of a sibling rule that gives priority to siblings currently in the school (sharing of books, drop off and collection, membership of parents' association, etc).

However, a sibling rule that gives blanket priority to siblings who are *former pupils* of the school does not offer the same advantages. In fact, it seeks to perpetuate the same objectionable aims as the parent as a past pupil rule. It serves only to give priority to families already educated at the school and to exclude those who have not had such an advantage.

[6] http://census.cso.ie/Census/TableViewer/tableView.aspx?ReportId=1587

[7] http://census.cso.ie/Census/TableViewer/tableView.aspx?ReportId=1221

Members of the Traveller community still have a lower take up of second level education compared to the general population. Figures from Department of Education and Science Survey in 2005 illustrate this. The figures found that 66% of Travellers completed their education at primary level education as compared to 21% of the general population. In senior cycle this number dropped to 2% as compared to 23% of the general population.[8] This type of policy is therefore detrimental to members of the Traveller community whose older siblings failed to progress to second level education. This argument was made by John Stokes in the Equality Tribunal but was rejected under the definition of indirect discrimination as Travellers were deemed to have a greater number of siblings than the general population thereby increasing their likelihood of having a sibling who attended the school. However, the potential for this rule to affect Travellers is arguably very real.

Past Pupils

The Irish Traveller Movement agree that giving priority to an applicant based on being a relative of any member of the school staff, Board of Management, past pupil, benefactor of the school etc. limits the opportunities of getting a school place for applicants who have no previous connections with the school and almost invariably places a child who has recently come to live in an area at a disadvantage (this type of policy negatively impacts on nomadic Traveller families as indicated above).

The legality of this rule is the subject matter of the appeal to the High Court by Mary Stokes.

This type of provision affords certain children a hereditary right. The appeal to the High Court concerns a claim that there is indirect discrimination in that the rule is particularly disadvantageous to Traveller children where there is an established history of under participation by male Travellers in post-primary education. The starting point for any analysis must be Section 7 of the Equal Status Act 2000 which expressly prohibits discrimination in the admission of students into post-primary schools, save on the

[8] Survey of Traveller Education Provision, Department of Education and Science, 2005, table 1.1, p.1

grounds of gender or religious denomination. It is an absolute prohibition.

In this case The Circuit Court held that the policy did place the John Stokes at a particular disadvantage but was not indirectly discriminatory because in the words of Section 3(1)(c) of the Equal Status Act 2000 as amended "*the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"*. The section makes a distinction between an "aim" and a "means". The interaction between both has to be analysed. In order to do so one has to be satisfied that the stated aim is in reality the real aim. In advancing its case the school contended that the "*parental rule"* [a means] was a manifestation of a *"family ethos in education*" [an aim].

We do not accept that the stated aim is in fact the true aim that the parental rule serves. It should be noted that there was no evidence that the school had as one of its aims the preferential provision of education to the sons of past pupils. There was no school charter or constitution put in evidence nor was there any document from the school's patron, the Edmund Rice Trust. The only document put in evidence was the Admissions Policy and the mission statement in that policy contains no reference to the education of children of past pupils either as a priority or at all. There is a reference to supporting the family ethos in education on page 4 of the policy, but then only in the context of making provision for siblings. It is not doubted that the school does pursue a family ethos in education, this is reflected in the reference to parents in the admissions policy, but otherwise what is meant by a family ethos is not articulated in the admissions policy or elsewhere. Accordingly the school is left at liberty to argue that any particular practice is being pursued in furtherance of the family ethos in education.

The Admissions Policy does not link the "parental rule" to any stated aim. It is only in the course of this admissions dispute that the school has sought to forge a connection between the provision and the stated ethos. This calls into question whether in reality there is any connection between a "*family ethos in education"* and the parental rule.

The question of what constitutes an ethos does need to be considered. The Education Act 1998 does not refer to the "ethos of a school", rather it uses the phrase

"characteristic spirit of the school", to describe a bundle of values and traditions that mark out the objectives of the school and how the school is conducted. The word "ethos" and "characteristic spirit" may be interchangeable. It is the case that "a family ethos in education" is a particular ethos. It is a phrase that reflects a philosophy of education that views education as a collaborative process involving both home and school. The Education Act 1998 itself recognizes the role of parents in education, in its long title it refers to a partnership with parents, it provides for parents to be represented on school boards and it provides for the creation of parents' associations.

However the fact that one can speak of a "family ethos in education" does not mean that the "parental rule" is in any material way connected with such an ethos. The fact that one can make a word association between "child of a past pupil" and "family" does not mean that the criterion is conceptually linked to "furthering a family ethos in education". The "parental rule" is used in selecting who gets into a school. It is not about the type of education they receive in school or the philosophy of education that informs school life. A rule that discriminates as between families seeking admission to a school is not a rule that enriches or adds to the family ethos of a school. When faced with a choice between a child of a past pupil and a child of one that is not, how can it be stated that choosing the former over the later, is about furthering a family ethos in education? How does the selection of one over the other strengthen or further the ethos? Both children are children of families, both would equally benefit from a school with a family ethos. Can it be said that a school that does not have a "parental rule" does not have "a family ethos in education"?

It is submitted that the School has sought to put a cloak of respectability on the parental rule by invoking an ethos where in reality and on the evidence the rule does not serve or support the stated ethos. The rule may be convenient, it may appear to provide material benefits to the school, it may reflect an affection for past pupils and *vice versa*, but it is not about "a family ethos in education". No educational value is being furthered. The admission of the children of past pupils in preference to other children does not further any educational objective or philosophy. The true aim is found within the rule, the aim is simply to afford an advantage to children of past pupils.

Notwithstanding whatever aim is identified as the relevant aim the important requirement of the Equal Status Act is that the aim be a "legitimate aim". The fact that the school has an aim and that the aim is based on a particular ethos does not mean that it is automatically a "legitimate aim". It is clear from Section 15 of the Education Act 1998 that the "characteristic spirit of a school" is a matter that informs how the School Board functions, but the "characteristic spirit of the school" is not a free license, the School Board is required to Act in accordance with law, it is required to have regard to the principles and requirements of a democratic society and specifically under S.15(2)(d) its admissions policy has to comply with principles of equality, respect the rights of parents and comply with constitutional rights. There are therefore boundaries to what can be done in the guise of furthering the family ethos of school.

In determining whether an aim is a "legitimate aim" the question of the school ethos may be one factor to consider but it is not the only factor and is not necessarily the decisive factor. In assessing whether an aim is legitimate or not, there are two considerations, namely (a) whether the aim it legitimate under its own legislative code i.e. the Education Act, 1998 and (b) whether in the broader context of the equality legislation whether it can be regarded as legitimate. In light of the Education Act read as a whole the bestowing of an admissions advantage on children of past pupils cannot be regarded as legitimate.

Likewise the preferential treatment of children of past pupils offends against the very public policy that underlies the Equal Status Act. By way of example if in the US, post the seminal decision in *Brown v. Board of Education*, the relevant whites only schools were to have replaced their exclusionary policy with a policy that allocated preferential places to children of past pupils, they would in essence have remained predominantly white. The Equal Status Act has clearly targeted the area of school admissions as a critical area for the furtherance of the equality agenda in Irish society and it has severely constrained the grounds upon which discrimination can exist. The grounds of total exclusion from admission are limited to the gender ground. In the case of religious belief a school can give priority to its own religion but can only exclude from consideration other faiths where same is essential to maintain the ethos of the school. These permissible grounds are found in international human rights law (Article 2 of the UNESCO Convention against Discrimination in Education of 14 December 1960 permits

single sex and private educational establishments and those set up for religious or linguistic reasons). International Human Rights Law does not recognise "family ethos" as a legitimate basis for discrimination in the provision of education.

The European Court of Human Rights in *DH v Czech Republic (Application No.57325/00 13 November 2007)* dealt with the issue of indirect discrimination and segregation in education. This case involved the overrepresentation of Roma in special schools in the Czech Republic. The Court stated that "Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective or reasonable justification must be interpreted as strictly as possible" (emphasis added). Furthermore, according to the ECJ, a party cannot "justify discrimination solely because avoidance of such discrimination would involve increased costs" (*Kutz-Bauer v Freie und Hansesdadt Hamburg* Case C-187/00 [2003] ECR 1-2741).

The concept of indirect discrimination was first developed by the US Supreme Court in the case of *Griggs* before making its way across the Atlantic first to Britain and then to Europe. The court, in that case, addressed its mind to the notion of necessity. The employer in question required applicants to positions in the business to have a high school diploma and or pass a literacy test. The court considered whether these requirements, which indirectly discriminated against African Americans, was necessary and determined that "the touchstone is business necessity": "If an employment practice operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited" (*Griggs v Duke Power Co*. 401 US 424 (1971)). As these jobs were largely unskilled the test of necessity was not satisfied.

This interpretation of necessary looks to the purpose of the discriminating entity. It implies that the respondent school would have to show that admitting students who do not have a father as a past pupil goes to the root of the functioning of the school. The main goal or purpose of the company is "business" and the main goal or purpose of a school is "education" - it would have to be necessary to the capacity of the school to educate in order for the policy to satisfy the 'necessary' defence.

The standard for objective justification has been set very high. This reflects a conscious

and deliberate decision by the legislature to outlaw, save in the most limited and exceptional circumstances practices or procedures that discriminate between persons. It is submitted that the school has not established any substantive necessity for this rule, the school can continue to function without the rule, its core operation of delivering education will continue, the existence of the rule does not impact on the curriculum it delivers, the staff it employs or the resources provided by the state to fund the school. In considering necessity it is legitimate to compare this school with other schools, it is accepted in evidence that other schools function without such an admissions rule. In the absence of exceptional circumstances particular to the School or to Clonmel it cannot be validly asserted that the parental rule serves a real need or that the rule is necessary. It is further submitted that the rule is the very type of provision which the Equal Status Act is designed to target and is a rule that runs counter to the equality values set out in the Education Act.

The School sought to argue that the complainant cannot establish discrimination because the disadvantage he suffers is also suffered by non-Traveller children whose fathers were not past-pupils of the Christian Brothers' High School, Clonmel. This raises an issue on the interpretation of Section 3(1)(C) of the Equal Status Act which needs to be addressed. Does a provision that is potentially discriminatory cease to be so because other people are also affected who do not have a statutory remedy under the Equal Status Act? The answer is no. A policy falls foul of the Act if it subjects any of the prescribed categories of persons to a particular disadvantage and is not dependant on that category establishing that they and they alone are adversely affected. This point is self-evident from a number of the leading ECJ cases in this area dealing with sex discrimination, where both men and women could be affected by the criterion in issue.

In *Bilka-Kaufhaus GmbH v. Weber von Hartz 1987 1 ICR 110 Case C170/84* what was in issue was whether a staff policy pursued by a department store company excluding part-time employees from an occupational pension scheme constituted discrimination contrary to article 119 where that exclusion affected a far greater number of women than men. The Court held;

> *If, therefore, it should be found that a much lower proportion of women*

> *than of men work full-time, the exclusion of part-time workers from the occupational pensions scheme would be contrary to article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex.*

In *Regina v, Secretary of State for Employment, Ex parte, Seymour-Smith and Another (Case c-167/97)* what was in issue was whether or not a qualifying period of two years employment for an unfair dismissal claim was discriminatory as against women. The national court sought to ascertain the legal test for establishing whether a measure adopted by a member state has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of article 119 of the E.C. Treaty. Again in that case there men and women with less than two years service, but that did not rule out a consideration as to whether or not the provision discriminated against women on the basis of the percentages able to benefit from the provision.

It has been suggested by the Circuit Court that the use of positive discrimination or affirmative action would ameliorate any discrimination or disparate treatment caused by such a rule. Affirmative action is a discrete mechanism to be used in limited circumstances. Lessons may be learned from the US on the use of affirmative action in education. In the US Supreme Court case of *University of California v Bakke* (1978) a white applicant to a university succeeded in gaining a place in the college after the court determined that the affirmative action measure that resulted in the award of a place to an African-American student before Bakke was overbroad and not sufficiently narrowly tailored to its purpose. Moreover, in light of the clear discriminatory nature of the parent rule it would appear to defy common sense to use affirmative action to try to overcome such a widely discriminatory rule that affects Travellers as well as other groups in society. The use of positive discrimination to overcome the parental rule would be akin to using a sledgehammer to crack a nut.

ENDS