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*International Journal of Discrimination and the Law* 2014 14: 145 originally published online 19 May 2014

DOI: 10.1177/1358229114534549

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**What is This?**
Perpetuating Traveller children’s educational disadvantage in Ireland: Legacy rules and the limits of indirect discrimination

Olivia Smith

Abstract
The impact of ‘subtle’ admission policies utilized by many secondary schools in Ireland on children from minority groups has been recently flagged as problematic by the Irish Department of Education. A new regulatory framework has been promised to address this issue but has yet to emerge. In the meantime, such policies, which include preferential parental legacy rules, certainly trigger the reconfigured principle of indirect discrimination in the access to and enjoyment of goods and services under the Equal Status Acts 2000–2012, which transpose a number of EU Equality Directives. This article considers the approaches taken to the demonstration of how suspect policies give rise to ‘particular disadvantage’ for protected groups in light of the shift away from the mandatory use of statistical evidence in the context of a discussion of a recent High Court case, Stokes v. Christian Brothers High School. This decision concerned the impact of a parental legacy rule on a child from Ireland’s Traveller community, a community that has a long and virulent history of educational (and other forms of) disadvantage. In response to the limited understanding of indirect discrimination taken in the High Court (which pivoted on the Oxford English Dictionary), which significantly undermines the principle’s ability to tackle structural inequalities, I go on to demonstrate how use of both the ‘social facts’ approach and a statistical approximation of the impact of the policy on...
the complainant’s group reveals ‘particular disadvantage’ in the use of legacy rules on Traveller children, children of migrants and children raised in non-traditional families.

**Keywords**
Indirect discrimination, school enrolment policies, Traveller community, statistics

**Introduction**

In 2006, the then Minister for Education in Ireland drew attention to the ‘subtle’ admission policies utilized by many secondary schools – such as parental and sibling preference policies – which were described as strategies for excluding children from certain disfavoured groups. A Department of Education audit of school enrolment policies was ordered (Department of Education and Skills, 2007). This exercise revealed how certain schools cherry-picked amongst their applicants such that the education of Traveller children, children with disabilities and children of migrants was being concentrated in particular schools, mainly vocational and community schools. The outcome of this exercise has been the publication of a discussion document on enrolment policy (Department of Education and Skills, 2011), which is expected to produce some kind of new regulatory framework in the future.

In the meantime, one dimension to this issue of interest to equality and discrimination lawyers is the role of discrimination law in challenging the impact of exclusionary and disadvantageous admission rules on children protected under its rubric. Ireland’s equality and discrimination law framework underwent considerable expansion in the mid-1990s and was subsequently amended in the mid-2000s as part of the process of transposing the new EU Equality Directives. These developments combined to open up the law’s protection beyond the traditional employment domain and into the realm of goods and services, including education, and to expand the protected grounds beyond gender and marital status to nine grounds, including, inter alia, age, disability, race and membership of the Traveller community. The Equal Status Acts 2000–2012 prohibit direct and indirect discrimination, harassment and victimization on the protected grounds in the context of, inter alia, access to and enjoyment of educational opportunities and also transpose a number of European equality directives, including the Race Directive. School enrolment policies are, therefore, subject to the non-discrimination provisions of the Equal Status Acts.

Discrimination law’s response to structural inequality has been largely predicated on the difficult statutory tort of indirect discrimination. Originally a judicially developed principle, it represents a fundamental recognition in law that discrimination is about more than deliberate or overt action by individual actors on the protected grounds and that inequality has endemic and institutional dimensions that derive from structural practices within important societal institutions. Such practices, which may appear ‘neutral’ on their face, can create patterns of disadvantageous and discriminatory effects on members of disfavoured groups, which if made out, will be prohibited by law where they cannot be objectively justified.
In this article, I consider what role discrimination law ought to play in addressing ‘subtle’ structural practices such as parental legacy rules that still operate within educational institutions’ admissions policies, which, whilst facially neutral, raise issues of indirect discrimination on children from minority groups. The litigation in the decision of *Stokes v. Christian Brothers High School* provides the context for the discussion. This case pivoted around the question of whether a school’s use of a ‘parental legacy rule’ in admissions gave rise to indirect discrimination against the complainant schoolboy as a member of the Traveller community.

The discussion proceeds as follows: By way of background, I briefly outline the entrenched position of inequality and disadvantage occupied by the Traveller community in Ireland. Thereafter, I move on to situate the provenance and purpose of the indirect discrimination norm, including the positive developments thought to be implicit in the simplification of its constituent elements following European Union (EU)-driven reform. I consider the approach taken by the Equality Tribunal to one of the key dimensions of indirect discrimination – that of ‘particular disadvantage’ – with the seemingly bizarre reasoning displayed following the appeal from the Circuit Court to the High Court. The High Court opted to depart from indirect discrimination’s accepted purpose of interrogating group disadvantage, overlooking the principle’s considerable, albeit difficult, jurisprudence in favour of a reliance on the Oxford English Dictionary. I suggest that Hamilton Krieger’s (2000) thesis on ‘capture and constraint’ helps to explain the judicial reductiveness on show here, which limits the transformative reach of the legislation. In response to the High Court judgment, I then go on to construct a statistical approximation of the impact of the admission policy on the complainant as a member of the Traveller community group compared with his comparator group of non-Traveller applicants. The purpose of this statistical exercise is twofold. First, it exposes the considerable burden on complainants where statistical methods are required to make out a prima facie case of indirect discrimination and second, somewhat paradoxically, it is constructed in order to expose the flaws in the High Court’s view that the legacy policy did not place the complainant, as a member of the Traveller community, at a ‘particular disadvantage’.

**The position of and protection granted to Ireland’s Traveller community**

Irish Travellers are a discrete group of people identified both by themselves and by the wider community as possessing a distinct culture and traditions, which historically focused around the practice of nomadism. The most recent census reported approximately 30,000 Travellers in the Irish Republic, equating to 0.6% of the population, with 1361 (0.07% of population) recorded in Northern Ireland (Central Statistics Office, 2012; Northern Ireland Statistics and Research Agency, 2012). The experiences of the Traveller community in Irish society remain distinctly characterized by entrenched disadvantage, exclusion, and prejudice and discrimination. Notwithstanding the increased levels of state attention directed towards ameliorating the position of the Traveller community, Traveller disadvantage and inequality in Ireland remains stubbornly acute, with members of the Traveller community faring considerably less well than non-Travellers.
across all indicators of well-being, including life expectancy, health, accommodation, education and employment. Early state policy problematized the position of Travellers, charging the Commission on Itinerancy (1963) with assimilating Travellers into ‘settled’ society as the means of solving this ‘problem’. It was not until the Task Force on the Travelling Community (1995) that the distinct culture of Travellers as equal in value to the settled population was first acknowledged as requiring support in public policy, with initial policy and law reform focusing on the housing context (Centre for Housing Research, 2008). The Task Force pointed out that the ‘forms of prejudice and discrimination experienced by the Traveller community equate with racism in the international context’ (1995, p. 79) and recommended, inter alia, the introduction of legal mechanisms to deal with the endemic forms of direct and indirect discrimination endured by Travellers as a group.

This express recognition of Travellers as a group that endures unjustifiable and endemic levels of discrimination was effected in law by means of their inclusion as a discrete protected group within the newly expanded equality and discrimination law framework introduced in the late 1990s. A notable feature of these measures is that membership of the Traveller community is specifically mentioned as a protected ground apart from the ground of race. Whilst this division has a particular history in domestic law and policy, and is frequently highlighted under the state’s international human rights obligations, it also raises a question as to the position of the Traveller community under the EU Race Directive. Unlike in the EU Race Directive, both of these grounds are given some further elucidation in domestic law. The race ground includes race, colour, ethnic or national origins or any combination of those factors. The Traveller community is defined 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, traditions, including historically, a nomadic way of life on the island of Ireland’. A prevailing view was that the incorporation of the ground and this definition into the equality legislation represented the state’s acceptance of the Traveller community as a distinct ethnic group (Equality Authority, 2006; Whyte, 2002), a position that has not transpired, as the state has continued to resist recognizing the Traveller community as an ethnic group (Quillian, 2012). Whilst nomadism is not as central a feature of Traveller life as it once was, there are other signifiers of Travellers’ ethnic status, including the importance of extended family, the existence of a distinct Traveller language, culture and customs and the existence of a long shared history of which the group is conscious as distinguishing it from other groups. These features accord with the criteria developed in international human rights instruments regarding the meaning of ethnicity or ethnic group, which includes self-identification (United Nations Committee on the Elimination of Racial Discrimination, 1990). Despite this, however, successive governments, whilst originally agonistic on the matter, have consistently denied that Travellers are an ethnic group (Ireland: Reports to UNCERD, 2004, 2011), a stance that remains an ongoing and incongruous issue, particularly as Travellers are recognized as an ethnic group in Northern Ireland.

Whilst the Traveller community’s status as an ethnic group is particularly pertinent for the purposes of implicating the state’s human rights obligations under international law, it is also of relevance for discrimination law, notwithstanding the separation...
between the Traveller community ground and the race ground in domestic discrimination law. In the EU context, the issue is whether Traveller community discrimination claims are justiciable by reference to the EU Race Directive, which raises interesting questions regarding the Court of Justice of the European Union (CJEU)’s future position on the meaning of race and the applicability of EU jurisprudence to the Traveller community ground. A number of commentators have taken the view that it is ‘likely’ (Kimber, 2003, p. 249) that Travellers will be able to rely on the protection of the Race Directive, citing in support references to the acceptance by courts in the United Kingdom of Irish Travellers as a racial group defined by reference to ethnicity for the purposes of the [then] Race Relations Act 1976. This issue has considerable implications, given that the substantive reach of indirect discrimination under the Race Directive, presuming that the approach in O’Flynn, discussed subsequently, if relied upon, may be more expansive than the protection available under domestic law. Indeed, a useful strategy on this point in the Stokes litigation would have been for an Article 267 reference to have been made to the CJEU for a determination on the issue, a strategy that appears something of a missed opportunity in light of the High Court’s peculiar understanding of indirect discrimination, discussed subsequently.

The provenance of indirect discrimination law

Anti-discrimination law’s response to structural inequality is largely predicated on the difficult statutory tort of indirect discrimination (Ellis, 1998, p. 122). First legislatively defined in the gender context in the Burden of Proof Directive, it has since been amended and replicated across a range of EU Directives, including the Race, Recast Gender, and Framework Employment Directives, and has been transposed into national law in the goods and services context following amendments to the Equal Status Act 2000. The genesis of indirect discrimination lies in the accepted limitations of the primary tool of anti-discrimination law, direct discrimination. Direct discrimination’s provenance is in excising differential or ‘less favourable’ treatment across the range of protected grounds and is concerned with what is generally understood as more ‘overt’ forms of discrimination. It fails to reach more covert practices that are implicit in established institutional and societal arrangements, practices that maintain existing distributive patterns and hierarchies and which benefit certain groups at the expense of others (Collins, 2003, p. 30). This shift of focus towards a wider understanding of inequality as embedded in institutional and structural relations, policies and practices, as opposed to that based on an individualized, intent-driven act of individual perpetrators, lies at the core of indirect discrimination’s concern with structural inequality. The concept of indirect discrimination foregrounds and questions the disproportionate effects of ‘neutral’ practices and dominant norms on protected groups (see generally, Tobler, 2005). However, not all practices that raise group-based disadvantageous effects will be prohibited as indirectly discriminatory practices remain justifiable by the respondent (see Townsend Smith, 1995), which allows ‘the refutation of the general assumption of a causal link between disadvantage and discrimination’ (Schiek, 2007, p. 324).

Whilst indirect discrimination is concerned with group disadvantage, its framing within the anti-discrimination paradigm means, somewhat paradoxically, that it is
litigated on an individual level (see Barnard and Hepple, 2000). This individualistic basis of anti-discrimination law forms one of the law’s most sustained criticisms and impacts on its ability to comprehensively address structural inequality (Lacey, 1998). Inequality can remain unearthed and unchallenged in the absence of an individual litigant.23 These deficiencies emphasize the need for a multidimensional approach to inequality and require anti-discrimination precepts to be supported by more substantive positive equality obligations and duties placed on the state and other societal institutions (Fredman, 2001, 2005; O’Cinneide, 2005). In this regard, Ireland’s performance certainly does not stand out, with the state so far preferring to limit its equality in law project to the narrow confines of anti-discrimination legislation (Mullally, 2001).24 Indeed, the Circuit Court made reference to a related point in the Stokes decision under discussion here when it concluded, ‘not without hesitation’, that although the school’s use of the parental rule was objectively justified, the legislature ought to address Traveller children’s educational disadvantage by way of positive action.25 There is much to be said for this latter point, particularly given that many schools may have positive action programmes applicable to other groups of students. However, this is not to suggest that positive action initiatives ought to substitute for the indirect discrimination principle or that it is otherwise redundant. As I discuss subsequently, indirect discrimination has to retain utility in weeding out unjustifiable forms of disparate impact because positive action under the Equal Status Acts remains entirely voluntary, and it is also both politically and legally difficult.26 It is also important that the key component of anti-discrimination law that attends to issues of structural discrimination, albeit imperfectly, is not stripped completely of its material worth. Therefore, the judicial response to structural inequality cannot be left to general exhortations around the possible usefulness of what remain non-mandatory positive action initiatives.27

Proving a prima facie case of indirect discrimination: Statistical versus common knowledge disparate impact

Recent amendments to the indirect discrimination principle in the Race and Framework equality directives28 were designed to ease the difficulties that arose from the requirement from the Burden of Proof Directive29 to statistically demonstrate the disparate effect that the challenged practice has on members of the claimant’s group as compared to the comparator group.30 The driver of this change was the well-founded concern regarding both the availability and the construction of strict statistical evidence and the consequent barriers to demonstrating discriminatory effects cases. The fear was that an insistence on strict statistical methods of proof would undermine the principle of equal treatment, particularly in respect of the newer protected grounds, such as race and sexual orientation, as a number of member states do not collate statistics on these identities. In any event, even if statistical evidence could be adduced, further problems had beset the case law interpreting the Burden of Proof Directive’s formulation of indirect discrimination, in respect of both how the statistics were chosen and how the pool of comparators was constructed.31

Therefore, the response to these concerns can be seen in the distinction between the younger Equality Directives and the Burden of Proof Directive approaches to
demonstrating a prima facie case of indirect discrimination. The former focus was on the term ‘particular disadvantage’ of the reference group as contrasted with the older provision’s requirement for disadvantage of a ‘substantially higher proportion of the members of one sex’, which the CJEU had held to be a statistical enquiry. The difference is further underscored by the recitals to both the Race and Framework Equality Directives, which point out that national rules ‘may provide in particular for indirect discrimination to be established by any means, including on the basis of statistical evidence’. This insertion of the key term ‘particular disadvantage’ into the Race and Framework Equality Directives (and subsequently into the Recast Gender Directive) and the shift away from strict statistical methods can be traced to a borrowing from EU law on the free movement of workers. In O’Flynn v. Adjudication Officer, the CJEU pointed out that the equal treatment rule laid down in Article 48 (now Article 39 of Treaty on the Functioning of the European Union) of the Treaty and in Article 7 of Regulation no. 1612/68 prohibits not only ‘overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result’. The CJEU went on to hold that unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

It is not necessary, according to the CJEU, to find that the provision in question does in practice affect a substantially higher proportion of migrant workers – ‘it is sufficient that it is liable to have such an effect’. This decision supports the proposition that indirect discrimination can be demonstrated in other ways than by statistical methods, upending the view that it is ‘fundamentally and unavoidably a statistical notion’ (Townsend Smith, 1995, p. 105). The effect of the O’Flynn test is, as Barnard and Hepple (1999) have pointed out, to allow courts ‘to take account of social facts and to use their general knowledge’. At the same time, this formula leaves open the question as to what extent or degree must a particular rule be shown to work to the disadvantage of migrant workers as compared to member state nationals. There must be a stronger negative effect on the former group than on the latter, which is ‘logically an absolute minimum’ (Tobler, 2005, p. 227).

The wording of indirect discrimination in Irish law transposes the younger Directives’ attempted exercise in simplification adopted from O’Flynn. It refers to ‘an apparently neutral provision’ that puts persons (of a particular characteristic) ‘at a particular disadvantage compared with other persons’, subject to the objective justification defence. Further, it gives express effect to the Directives’ Recital 15 provisions and states that statistics are no longer essential to proof of indirect discrimination. The legislation makes it clear that statistics are admissible but not mandatory – thereby implicitly creating two categories of cases: those that are proven by reliance on general knowledge and social facts and those that are demonstrated with reference to statistical evidence. These amendments, therefore, are thought to go some way towards offsetting the barriers faced by complainants in amassing the strict statistical evidence required under the provision’s
previous formulations. Whilst there is as yet no CJEU case law on the contours of the term ‘particular disadvantage’ and the approach to common sense understandings of indirect discrimination under the Race and Framework Equality Directives, national courts and tribunals have been grappling with the new definition. Indeed, the tribunals in Ireland have declared a willingness to rely on the general knowledge approach in certain circumstances. For example, in Inoue, a case dealing with indirect gender discrimination in employment, the Labour Court held that as an expert tribunal, it could take into account, even in the absence of strict statistical evidence, matters such as the risk of indirect discrimination on a protected ground under the Act which ‘are obvious to the members of the court . . . drawing on their own knowledge and experience from its specialist experience’. The Labour Court went on to observe that it would be ‘alien to the ethos of this court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence’ in such circumstances. Similarly, in McDonagh v. Navan Hire Limited, decided under the Equal Status Acts, the Equality Tribunal considered the issue in the context of a complaint of indirect discrimination on the grounds of membership of the Traveller community when the complainant was denied a hiring service under a hiring policy that demanded a permanent address and landline phone number. The Equality Tribunal noted that the condition – the provision of a permanent address that is not a halting site – was one that fewer Travellers than non-Travellers could satisfy. Relying on the Labour Court in Inoue, it held that

[i]t would be reasonable therefore to infer from this rationale than an expert tribunal such as the Equality Tribunal, can similarly take account of matters such as the number of Travellers living on halting sites in comparison to the number of non-Travellers, matters which are obvious from the Tribunal’s specialist experience.

Therefore, commentators’ prediction that the trickiness of demonstrating a prima facie case of indirect discrimination would be eased by the shift to the language of ‘particular disadvantage’ has appeared to have materialized in the lower tribunals in Ireland. However, as is discussed subsequently, the High Court’s decision in Stokes is an unhappy turn in the new provision’s interpretation in the Irish context.

The Stokes litigation

The Stokes litigation concerned an unsuccessful application made on behalf of a schoolboy member of the Traveller community for admission to the respondent secondary school. The complainant alleged that an element of the school’s admission policy gave rise to indirect discrimination on the grounds of his membership of the Traveller community in contravention of section 3(1)(c) of the Equal Status Acts 2000–2008 (now 2012). In the academic year concerned, the school had 140 places for incoming students and was oversubscribed with 174 applicants. The first round of the admission policy awarded places to boys who satisfied its ‘maximum eligibility criteria’ which included applications made on behalf of a boy whose parents seek to submit their son to a Roman Catholic education in accordance with the school’s mission statement; those who attended primary school in one of the listed feeder schools; and those who already
had a brother who attended/attends the school or is the child of a past pupil or has close family ties with the school. Where places remained unfulfilled following the first-round criteria, the second round involved a lottery for those remaining applicants who applied on time. John Stokes met two of the three maximum eligibility criteria: Roman Catholic and attendance at a designated feeder primary school; as the oldest son, John could not satisfy the sibling rule. His father, as was commonplace within the Traveller community, had not attended the school nor any secondary school. Consequently, he was placed in the second-round lottery and was unsuccessful when the draw was made. According to the Equality Tribunal figures, 90 places were awarded under the first round to those with maximum eligibility – such students would have satisfied either the sibling or father rule, along with the other criteria; 84 names were entered into the second-round lottery for 47 places.

That the complainant’s father had not attended secondary school is unsurprising when considered against the backdrop of pervasive educational disadvantage amongst members of the Traveller community relative to the rest of the population, particularly in the era in question, the 1980s. As noted above, Traveller educational disadvantage is one of many general indicators that distinguish their well-being from that of the ‘settled’ community in Ireland. A combination of factors has contributed to educational disadvantage amongst Travellers as a group. These include overt animus and prejudice against Travellers as a group, which was problematically left unchecked until 2000 due to the absence of formal anti-discrimination guarantees, the impact of default cultural norms and structures that are antagonistic to Traveller traditions, including the tradition of travelling, and the failure of the state, at least in the recent past, to develop inclusionary policies targeted at addressing Traveller educational disadvantage. In recent times, there is certainly evidence of more concerted state efforts to address the myriad forms of Traveller exclusion, including the development of greater Traveller educational supports (Report on Traveller Education Strategy, 2006). However, the critical point in the context of this discussion remains that at the relevant time, which is the era when the complainant’s father was of schoolgoing age, comparatively few efforts were made to facilitate Traveller inclusion in mainstream educational structures. This history of exclusion does not simply remain history, however; it retains significance given the reliance on historical practices and patterns to determine and distribute the availability of present-day opportunities for Traveller and other children. Indeed, the school could produce no evidence to demonstrate that any Travellers had attended the school during the 1980s when the complainant’s father was of secondary school age. Therefore, this reliance on history that is implicit in ‘neutral’ parental legacy rules crystallizes what Sheppard (2010) calls ‘one of the most difficult dimensions of systemic discrimination...its tendency to be reinforced over time’.

**The ‘father rule’: Prima facie indirect discrimination?**

In *Stokes*, the complainant argued that the parental rule in the school’s admission policy was indirectly discriminatory as it puts the complainant as a member of the Traveller community at a ‘particular disadvantage’ compared to other persons, that is, non-Travellers. Given the well-known educational disadvantage endured by the Traveller community as a whole and, more specifically, by the complainant’s father who had not attended
this nor any school, it does not appear controversial to assert that the parental legacy policy would on the general knowledge approach to indirect discrimination, discussed above, raise a prima facie case of disparate impact across a range of protected grounds. In support of this assertion, the complainant adduced evidence from the Department of Education regarding the low participation rates by members of the Traveller community in post-primary schools in 1988.\textsuperscript{47} Indeed, prior to 1990, entrance to the school was determined by competitive written examination, which, according to the Equality Tribunal, would have acted as a ‘serious barrier to Travellers securing admission since the academic standard achieved by Travellers in primary schools at that time was on average very low’.

As is discussed in detail subsequently with respect to the High Court’s approach to the determination of a prima facie case, the central enquiry in the first limb of indirect discrimination turns on the EU-driven provision of ‘particular disadvantage’. The Equality Tribunal noted that whilst the policy of attributing priority to the sons of former pupils appeared to disadvantage more Travellers than non-Travellers, it was also necessary to show that the complainant was subjected thereby to a ‘particular disadvantage’ as compared to non-Travellers. This was made out, according to the Equality Tribunal, because the application of the parental rule meant that the complainant had a 55\% chance of being selected for a place in the school in the second-round lottery (recall, the complainant did not satisfy the sibling rule); whereas the absence of the parental rule meant that his chance in the second round would have increased to 70\%.\textsuperscript{48} Thus, the particular disadvantage endured by the complainant was, according to the Equality Tribunal, the ‘loss of chance’ of a successful application as a consequence of the parental policy. Whilst the Circuit Court ultimately agreed with the Equality Tribunal that the parental legacy rule raised a case of indirect discrimination on the Traveller community ground, it appeared to ground it on a common understanding of social facts approach, noted above, that was cognizant of the well-recognized nature of Traveller educational disadvantage, as opposed to a direct reliance on the loss of chance approach. The battleground between the Equality Tribunal and the Circuit Court was on the application of the justification test to the circumstances of the case. However, on appeal from the Circuit Court, the High Court dismissed the case at the first hurdle of particular disadvantage.

‘Particular’ disadvantage in the High Court

Early in the judgment, McCarthy J dismissed the loss of chance argument utilized by the Equality Tribunal to demonstrate that the policy generated particular disadvantage for the complainant as a member of the Traveller community. This approach was not of any ‘particular assistance’ because, according McCarthy J, ‘we simply do not know what the policy would be if the Parental Rule were abolished’.\textsuperscript{49} Whilst I suggest subsequently that there are other ways of considering the particular disadvantage limb apart from the loss of chance enquiry, I would question McCarthy J’s reasoning on this point because previous judgements\textsuperscript{50} have addressed the issue of a practice’s particular disadvantage through the construction of pools of comparators made up of persons who would have otherwise qualified under the policy in question excluding the suspect requirement.
In order to analyse the High Court’s approach, it is useful to provide a reminder of the governing provision in section 3(1)(c) of the Equal Status Acts, which states that discrimination shall be taken to occur:

where an apparently neutral provision\textsuperscript{51} puts a person referred to in any paragraph of s.3(2) 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.

The persons referred to in section 3(2) are those as described by the discriminatory grounds in the Acts, in this context, where one is a member of the Traveller community and the other is not. According to the High Court, ‘[n]o remedy is available to travellers (sic) of course merely because they can show their disadvantage as such but only if they can go further and say that the disadvantage is particular’\textsuperscript{52}. This raises the critical question about the establishment of ‘particular’ disadvantage both with respect to what degree of disadvantage needs to be demonstrated such as to render it particular to the reference group and with respect to, quite fundamentally, how it is to be demonstrated. Beyond stating that statistical evidence ‘may’ be adduced, the statute is silent as to the appropriate method(s).

Previous approaches under older definitions of indirect discrimination demanded the construction of a relevant pool within which the positions of members of the complainant and comparator groups vis-à-vis the impugned requirement or policy were compared. Thereafter, following this general approach, some disparity between the rate or extent of the disadvantage, measured by way of the ability or inability to comply with the suspect practice, endured by the comparator group and the complainant group would need to be shown in order to demonstrate disadvantage of a ‘substantially higher proportion of the members of one sex’.\textsuperscript{53} Given that little judicial authority exists on the differences between the previous incarnations of the definition and the current statutory formulation, it would be expected that some guidance would be sought from a range of suitable sources. These might include reference to the purpose of this complex statutory tort, which is concerned with unearthing structural manifestations of inequality, the extensive body of case law which indirect discrimination has generated (albeit largely in the employment context) and engagement with the reasoning of the expert tribunals in such decisions.\textsuperscript{54} However, the course charted by the High Court was to step outside the statutory matrix and its related sources and to seek elucidation on the term ‘particular’ from the Oxford English Dictionary. In total, the Court cited five different definitions of the word particular, including

\begin{itemize}
\item ‘pertaining or relating to a single definite thing or person or set of things or persons, as distinguished from others’;
\item ‘of or belonging to some one thing and not another or to some and not all; of one’s (its etc) own; special not general’;
\item ‘belonging only to a specified person or thing’;
\item ‘peculiar, restricted to;
\end{itemize}
The learned judge went on to apply the dictionary definition to the case at hand, stating:

I do not believe that the disadvantage suffered by travellers (sic) (in common with all other applicants who were not the sons of past pupils) pertains or relates to ‘a single definite person . . . or persons as distinguished from others’ or ‘distinguished in some way among others of the kind; more than ordinary; worth notice, marked; special’. The disadvantage relates to persons in addition to travellers and is not peculiar or restricted to travellers, and does not distinguish them among others of the kind (i.e. applicants for admission) and cannot be said to be ‘more than ordinary’, ‘worth notice’, ‘marked’, and ‘special’ because, of course, there are others in the same position as they are.

‘Particular disadvantage’ was not made out in this case, according to McCarthy J, as ‘everyone who is not the son of a past pupil is at a disadvantage’ and as a result there is no distinction between the extent of the disadvantage suffered by Travellers and others. With respect, I would argue that the High Court did not place itself in a position to secure this conclusion because it did not measure nor estimate the extent or rate of Traveller disadvantage relative to non-Travellers arising from the operation of the suspect rule.

I would suggest that a decontextualized resort to a dictionary source in this manner is highly problematic. In particular, the central reliance on phrases such as ‘belonging only to a specified person’, which relies on the singular, and ‘restricted to’ immediately seem suspect in light of the accepted purpose of indirect discrimination, which is concerned with group disadvantage deriving from the differential group impact of the so-called neutral practices. This reasoning appears to suggest that the High Court (incorrectly) viewed the word ‘particular’ as a synonym for the term ‘exclusive’ and the fact that the disadvantage was viewed as not exclusive to Travellers and affected others meant on the High Court’s reading that particular disadvantage was not made out. Yet the whole crux of indirect discrimination is with disparate group impact and not, as McColgan (2005, pp. 84–85) has pointed out, whether there has been a difference in treatment between the complainant and the comparator. Consequently, the fact that the disadvantage is ‘not restricted to travellers (sic)’ does not advance the enquiry. This tells us nothing about disparate group impact. The High Court appeared to miss this crucial element of the indirect discrimination principle, proof of which is not compromised by the fact that disadvantage arising from the suspect provision accrues to persons outside the complainant’s group. Further, implicit in the High Court’s reasoning is a problematic reliance on absolute, albeit unreferenced, numbers implicit in the statement that ‘everyone who is not the son of a past pupil is at a disadvantage’: that \(X\) number of ethnic minority persons is disadvantaged and \(X + Y\) number of ethnic majority persons is disadvantaged by a policy ‘does nothing to prove that those of minority background have not been disadvantaged’ (Schiek, 2007, p. 407).

The appropriate enquiry would be to consider the extent or rate of the disadvantage being endured by the protected group, in this case, the Traveller community, as
compared to the comparator group, non-Travellers, and then to consider whether there is
a significant difference between the two groups which would make the disadvantage one
that is particularly experienced by Travellers. As noted above, there are two ways of
making out this requirement, through common understandings as determined by the
expert tribunals or through statistical evidence. What is ironic is that the shift in the stat-
utory scheme away from a requirement of strict statistical evidence, designed to allow a
wider range of evidence, including social facts, to be used to demonstrate disparate
effects so as not to frustrate the presentation of prima facie cases of indirect discrimina-
tion, has now been turned on its head and utilized in this instance to facilitate the denial
of a prima facie case.

More widely, the reasoning in Stokes is an example of the continuing troubles that
have beset the principle of indirect discrimination and reflects the disconnect between
legal norms transformative ambitions and existing social practices. A body of academic
scholarship has explained this gap in equality law jurisprudence through the heuristics of
between formal laws that reinforce existing social norms (as most criminal laws do) and
those laws designed to transform existing practices and institutions, such as non-
discrimination and accommodation mandates, which includes the indirect discrimination
principle. She suggests that where transformative laws seek changes that sharply conflict
with normative systems that continue to enjoy significant popular support, dominant
norms may subtly reassert themselves within the legal regime designed to replace them.
This ‘capture’ effect, Hamilton Krieger argues (2000, pp. 485–493), not only constrains
implementation of transformative legal measures, it risks legitimating and reifying the
very norms it aims to undermine. I suggest this thesis can help explain the forces at work
within the Stokes litigation. The subtext is that despite the surface commitment to equal-
ity norms that enjoy ‘popular support’, the strength of these commitments weakens in
practice where they conflict with majority groups’ enjoyment of ‘routine’ practices that
benefit their children in education settings.

In the next section, I attempt to consider a number of means beyond the dictionary
approach by which the High Court could have assessed whether the legacy rule gave rise
to disparate impact on the Traveller community ground. The purpose of this exercise is to
problematize both the statistical approach to indirect discrimination and the High Court’s
dictionary-led approach.

**Beyond the dictionary: Proving prima facie case of indirect
discrimination by social facts and/or statistics**

As noted above, a consideration of (unreferenced) absolute numbers does not clarify that
members of a minority group have not been particularly disadvantaged by a suspect cri-
terion, practice or policy. The social facts approach recognizes that to predicate access to
educational opportunities for children upon the educational participation of their parents
could raise a prima facie case of disparate impact upon Traveller children compared with
non-Traveller children due to the considerable historical (and continuing) educational
disadvantage amongst Travellers as a group relative to the rest of the population. This
common knowledge has roots in the previously mentioned research reports, both
quantitative and qualitative, that have recorded the high rates of educational disadvantage amongst Travellers as a group. This has long been accepted to be at a higher rate than amongst the population as a whole, even though the state did not collate official statistics on Travellers until the late 1980s. The Equality Tribunal and the Labour Court have previously relied on the social facts approach in adjudicating and applying principles of non-discrimination, with the former having previously applied it in an indirect Traveller discrimination case.\(^{59}\)

The other methodology would be to consider more closely the different statistical options. This would involve comparing the relative proportions of the respective groups who could and could not comply with the requirement in order to determine whether particular group disadvantage exists by reference to the protected discriminatory ground. A statistical enquiry remains a valuable, albeit difficult, evidential aid to demonstrating the particular nature of the policy’s disadvantage on the complainant as a member of a protected group. As Fredman (2011, p. 189) cautions, were the role of statistics in uncovering indirect discrimination to be discarded entirely, it would mean that the law would simply be confined to dealing with instances of obvious indirect discrimination, which would be insufficient to flush out measures that appear wholly neutral and are not in any ways suspect.

Much of the previous authority concerning statistics and indirect discrimination turned on the selection of the pool of persons from which the statistical analysis could be made.\(^{60}\) Of course, those decisions concerned definitions of indirect discrimination with wording different from the current governing paradigm such as whether a considerably larger proportion of one group than the other was able to comply (or not comply) with the suspect provision. In addition, there was a lack of consensus over how the pool containing the groups for comparison was selected: the tribunals and courts retain the power to determine the appropriate pool for comparison. However, given that the construction of the respective groups can take place at different levels, complainants have faced real difficulties in anticipating the level at which the group comparison would be drawn. There exists no authoritative ruling either from domestic courts or from the CJEU on how exactly the pool should be determined.\(^{61}\) Superior court guidance on this point in Ireland is thin, but UK case law has accepted the pool at a range of levels.\(^{62}\)

With these points in mind, it is worth considering the possible options. The largest possible pool for comparison is that of all Traveller and non-Traveller children of secondary school age in the entire population, considered above, albeit not there in the strict statistical sense. A narrower pool is the relevant population, which in the context of school admissions can be divided into two sub-pools: the group who actually apply to the school – the applicant pool, or those who could apply – the potential applicant pool (Hervey, 1994). In order to expound fully on the matter, I have proceeded to draw the pools on a range of different levels.

The widest level would be to seek to establish national statistics of education levels amongst Travellers compared with non-Travellers within the estimated relevant particular age bracket, that is, parents of children of secondary school age. The problem with constructing the pool at the national level is that the criterion at issue was not to have a parent (more specifically, a father) attend secondary school but to have been a past pupil of the particular school, a point raised by the respondents in the litigation. The widest
level group would collate the educational achievement of parents of current (or recent) children of senior cycle age in primary school and to delineate those figures with reference to the proportions of Traveller children and non-Traveller children whose fathers did and did not access secondary school. Of course, strict statistical evidence relevant to the particular time frame may be difficult to obtain (as would educational attainment by parental status), given that the state did not officially collate statistics for the Traveller community during the time when such children’s parents would have been of secondary school age. However, there may be other means of deriving an approximation of education rates of the groups. For instance, evidence was adduced by the Department of Education that in 1988 the number of Travellers enrolled in post-primary schools in the entire state was less than 100, which shows a massive disparity with the rate of secondary school attendance amongst non-Travellers at the time. Additionally revealing is the report, *Equality in Ireland*, published by the Central Statistics Office (2006), which is presented in Table 1.

This table reveals the heightened rate of educational disadvantage amongst the Traveller community as compared to non-Traveller Irish persons. Therefore, in 2006, Irish non-Travellers were approximately 3.7 times more likely to have attended secondary school than Irish Travellers. If these general statistics were to be applicable across Irish educational institutions, one could deduce that the application of a parental legacy rule in schools’ admission policies nationally would place Traveller children at a particular disadvantage as compared to non-Traveller children. However, this broad statistical account does not address the impact of the narrower policy rule in question, which required attendance at the particular school.

Moving away from a statistical analysis at the national level, I next attempt to construct one at the narrower level with reference to the relevant population by considering the respective groups within the potential applicant pool. The point of this exercise is ‘to compare the relative possibility of each of the grounds – e.g. the ethnic majority and ethnic minority to belong to the (dis)advantaged group’ (Schiek, 2007, p. 399). Given the absence of domestic authority on the construction of the pool in goods and services cases, I have borrowed from the test in the English decision of *Jones v. University of Manchester*, which concerned indirect sex discrimination in access to education and training. Adapting it to the Traveller community ground, I have attempted to provide statistical values in order to allow for a comparison of the impact of the policy on Travellers and non-Travellers. The reworked test from *Jones* proceeds as follows:

1. Identify all those people who but for the disputed requirement, in this case, the parental rule, would be in a position to qualify under the admission policy. In

### Table 1. Educational attainment by ethnicity, 2006.

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Primary only or less</th>
<th>Secondary only</th>
<th>Third Level</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>White Irish</td>
<td>20.2</td>
<td>50.7</td>
<td>29.1</td>
<td>100</td>
</tr>
<tr>
<td>Irish Traveller</td>
<td>77.0</td>
<td>22.2</td>
<td>0.8</td>
<td>100</td>
</tr>
</tbody>
</table>

Smith
other words, the numbers who could meet the other qualifying criteria: male, seeking to submit their son to a Roman Catholic education in accordance with the of the school mission and has attended primary school in one of the designated list of feeder schools set out in the policy.66

2. Divide that population into those who can comply with the suspect requirement and those who cannot.

3. Ascertain the number of Traveller and non-Traveller children in each of the two groups and the numbers of Travellers and non-Travelers in the pool as a whole.

4. Express the proportion of non-Travelers who can comply with the requirement as a percentage of the total number of non-Travelers in the pool. Do the same in relation to the Travellers in the pool.

5. Compare the percentage proportion of non-Travelers who can comply with the requirement with the percentage proportion of Travellers who can comply and decide whether that comparison reveals that ‘a considerably smaller proportion’ of Travellers than non-Travelers in the pool can comply with the requirement.

(The updated statutory language asks whether there is particular disadvantage on Travellers as compared to non-Travelers.)

As alluded to previously, I have had some difficulty in locating exact numbers that equate to the specific time period governing the particular application cycle. Indeed, this difficulty underscores the considerable burden placed on complainants under the statistical method. It would be necessary to obtain the exact enrolment figures in the listed feeder schools for the year 2008, information that I have been unable to access. As a result, I have taken some leeway and inserted figures from the 2011 enrolment figures to be used as proxy for the 2008 figures, which I use alongside 2006 census figures, at the same time as borrowing from some figures relied upon in the judgment itself. Whilst I acknowledge these borrowings are less than ideal and may attract some criticism regarding strictness or accuracy, it should be remembered that the point of this exercise is to construct the best approximate statistical figure in order to act as an evidential aid to the commonly understood view that members of the Traveller community have endured and continue to endure disproportionate educational disadvantage relative to the rest of the population. Therefore, what I set below is an academic exercise undertaken to problematize the High Court’s reasoning, an undertaking that reveals both the difficulty with and yet the simultaneous need to assert some statistical evidence as a counter to the High Court decision. It demonstrates the tension implicit in this decision: that is, notwithstanding the legislative amendment classifying statistical evidence as non-mandatory, it may be necessary to assert statistical evidence to raise a prima facie case where common knowledge understandings are delegitimized.

Thus, as per the first limb of the Jones test, I attempted to construct all those students who, but for the disputed requirement, would have been in a position to qualify under the admission policy. To this end, I obtained the numbers of male students enrolled in the listed feeder primary schools set out in the appendix to the school’s admission policy.67 I calculated a total of 1684 students in attendance at such feeder schools and I arrived at a number of 211 as the average number of sixth class students who would qualify as applicants from feeder schools.68 That number was then considered in light of the rate of
Roman Catholics in the town of Clonmel in the 2006 census (92%). Thus, the final figure in the general pool of potential applicants was calculated at 194 applicants. Within this general pool, the number of Travellers and non-Travellers was 12 and 182, respectively. The next stage was to divide this population into two groups – namely, those who can comply with the requirement, that is, to have a father who attended the school, and those who cannot comply. Numbers on this criteria would be very difficult to obtain in the absence of a quantitative survey, hence my solution was to ‘borrow’ as a sample, from the rate of applicants in Stokes who could actually meet the parental legacy rule, which was 21%. Therefore, the two groups within the pool were those who could comply with the criterion – 41 applicants – and those who could not comply with the criterion – 153 applicants. I then moved on to consider the number of Traveller and non-Traveller children in each of the groups. The number of non-Travellers who could comply was 41, and the number of Traveller children who could comply was 0, as it was recognized in Stokes that not a single Traveller had attended the school prior to 2007. Therefore, the number of non-Travellers who could not comply was 141, and the number of Travellers who could not comply was 12. This meant that 0% of Traveller children could comply and 22% of non-Traveller children could comply with the rule, with 78% of non-Traveller children not in a position to comply as against 100% of Traveller children being disadvantaged. Following the construction of the statistical impact of the policy on the protected and non-protected groups, the next issue is to consider whether the difference in impact or in the disadvantage rate is statistically significant. I would argue that the difference between these two is certainly statistically significant so as to demonstrate that the disadvantage was greater vis-à-vis members of the Traveller community than non-members of the Traveller community, so as to render it particular to Travellers. This admittedly complex exercise that I have completed here reveals a rather different perspective on the impact of parental legacy rules on children from minority groups as compared to an approach driven by a reliance on the Oxford English Dictionary.

Conclusion

The Stokes litigation is an early dent in the contours of the new definition of indirect discrimination in Irish law. The prediction that the new formula of indirect disadvantage would make it easier to raise a prima facie case of indirect discrimination has been overturned by this troubling decision. It raises particular questions that linger, including the position of Irish Traveller children under the EU Race Directive and whether the High Court’s particularly peculiar interpretation of ‘particular disadvantage’ would be in keeping with the CJEU’s future approach to indirect race discrimination in the goods and services context. The problem with the High Court decision is the double bind that is created where both common sense understandings of indirect discrimination and statistics-based evidence are delegitimized in favour of a mechanical reliance on the Oxford English Dictionary. It also represents an attack on the values underpinning indirect discrimination and its concern for structural inequality. Whilst litigated with respect to the Traveller community ground, the application of these types of provisions in school admissions policies raises possible disparate impact concerns across a range of other
grounds, such as the race ground, as children of new migrant communities are less likely to have parents who are past pupils of Irish secondary schools. Such policies also privilege particular types of family forms as it constructs parents or, more narrowly here, fathers’ life experiences as a gatekeeper, which could deny maximum eligibility to those applicant children raised in the absence of fathers. The exclusionary impact of schools’ ‘subtle’ admission practices has been already flagged by the Department of Education (Department of Education and Skills, 2011), but this litigation presented an opportunity to critically assess these practices by reference to the substantive aspirations of discrimination law, which includes the weeding out of structural inequalities. Whilst these ‘subtle’ inequalities in schools’ admission policies may be eventually addressed by means of legislative intervention, the remaining concern is the precedential value of the High Court’s interpretation of the disparate impact limb of particular disadvantage. If the Stokes approach is to be followed, it will turn out to be one of the most retrograde interpretations of indirect discrimination in the context of access to goods and services and a clear attack on the substantive equality aspirations for Irish anti-discrimination law.

Acknowledgement

The author is grateful to Dr David Doyle for discussion around statistical methods.

Funding

This research received no specific grant from any funding agency in the public, commercial or not-for-profit sectors.

Notes

4. The doctrine, according to Baroness Hale, ‘looks beyond the formal equality achieved by the prohibition of direct discrimination towards the more substantive equality of results’. Rutherford v. Secretary of State for Trade and Industry (No.2) (2006) UKHL 19, para. 71.
7. The focus of this article is on this element to indirect discrimination. The Equality Tribunal and the Circuit Court took differing approaches to the question of objective justification, with
the latter accepting the school’s justification. This issue was not addressed by the High Court following its dismissal of the case at the prima facie stage.


9. See Department of Health (2010), *All-Ireland Traveller Health Study*, which reported that the life expectancy at birth for male Travellers remained at the 1987 level of 61.7, which is 15.1 years less than the rate for men in the general population.


11. One in three Irish Traveller households in mobile/temporary accommodation lives without sewerage facilities, with one in five households with no access to piped water. Central Statistics Office (2012), *Census 2011*.

12. In 2011, 17.7% of Irish Travellers had no formal education compared with 1.4% of the general population, and only 1% of Travellers completed third level in 2011 as compared to 30.7% of the general population. See also, Central Statistics Office (2006), *Equality in Ireland*.

13. The 2011 Census reported an 84.3% unemployment rate among Irish Travellers, up from the 2006 figure of 74.9%.


16. There has been considerable debate as to whether an objective standard, which relies on common nationality or tribal affiliation, religious faith, shared language, culture or traditional origins or a subjective standard where minority groups self-identify as a particular ethnic group, should be the preferred approach. Some states, such as the United Kingdom, rely on a combined approach: see *Mandla v. Lee* (1983) IRLR 209. The UN Committee on the Elimination of Racial Discrimination in General Comment No. 8 states ‘such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned’.

17. The UN Committee on the Elimination of Racial Discrimination is of the view that ‘the recognition of Travellers as an ethnic group has important implications under the Convention’ (Articles 1 and 5) and has encouraged the state ‘to work more concretely towards recognising the Traveller community as an ethnic group’. These comments were reiterated in the Committee’s concluding observations on Ireland’s third and fourth periodic reports in 2011. CERD/C/RL/CO3-4.


24. The equality agenda in Ireland has lost momentum following the flurry of activity in the 1990s, particularly as no statutory positive equality duties have been implemented, although


26. The difficulties with the reconciliation of the principle of equal treatment and positive action in the employment context can be seen in CJEU case law such as C-407/98 *Abrahamsson v. Fogelqvist* (2000) ECR I-5539.


29. Article 2(2) of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.


31. See the comments of Lord Walker in *Secretary of State for Trade and Industry v. Rutherford (No. 2)* (2006) UKHL 19 at para. 38.


33. Recital 15.


35. Council Regulation 1612/68 on freedom of movement for workers within the Community LJ L 257.

36. At para. 17. See also the earlier decision of *Sotgiu v. Deutsche Bundespost* Case 152/73 (1974) ECR 153.

37. Section 3(1)(c) of the Equal Status Acts 2000–2012. This definition raises problems with the transposition of the EU Equality Directives, given that these instruments include the phrase ‘would put’, which allows a claim to proceed on the basis that the provision is liable to put members of the relevant group at a ‘particular disadvantage’.


41. Ibid.

42. DEC-S-2004-017.

43. Bamforth et al. (2007, pp. 314–315) described the shift as ‘potentially very significant’.

44. There was no suggestion that the school had intentionally adopted this policy in order to screen out Traveller children.

45. However, the state’s commitment to implement this strategy has been criticized by the Irish Human Rights Commission. See IHRC *Shadow Report to the CERD Monitoring Ireland’s Compliance* (November 2010).

46. It was also noted that the policy would impact on groups such as the Nigerian community and the Polish community, where due to recent immigration into Ireland, such parents of boys
were most unlikely to have attended the school previously. Of course, neither the Equality Tri-
bunal nor the Circuit Court considered the impact of the provision on boys raised in the
absence of fathers such as by lesbian parents.
47. In 1988, the Department’s figures showed fewer than 100 Travellers enrolled in secondary
schools. DEC – S2010-056, para. 10.
48. The Equality Tribunal’s reasoning on this point noted that all children of past pupils who
applied on time and who did not meet the sibling criteria were successful. The chances of
an applicant like the complainant who did not meet any of these criteria being successful in
the second round were 55%, that is, he was one of 84 applicants in a lottery for 47 places.
If the third sub-criterion (being a child of a past pupil) was not a priority, then those places
awarded to the sons of past pupils who did not meet the sibling criteria (36 in all) would have
been added to the number to be allocated by lottery under round two. That would have
increased the complainant’s chances in the second round to 70%, that is, he would have been
one of 120 applicants in the second-round lottery for 83 places. DEC-S2010-056, para. 11.
49. At para. 2.
50. For example, see the Irish Supreme Court decision in Nathan v. Bailey Gibson (1998) 2 IR 162
51. A provision is defined widely in section 2 of the Equal Status Acts to mean ‘a term in a con-
tract or a requirement, criterion, practice, regime, policy or condition affecting a person’.
52. At para. 22.
53. See Article 2(2) of the Burden of Proof Directive.
Hire Ltd DEC-S-2004-017.
55. At para. 23.
56. At para. 25.
57. At para. 26.
58. For instance, under the most litigated indirect discrimination ground, the sex ground, cases
have not been dismissed on the basis of the presence of men within the comparator pools who
were also disadvantaged by the requirement at issue.
60. Most of this authority derives from English discrimination law jurisprudence and includes
London Underground v. Edwards (No 2) (1998) IRLR 364 and Rutherford and Another v. Sec-
61. There has been considerable litigation on this point in the United Kingdom, considerably less
in Ireland. This decision on the pool could have considerable impact on the strength of the
statistical figures, as Fredman (2011) has pointed out.
62. See, for example, Jones v. University of Manchester (1993) IRLR 218; London Underground
63. This reference was made in evidence and cited in the Equality Tribunal decision DEC-S2010-
056.
65. There is not much case law on indirect discrimination cases concerning access to employment,
let alone goods and services. Questions remain how the pool of comparators would have to be
established in these cases.
66. The criterion of having a sibling attend the school was not utilized in this statistical account.
67. This information was obtained from www.schooldays.ie. Last accessed 28 January 2013.
68. I did this by dividing the total number of students in the secondary school’s feeder primary schools by the number of grades (eight) in primary school.
70. This figure is based on the proportion of the population from the Traveller community in Clonmel of 6.2% (Central Statistics Office, 2007).
71. I justify this choice given the absence of a large discrepancy between this pool as constructed and the number of actual applicants in Stokes. Of the 174 applicants, 36 were able to comply with the parental rule.
72. In the United States, the Equal Employment Opportunity Commission adopts what is called the ‘four-fifths’ rule, which is where a selection rate for any race, sex or ethnic group is less than four-fifths or 80% of the rate for the group with the highest rate will be regarded as evidence of adverse impact. The compliance rate for the majority group here is 22% and for Travellers is 0%, then the ratio for Travellers is 0:22, or 0%, which is overwhelmingly less than four-fifths. 29 CFR 1607.4(D) cited in Fredman (2011).
73. Such a rule could impact children within same-sex families, such that a son of a lesbian couple may be unable to meet the ‘parental’ rule in respect of single-sex schools, which continue to dominate in Ireland. In addition, children of mothers unaware of their father’s identity are also adversely affected by the policy.

References


