

Joint Submission to the Department of Education and Skills Consultation on the role of denominational religion in the school admissions process

March 2017



Supporting Lesbian, Gay, Bisexual & Trans Young People in Ireland



PAVEE POINT
TRAVELLER AND ROMA CENTRE

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Introduction

EQUATE, BelongTo, Children's Rights Alliance, Pavee Point, ISPCC, EPIC and Migrants Rights Centre Ireland (MRCI) welcome the opportunity to make a joint submission to the Department of Education and Skills consultation on the role of denominational religion in the school admission process and possible approaches for making changes.

In recent years, there has been a sustained national dialogue about the role of religion in Irish schools. The organisations that have come together to produce this submission work to support children and young people to access their rights in Ireland.

This submission reflects our concerns, in line with those of the United Nations Committee on the Rights of the Child, that allowing religion to be used as a core criteria for admissions to publicly funded schools undermines the child's right to access to education.

We all believe that education is a fundamental cornerstone of our society and that schools must operate in the best interests of all children.

In this submission, we respond to the consultation documents six options and unambiguously choose option 4 (i) from the six options provided.

We will also clearly outline detailed constitutional opinion as to why Section 7(3)(c) of the Equal Status Act can be removed within constitutional parameters.

This submission is presented in the framework offered by the consultation document with our initial option being set out and then answers to the specific issues A – D answered where applicable.

Department of Education and Skills Consultation Document

From the consultation document: "Please indicate clearly in your response what your preferred approach is, whether 1,2, 3 or 4 (and, in the case of approach 4, what your preferred 'sub-option' is)":

EQUATE, BelongTo, Children's Rights Alliance, Pavee Point, ISPCC, EPIC and MRCI choose option:

- 4 (i) Outright repeal of section 7(3)(c) of the Equal Status Act in respect of publicly-funded primary schools

Section 7(3)(c) of the Equal Status Act 2000 allows state funded schools to discriminate against children on religious grounds. All children have the right to education. All children also have a right to freedom of religion or belief. These rights are individual rights held by every child. Even one child being refused a place in their state funded local school because of their family's religion or beliefs is a denial of these rights and is not acceptable in a modern pluralist democracy. Each of the other five options will continue to allow schools to use religion as a criteria in some form for school admissions.

Recommendations from International and National Children and Human Rights Bodies

In February 2016 in its report on Ireland, the United Nations Committee on the Rights of the Child made a recommendation to the Irish Government that it remove the ability of schools to use religion as an admission criteria. It called on the Irish state to:

“... amend the existing legislative framework to eliminate discrimination in school admissions, including the Equal Status Act.”¹

Ireland has ratified four relevant UN Treaties and each of those treaty bodies have considered the Equal Status Act as part of their own assessments of Ireland. Each of them have found that Section 7(3)(c) to be contrary to the provisions of these treaties. These UN treaties are:

- The International Convention on the Elimination of All forms of Racial Discrimination
- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights
- UN Convention on the Rights of the Child

Irish children and human rights bodies have made similar findings about Section 7(3)(c).

In their observations on the Education (Admission to Schools) Bill in November 2016 the Irish Human Rights and Equality Commission said:

“The Commission recommends that the Equal Status Act be amended to give effect to the principle that no child should be given preferential access to a publicly funded school on the basis of their religion.”²

The Ombudsman for Children in his comment on this Bill said that:

“The Education (Admission) to Schools Bill 2016 needs to fully consider children’s rights and dignity and to take appropriate account of Ireland’s international obligations under the UN Convention on the Rights of the Child. Specifically, the right of all children not to be discriminated against on any grounds (Article 2) and to have their best interests treated as a primary consideration in all actions concerning them, including the actions of legislative bodies and administrative authorities (Article 3).”³

The most recent report from the Special Rapporteur on Child Protection has also said that:

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http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fCO%2f3-4&Lang=en

² Irish Human Rights and Equality Commission Observations on the Education (Admission to Schools) Bill 2016 p2 <https://www.ihrec.ie/app/uploads/2016/11/Observations-on-Education-Admission-to-Schools-Bill-2016.pdf>

³ Education in focus report OCO <https://www.oco.ie/wp-content/uploads/2016/11/Education-In-Focus.pdf> p4

“The Equal Status Acts 2000 and the Education (Admission to Schools) Bill 2015 should be amended to ensure the principle of non-discrimination in school admission policies.”⁴

Section 7(3)(c) of the Equal Status Act has been found to be in breach of several international human rights treaties that Ireland has ratified, domestic human and children rights bodies have found that it is discriminatory and does not honour the rights of children and parents of children of school going age agree that religion should not be a part of state funded school admission policies.

Comments from individual organisations

The Children Rights Alliance Government Report Card 2017 also calls on the Government to take action on Section 7(3)(c) :

“The renewed focus to this area by the Minister is welcome but it seems likely that another group of young children will potentially face discrimination before their first day of school. While the complexity of the issue is acknowledged, it should no longer be used as a reason to deny children access to publicly funded education on an equal basis.”⁵

The most recent research published by EQUATE, *Religion and School: Parents’ Voices Research* shows strong support amongst parents for the amending of Section 7(3)(c).

EQUATE commissioned research of a nationally representative sample of parents of children of school going age from 3-15 years old, conducted by Research Now. Quotas were set on gender, age, social class and region to correctly reflect the known demographics of parents in the ROI.

Key results included:

- 72% agree the law should be changed so that baptism can no longer be a requirement for school admission in state funded schools.
- 24% agree that they personally would not have baptised their child, if they didn’t need it to gain entry to school.

The full research can be found [here](#).

MRCI comment on the consultation notes that contemporary Ireland is one of the most diverse countries in Europe, with over 16% of the population being foreign born and over a quarter of children being born to at least one foreign parent. We are proud of this diversity, we cherish how it contributes to living in a more open tolerant country. But discriminatory practices such as the baptism barrier hinder this process of integration. Every year we assist families with children of different religious backgrounds whom are faced with discrimination at admission; this brings unnecessary anxiety to them. It is unacceptable.

⁴ Ninth Report of the Special Rapporteur on Child Protection Professor Dr Geoffrey Shannon 2016 p21
<http://www.dcy.gov.ie/documents/publications/201611189thReportoftheSpecialRapporteuronChildProtection.pdf>

⁵ Children’s Rights Alliance Report Card 2017 - <http://childrensrights.ie/resources/report-card-2017>, p58

EPIC believes that the removal of Section 7(3)(c) of the Equal Status Act is crucial to restoring equality among children in care. Non-religious and non-Catholic children placed in foster families are refused access to the schools closest to their placement on religious grounds. Placement in care is sufficiently complex without the added obstacle of not being able to attend school in the area of the foster placement on religious grounds. EPIC advocates for the respect of children’s rights, which includes the right to education and the right to be treated equally. Therefore, EPIC strongly supports option 4 (i) as it is the only option that will guarantee access to education for all children.

Pavee Point also note that issues concerning school admissions process go beyond using religion as a core criteria for admissions. Children from families with a migrant background may be affected by the use of religion and/or past pupil criterion in school admissions. Even when migrants, such as Roma, are Catholic, they can be impacted by past pupil criterion in school admissions.

Summary: Opinion on the Constitutionality of Reforming s.7(3)(c) of Equal Status Act 2000

A legal opinion written by three constitutional experts, Dr. Conor O'Mahony (UCC), Dr. Eoin Daly (NUIG) and Dr. David Kenny (TCD), shows that the Oireachtas has the power to eliminate the baptism barrier and can do so immediately.

The Opinion considers the possibility of amending Section 7(3)(c) of the Equal Status Act 2000 (Act) so that schools in receipt of public funding would not be permitted to discriminate on grounds of religion in their admission policies.

It finds that the Oireachtas has the power to impose reasonable conditions on the provision of funding to educational institutions, and this includes requiring that all publicly funded schools must accept all children of all religions and none on an equal basis.

Amending S.7(3)(c)

Under the current admission legislation some families and religious groups have extremely strong privileged protection for their rights in school admission policies while other families and religious groups have limited protection of their rights.

The opinion identifies three groupings of people most directly affected by the current legislation which is shown in this table:

| | |
|----------------|---|
| Group A | The Catholic majority, who are able to access Catholic schools everywhere in the country. |
| Group B | Members of minority religious groups who live within reasonable distance of a denominational school specifically attuned to their religious beliefs (this includes Protestants living within reasonable distance of a Protestant denominational school, as well as Muslims or Jews living within reasonable distance of the tiny number of Muslim (2) or Jewish (1) denominational schools currently in place). |

| | |
|----------------|---|
| Group C | Members of minority religions who do not live within reasonable distance of a denominational school specifically attuned to their beliefs. Non-religious families. |
|----------------|---|

The imbalance of rights highlighted by the 3 groups above could be lessened by amending Section 7(3)(c) so that the exception could not be relied on by schools that receive any state funding. This would create a fairer balance between the right to religious freedom of Groups A and B and the right of Group C to religious freedom and to accessible free primary education.

Having established the 3 groups affected by Section 7(3)(c) the opinion proceeds to analyse three key specific issues on the constitutionality of amending the law which are summarised in the following 3 points, (for a fuller analysis of these three points please go the appendix for the full opinion is produced).

1. The general reluctance of the courts to second-guess legislation aimed at balancing competing constitutional rights

Previous case law from the Supreme Court has demonstrated that it is not enough to show that a different policy could have been adopted; it must be shown too that the law it challenged is arbitrary and lacks an objective basis. A common theme linking the judgements cited in the opinion is a desire by the courts to stay away from regulating complex matters of social policy and to defer to the Oireachtas concerning the optimum balance of competing constitutional rights.

2. Is there a constitutional right to public funding for denominational schools that operate discriminatory admissions policies?

Article 42 of the Constitution sets a protection for parents to establish and operate private or denominational schools, it does not however establish an automatic right to be provided with public funding for such schools. Religious denominations may have a right under Article 44 to operate entirely private educational institutions that have a religious ethos and operate discriminatory admissions policies, but they do not have an automatic entitlement to public funding for such institutions.

Where public funding is provided, it is clearly established that the State is entitled – and perhaps even obliged – to make its provision subject to reasonable conditions.

3. Is an interference with the denominational character of schools a proportionate measure to protect the religious freedom of members of minority religions or of none?

Laws which restrict the exercise of a constitutional right will only be deemed unconstitutional if the effect of the restriction is disproportionate to the legitimate aim being pursued.

The Oireachtas enjoys a wide discretion in balancing competing constitutional rights, and any legislation enacted to this end has a particularly strong presumption of constitutionality. Recent case law has shown that the Courts have been extremely reluctant to substitute their view over that of the Oireachtas as to what is the correct balance. All the courts have required is that the legislation had an objective and rational basis for pursuing the objective in this way.

Conclusion of the opinion

Amending Section 7(3)(c) of the Equal Status Act so that it cannot be relied upon by schools in receipt of public funding to discriminate against any child whose religion is not that of the patron of that school would create a fairer balance for all religious and non-religious children and families in Irish schools.

Address each of the issues at A – D in respect of your preferred approach:

In this section the submission deals with specific issues raised by the consultation document and lettered A – D.

A.

“Possible impacts on minority religions”

As outlined in the above constitutional opinion summary we believe that option 4(i) it will create a fairer balance between all religious and non-religious families and children in respect to school admission.

Currently members of minority religions who do not live within reasonable distance of a denominational school specifically attuned to their beliefs, which is the vast majority of minority religions as recorded in the census, are disadvantaged. Implementing option 4 (i) will in fact improve access to schooling for these children and families.

B.

“Possible constitutional issues”

The above summary of Dr. Conor O'Mahony, Dr. Eoin Daly and Dr. David Kenny legal opinion sets out that we believe that option 4(i) is within constitutional parameters.

D.

“Possible unintended impacts on other goals of education policy”

Option 4(i) would create a situation where no child would be discriminated against on the basis of their religion or belief. The intended consequence of this would be that every child and family in Ireland would have the same opportunities for school access regardless of their religion or belief as is the case with other education policy areas.

Conclusion

We acknowledge the hard work and dedication of teachers and of schools across Ireland who every day support children and young people to learn and grow. In often very challenging circumstances they work tirelessly to support every child and young person to reach their full potential.

We believe that removing Section 7(3)(c), in line with option 4.1 of this consultation document, would further empower schools and allow children, young people and families to realise their rights.

As this submission sets out the State currently sanctions discrimination in admission to schools through Section 7(3)(c) of the Equal Status Act 2000.

All children have the right to education. All children also have a right to freedom of religion for belief. These rights are individual rights held by every child. Even one child being refused a place in their state funded local school because of their family's religion or beliefs is a denial of these rights and is not acceptable in a modern pluralist democracy.

There is an opportunity now to end this discrimination and ensure that no parent or child placed in foster care has to join a religion to gain access to a school and that no child is isolated from their local school because of religion or beliefs.

Appendix – Full text of Constitutional Opinion

Opinion on the Constitutionality of Reforming s.7(3)(c) of the Equal Status Act 2000

Dr Conor O'Mahony, Senior Lecturer in Constitutional Law, University College Cork

Dr Eoin Daly, Lecturer in Constitutional Law, National University of Ireland Galway

Dr David Kenny, Assistant Professor in Constitutional Law, Trinity College Dublin

Executive Summary

The United Nations Committee on the Rights of the Child has recommended that Ireland “amend the existing legislative framework to eliminate discrimination in school admissions, including the Equal Status Act”. This opinion assesses whether an amendment of this nature would be compatible with the Irish Constitution. It begins by examining the approach of the Irish courts to assessing the constitutionality of legislation that is aimed at striking a balance between competing constitutional rights. The case law clearly establishes that such legislation enjoys a strong presumption of constitutionality, and is often subject to a more lenient standard of review, making it more likely to be upheld. The onus is on the person challenging the legislation to meet a high burden in establishing that the rights of one party or group have been restricted to the point where the legislation is unconstitutional, and the record shows that the courts are extremely reluctant to interfere with the balance struck by the Oireachtas.

The opinion then considers the possibility of amending the Equal Status Act 2000 such that schools in receipt of public funding would not be permitted to discriminate on grounds of religion in pupil admissions. It concludes that the case law shows that there is no constitutional right to unconditional public funding for private or denominational schools, and that the Constitution permits the imposition of reasonable conditions on the provision of public funding. Moreover, the rights of religious institutions can (like all constitutional rights) be subject to general limitations in the common good, or to reconcile them with other constitutional rights. The proposed amendment would have the effect of striking a fairer balance between the constitutional rights of families from various religious groups by moving to a situation where all families have their rights protected to at least some extent, rather than some families and religious institutions having extremely strong and privileged protection for their rights while others have very little. As such, the amendment clearly passes the tests established in the case law for assessing the constitutionality of legislation aimed at balancing competing constitutional rights.

Section 7 of the Equal Status Act 2000

Section 7(2) of the Equal Status Act 2000 prohibits discrimination by educational establishments on any of the nine grounds of discrimination specified in section 3(2) of the Act. One of these grounds is religion. This prohibition extends to:

- (a) the admission or the terms or conditions of admission of a person as a student to the establishment,
- (b) the access of a student to any course, facility or benefit provided by the establishment,
- (c) any other term or condition of participation in the establishment by a student, or
- (d) the expulsion of a student from the establishment or any other sanction against the student.

However, s.7(3)(c) makes an exception for denominational schools, which are allowed to discriminate on grounds of religion in pupil admissions as follows:

- (3) An educational establishment does not discriminate under subsection (2) by reason only that—
...
(c) where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school ...

Section 7(3)(c) envisages two separate scenarios:

- 1) The school is oversubscribed. In this instance, preference may be given to children from a particular religion over children from other religions or none. No further justification is required.
- 2) A place is available in the school. In this instance, admission may still be refused, but only if it can be shown that the refusal is essential to maintain the ethos of the school.

Impact of s.7(3)(c)

The Irish primary school system currently consists overwhelmingly of denominational schools, with 96% of schools operating a religious ethos under the patronage of a religious denomination.¹ As a result, the general prohibition on religious discrimination in school admissions is largely negated by the exception provided in s.7(3)(c), since over 96% of schools are entitled to avail of the two possibilities set out above (and need not even provide justification in the case of oversubscription).

Within this 96%, over 90% of schools are Catholic denominational schools.² In many areas of the country, alternatives to Catholic denominational schools are either unavailable or lack sufficient

¹ "Choosing segregation? The implications of school choice", Oireachtas Library and Research Service, No. 1 of 2015, available at http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/SpotlightSchoolchoice290915_101712.pdf, p.6.

² *Ibid.*

capacity to cater for demand from non-Catholic families.³ In such circumstances, non-Catholic families must rely on Catholic schools to avail of their children’s right to free primary education; but Catholic schools are legally entitled to refuse admission to non-Catholics. The result is twofold: some non-Catholic children are unable to access a school in their local area, and many families feel pressured to (and often do) baptise their child so as to ensure admission to their local school (where otherwise they would have chosen not to).⁴

In 2016, the UN Committee on the Rights of the Child, in its Concluding Observations on Ireland’s Report on implementation of the Convention on the Rights of the Child, expressed concern about schools continuing to practise discriminatory admissions policies on the basis of the child’s religion and recommended that Ireland “amend the existing legislative framework to eliminate discrimination in school admissions, including the Equal Status Act”.⁵ Although an indication was given to the Committee that the Government intended to amend s.7(3)(c), the Minister for Children later suggested that the Government had legal advice that such a reform might not be constitutional and thus might require a referendum.⁶

The focus of this opinion is to examine whether it would be constitutionally permissible, in line with the recommendations of the Committee, to repeal or amend s.7(3)(c), so that denominational schools would be prohibited from discriminating on grounds of religion in school admissions. Answering this question involves an assessment of the case law concerning religious freedom in the education system, as well as a more general discussion of the approach of the Irish courts to legislation which attempts to balance or reconcile competing rights.

The resolution of this issue involves striking a balance between the competing rights of a number of groups in Irish society:

| | |
|----------------|---|
| Group A | The Catholic majority, who are able to access Catholic schools everywhere in the country. |
| Group B | Members of minority religious groups who live within reasonable distance of a denominational school specifically attuned to their religious beliefs (this includes Protestants living within reasonable distance of a Protestant denominational school, as well as Muslims or Jews living within reasonable distance of the tiny number of Muslim (2) or Jewish (1) denominational schools currently in place). |
| Group C | Members of minority religions who do not live within reasonable distance of a denominational school specifically attuned to their beliefs, or non-religious families. |

³ Fiona Dillon, “Educate Together Schools massively over-subscribed”, *Evening Herald*, February 18, 2015, <http://www.independent.ie/irish-news/education/educate-together-schools-massively-oversubscribed-31001877.html> (reporting that four multid denominational schools in Dublin received more than 1,200 applications for just 335 places).

⁴ For empirical evidence of parents choosing to baptise their child for the sole reason of securing admission to a school, see Alison Mawhinney, *Freedom of Religion and Schools: the Case of Ireland* (Saarbrücken: VDM Verlag, 2009), pp.136 and 142-143; Behaviour and Attitudes, “Equality in Education in Ireland”, <http://banda.ie/equality-education-ireland/> and Michael Sheils McNamee, “‘Like most of my friends, I baptised my children so they could go to school’: The anger of Ireland’s non-religious parents”, *The Journal.ie*, May 16, 2016, <http://www.thejournal.ie/children-baptism-school-education-atheist-2751933-May2016/>.

⁵ Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4, paras. 63-64.

⁶ Kitty Holland, “School bias over religion may require referendum”, *The Irish Times*, January 15, 2016.

In addition to the individual and family rights afforded to members of Groups A, B and C, there are also institutional rights at stake where religious denominations own and manage schools; these will be set out further below.

At present, families from Groups A and B enjoy two significant privileges:

- 1) Preferential access to publicly funded schools;
- 2) Public funding for schools operating a denominational ethos specifically attuned to their beliefs.

By contrast, families from Group C enjoy neither of these privileges. In addition to this comparative disadvantage, they face two significant barriers to the exercise of their constitutional rights that are not faced by members of Groups A and B:

- 1) Precarious access to free primary education by virtue of their religious beliefs;
- 2) Pressure to baptise their children so as to ensure access to reasonably accessible education.

The imbalance inherent in the current position could be ameliorated to some extent (if not entirely eliminated) by amending s.7(3)(c) in one of a number of ways – for example:

- 1) Repeal s.7(3)(c) altogether, removing the exception to the general prohibition on religious discrimination in school admissions;
- 2) Amend s.7(3)(c) so that the exception could not be relied on by publicly funded schools.

The purpose of such an amendment would be to strike a fairer balance than is currently struck between the right to religious freedom of Groups A and B and the rights to both religious freedom and accessible free primary education of Group C. As such, the first point to consider is the approach of the Irish courts to assessing the constitutionality of legislation aimed at balancing competing constitutional rights.

1) The general reluctance of the courts to second-guess legislation aimed at balancing competing constitutional rights

In assessing the likelihood of a constitutional challenge to any piece of legislation, the starting point is that all laws passed by the Oireachtas enjoy the presumption of constitutionality, and the onus lies on the person challenging the law to rebut this presumption.⁷ When the legislation in question is aimed at balancing competing constitutional rights or dealing with contested matters of social policy, the courts have consistently expressed the view that the courts should be very slow to second-guess the balance struck by the Oireachtas. A well-known example of this view is the following passage from the judgment of Kenny J in *Ryan v Attorney General*:

“None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and

⁷ See, e.g., *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] I.R. 413 at 417, as recently approved in *Curtin v Dáil Éireann* [2006] 2 I.R. 556 at 620.

the interference with the personal rights of the citizen. Moreover, the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to this type of legislation.”⁸

Religious discrimination and school admissions is a classic case of dealing with a controversial social matter and reconciling competing rights. Accordingly, this passage demonstrates that it is a matter for the Oireachtas to deal with; the presumption of constitutionality will apply with “particular force” to any legislation enacted in this space, and the decision of the Oireachtas should prevail unless it lacks “reasonable proportion”.

The role of the Oireachtas in balancing competing rights was later developed by the Supreme Court in *Touhy v Courtney*, when Finlay CJ stated:

“The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.”⁹

The preference of the courts to defer to decisions made by the Oireachtas on sensitive matters of social policy, and their reluctance to strike down laws aimed at balancing competing constitutional rights, has been re-affirmed by the Supreme Court in a number of recent decisions. In *Fleming v Ireland*, a case concerning whether the ban on assisted suicide violated the constitutional rights of a disabled woman, the Supreme Court stated that “[t]he presumption [of constitutionality] may be regarded as having particular force in cases where the legislature is concerned with the implementation of public policy in respect of sensitive matters of social or moral policy.”¹⁰ The challenge to the law in that case was rejected on the basis that “the legislation in question called for a careful assessment of competing and complex social and moral considerations. That is an assessment which legislative branches of government are uniquely well placed to undertake.”¹¹

Similarly, in *MR v An tArd Chláratheoir*,¹² the Supreme Court overturned a decision by the High Court in which it had attempted to fashion new rules governing parentage in the context of surrogacy arrangements. Chief Justice Denham commented that “[a]s a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for this Court to legislate on the issue ... It is, thus, quintessentially a matter for the Oireachtas.”¹³ In *MD (a minor) v Ireland*, the Supreme Court considered a challenge to the constitutionality of s. 5 of the Criminal Law (Sexual Offences) Act 2006 insofar as it criminalised sexual behaviour by boys but not by girls. The State justified the legislation by reference to the social policy of protecting young girls from pregnancy. The Supreme Court rejected the challenge as follows:

⁸ [1965] I.R. 294 at 312.

⁹ [1994] 3 I.R. 1 at 47.

¹⁰ [2013] 2 I.R. 417 at 441.

¹¹ *Ibid.*

¹² [2014] I.E.S.C. 60.

¹³ *Ibid* at paras. 96 and 113. She went on to say at para. 118 that “The issues raised in this case are important, complex and social, which are matters of public policy for the Oireachtas. They relate to the status and rights of children and a family.”

“This was a choice of the Oireachtas. Even in a time of social change, it is a policy within the power of the legislature ... The Oireachtas could have applied a different social policy but s. 5, the policy which they did adopt, was within the discretion of the Oireachtas, and it was on an objective basis, and was not arbitrary.”¹⁴

Thus, it is not enough to show that a different policy could have been adopted; it must be shown that the law that is challenged is arbitrary and lacks an objective basis. To use the phrasing in *Ryan v Attorney General* (quoted above), it must lack “reasonable proportion”; or, in the wording used in *Touhy v Courtney*, a balance struck between competing rights must be “so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.” The common theme linking these judgments is a desire by the courts to stay away from regulating complex matters of social policy involving competing rights, and to defer to the judgment of the Oireachtas on how these rights should be balanced. Clearly, any reform of s.7(3)(c) of the Equal Status Act 2000 aimed at striking a fairer balance between the rights of members of different religious groups or none would fall into this category of legislation, and the burden imposed on any litigant seeking to impugn its constitutionality would be similarly high.

2) Is there a constitutional right to public funding for denominational schools that operate discriminatory admissions policies?

In considering the balance struck by the Oireachtas in any amendment of s.7(3)(c), it is important to consider the nature of the constitutional rights at play. The purpose of the amendment would be to safeguard the following constitutional rights for Group C:

- 1) The right of parents under Article 42.1 to determine the religious education of their children (which is burdened by pressure to baptise children);
- 2) The right of children under Article 42.4 to reasonably accessible free primary education (which is burdened in situations where children are unable to secure admission to their local school);
- 3) The right of both parents and children under Article 44.2.1° to religious freedom and freedom of conscience (which is burdened by either of the above scenarios);
- 4) The right of both parents and children under Article 44.2.3° to not be discriminated against on the grounds of religious profession, belief or status.

The rights of Groups A and B that might be limited by this amendment are, in essence, variations on a right to own and operate denominational schools. This is a confluence of the right of parents from Groups A and B to control the religious education of their own children (Article 42.1), their right to establish and manage private schools (Article 42.2) and their right to determine the type of school that their children shall attend.¹⁵ In addition to these individual and family rights, there is an institutional right of religious denominations under Article 44.2.5° to manage their own affairs, which includes a right to maintain institutions for certain purposes. To the extent that this includes a

¹⁴ [2012] 1 I.R. 697 at 719. This was quoted with approval by the Supreme Court in *Fleming v Ireland* [2013] 2 I.R. 417 at 441.

¹⁵ See, e.g., *State (Doyle) v Minister for Education* (1955) [1989] I.L.R.M. 277 at 280: “...Article 42.2.3° appears to us expressly to secure to parents the right to choose the nature of the education to be given to their children and the schools at which such education shall be provided and this right is a continuing right.” See further Keane CJ in *Sinnott v Minister for Education* [2001] 2 I.R. 545 at 629.

right to maintain schools with a religious ethos, then the rights of religious denominations might be limited to some extent by the proposed amendment.

Denominational schools were clearly envisaged by the Constitution, as was the provision of public funding to those schools. However, it was also envisaged that children from different denominations or none may sometimes have to attend a denominational school. All of this is clear from Article 44.2.4°:

Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

Article 44.2.5° further provides:

Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

The Supreme Court has accepted that the latter provision applies to educational institutions.¹⁶ It is thus clear that the establishment and operation of denominational schools is an activity that in principle engages a variety of provisions under Articles 42 and 44. Accordingly, outright repeal of s.7(3)(c) may potentially be open to challenge, in that it may be seen as an excessive interference with the management by religious denominations of their own affairs within private religious institutions.

However, the second option discussed above – namely, the amendment of s.7(3)(c) so that it cannot be relied on by publicly funded schools – is not problematic in the same way. It would not prevent religious denominations from operating discriminatory admissions policies in private religious institutions – it would simply make the provision of public funding to such institutions conditional upon non-discriminatory admissions policies. Religious denominations would remain free to avail of a significant exception to anti-discrimination law and choose to operate discriminatory admissions policies in denominational schools, but they could not accept public funding for such schools.

While Article 42 of the Constitution clearly protects the freedom of parents to establish and operate private or denominational schools, it does not establish an automatic right to be provided with public funding for such schools. Similarly, religious denominations may have a right under Article 44 to operate entirely private educational institutions¹⁷ that espouse a religious ethos and operate discriminatory admissions policies, but they do not have an automatic entitlement to public funding for such institutions. Where public funding is provided, it is clearly established that the State is entitled – and perhaps even obliged – to make its provision subject to reasonable conditions.

In *O’Shiel v Minister for Education*,¹⁸ the plaintiffs had argued that if they established on the balance of probabilities that they were supplying primary education within the meaning of Article 42.4, the

¹⁶ *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321 at 355.

¹⁷ In 2014/15, there were 548,542 children enrolled in primary schools. Of these, 3,846 were enrolled in private primary schools; the remainder were enrolled in schools aided by the Department of Education and Skills. See <http://www.education.ie/en/Publications/Statistics/Statistical-Reports/Statistical-Report-2014-2015.xlsx>, Table 2.1.

¹⁸ [1999] 2 I.L.R.M. 241.

State was under a duty to make provision for the cost of that education.¹⁹ Laffoy J. examined the issue of the State placing conditions on the provision of funding to private schools and stated:

“In order to fulfil its constitutional obligation to provide for free primary education, in my view, the State must have regard to and must accommodate the expression of parental conscientious choice and lawful preference. However, this does not mean that the State must accede to an application for financial aid from any group of parents who are united in their choice of primary education ... Fulfilment of the State’s constitutional obligation under Article 42.4 must take account of the parental freedom of choice guaranteed by Article 42, but it *must be based on arrangements which have a rational foundation and prescribe proper criteria for eligibility which accord with the purpose of Article 42 and of the provisions of the Constitution generally.*”²⁰

Therefore, conditions may be attached to funding provided that those conditions have a “rational foundation” and “accord with the purpose of Article 42”. On the latter point, Laffoy J went on to state that “freedom of parental choice ... is the fundamental precept of the Constitution”.²¹ Therefore, it seems likely that any conditions that might be attached to State funding that are aimed at protecting parental freedom of choice would indeed have a rational foundation and accord with the purpose of Article 42.

If s.7(3)(c) were amended so that it could only be relied on by a school that is not in receipt of public funding, the purpose of this would be to protect the freedom of choice available to parents in Group C. This would be achieved by removing the possibility that such parents could have their children turned away from over 90% of schools on the basis that they are not Catholic or Christian. Making funding conditional on a non-discriminatory admissions policy cannot be argued to be an infringement on a constitutional right to be provided with public funding for denominational schools, since no such positive right exists. It also could not be said to be an infringement of a right to own and operate private denominational schools (even ones operating discriminatory admissions policies), since this right would remain intact. (Even if this latter right was found to be restricted, the restriction in question is most likely proportionate, as discussed further below.) Moreover, an amendment of this nature would clearly have a rational foundation and accord with the purpose of Article 42.

Equally, notwithstanding the fact that the amendment would prevent denominational schools from giving preference to children from the school’s own religious denomination, it would not involve any restriction on a right of a child to attend a denominational school (since no such constitutional right has ever been established). A right of parents to choose the type of school that their children shall attend has been recognised, but as already outlined, this right is not currently enjoyed by the vast majority parents who are members of minority religions or none. Families in Group C for the most part have no choice but to send their children to a Catholic denominational school. Amending s.7(3)(c) so as to make it inapplicable to publicly funded schools would simply equalise the impact of school oversubscription so that every parent had the possibility of securing access for their children to the school-type of their choice (be that denominational or multi-denominational), but no parent had the certainty of same. Families in Groups A and B would be less well situated than they are at present, but would not be less well situated than parents in Group C. Indeed, by virtue of demographics and the huge number of Catholic schools (and significant number of Protestant

¹⁹ *ibid* at 255.

²⁰ *ibid* at 263–264 (emphasis added).

²¹ *ibid* at 263.

schools), families in Groups A and B would remain significantly better situated than families in Group C. Catholics in particular would universally continue to enjoy access to publicly funded schools operating a religious ethos specifically attuned to their beliefs.

3) Is an interference with the denominational character of schools a proportionate measure to protect the religious freedom of members of minority religions or of none?

Even if, contrary to the above analysis, an amendment of s.7(3)(c) to prohibit admissions policies that discriminate on grounds of religion in publically funded schools were deemed to burden the constitutional rights either of Groups A or B, or of religious denominations operating denominational schools, this would not necessarily mean the amendment would be unconstitutional. Laws which restrict the exercise of a constitutional right will only be deemed unconstitutional if the effect of the restriction is disproportionate to the legitimate aim being pursued.

The proportionality test was set out by Costello J in *Heaney v Ireland*,²² and requires that the law in question:

1. Pursue an objective of sufficient importance.
2. Be rationally connected to that objective, and not unfair or arbitrary.
3. Impair the right as little as possible.
4. The effect of the restriction on the right must be proportionate to the objective.

Moreover, where the legislation that restricts constitutional rights involves balancing two or more sets of directly conflicting constitutional rights – as opposed to balancing one set of rights with state interests – then the more deferential standard set out in *Tuohy v Courtney* applies: the balance struck will only be interfered with when it is “so contrary to reason and fairness as to constitute an unjust attack on ... constitutional rights”. Courts are not always consistent in respect of when each test is applied, but it seems that, in a challenge to a legislative amendment to s.7(3)(c), the more deferential *Tuohy* standard should apply.

However, even assuming that the somewhat less deferential proportionality test were to apply, the measure should withstand scrutiny. To apply these four stages of the test to the proposed amendment to s.7(3)(c):

1. The amendment would pursue a legitimate aim (or, in Costello J’s words, an objective of sufficient importance) – namely, protecting the freedom of choice of parents who come from minority religions or none, as well as the right of their children to reasonably accessible free primary education.²³
2. The amendment would be rationally connected to that aim, in that it would protect freedom of choice by removing a key barrier to it in the form of legislation that allows for religious discrimination in school admissions.
3. The amendment would impair the right (i.e. the religious freedom of parents in Groups A and B and the right of religious denominations operating denominational schools to manage their own affairs) as little as possible, because:
 - a. There is no less restrictive means available of achieving the same end. A lesser amendment (e.g. repealing the part of s.7(3)(c) that allows for outright refusal of

²² [1994] 3 I.R. 593 at 607.

²³ The right to reasonably accessible free primary education was recognised in *Crowley v Ireland* [1980] I.R. 102 at 113, *per* McMahon J.

admission, while retaining the part that allows for preference to be given when the school is oversubscribed) would still result in the same situation that currently pertains – namely, a restriction on the freedom of choice of families from Group C, and pressure on them to baptise their children.

- b. Denominational schools would remain free to operate a denominational ethos and maintain a characteristic spirit in line with that ethos. The protections offered to this end by the Employment Equality Act 1998 and the Education Act 1998 would remain in place. They would also remain free to operate discriminatory admissions policies in fully private denominational schools. The only restriction on their right to manage their own affairs would be a condition placed on the provision of public funding, which (as outlined above) is designed to bolster constitutional rights and the “fundamental precept” of freedom of choice, and falls squarely within the terms of the *O’Shiel* decision.
- c. Groups A and B would not be subject to any interference with their religious freedom beyond the fact that their children would have to attend school alongside some children from different religions or none.
- d. The effect on the rights of Groups A and B would be proportionate to the objective being pursued, in that any restriction on their right to religious freedom would be partial at most, and would prevent a much more serious restriction on the rights of Group C. At present, Groups A and B get the best of every world – a strongly protected right to education (including preferential admission) and a strongly protected right to religious freedom (including publicly funded schools attuned to their beliefs), whereas Group C get neither of the above. Families in Group C face barriers in accessing schools at all, and even if able to access the schools, they have to settle for a religious ethos different to their own. In essence, Groups A and B get everything they want while Group C gets very little of what it wants. The proposed reform would strike a fairer balance under which Groups A and B would continue to enjoy access to publicly funded schools attuned to their beliefs (which Group C would not), but would have to forgo the guarantee of preferential access to such schools so as to accommodate the constitutional rights of Group C.

It goes without saying that if the amendment can withstand proportionality analysis, it can withstand the more deferential analysis of the *Tuohy* test. The balance struck by the proposed amendment cannot be described as either lacking reasonable proportion (to use the language of *Ryan v Attorney General*) or being “so contrary to reason and fairness as to constitute an unjust attack on ... constitutional rights” (to use the language of *Touhy v Courtney*). It is a policy choice made by the Oireachtas to strike a balance between competing constitutional rights in a context of scarce resources. Moreover, as noted above, the vast majority of families in Groups A and B would continue to enjoy access to publicly funded schools operating a religious ethos specifically attuned to their beliefs. As such, there is little likelihood of a court declaring it to be unconstitutional.

Conclusion

The Oireachtas enjoys a wide discretion in balancing competing constitutional rights, and any legislation enacted to this end enjoys a particularly strong presumption of constitutionality. The onus is on the party challenging the legislation to demonstrate that it is “so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.” Recent case law shows that the courts have been extremely reluctant to substitute their view as to the correct

balance for that struck by the Oireachtas; all that they have required is that the legislation had an objective and rational basis for pursuing the objective in this way.

The current imbalance in the protection of religious freedom in the education system is well documented. Section 7(3)(c) of the Equal Status Act 2000 is at the heart of this imbalance. Amending s.7(3)(c) so that it cannot be relied upon by schools in receipt of public funding would strike a significantly fairer balance between families from Groups A and B and families from Group C. It would have an objective and rational basis both in rights protected in international human rights law and the Irish Constitution and in empirical evidence about the manner in which s.7(3)(c) combines with school patronage arrangements to undermine the rights of families from Group C. It would not restrict any right of parents to unconditional public funding for denominational schools, or any right to send a child to a denominational school, since neither right is protected by the Irish Constitution. Similarly, the rights of religious denominations to manage religious institutions are either not restricted at all (since they have no right to unconditional public funding), or are appropriately and legitimately limited by reference to the rights of others and the public interest. Overall, the impact of the amendment cannot be said to be disproportionate to the objective, since the vast majority of families in Groups A and B would continue to enjoy access to publicly funded schools operating a religious ethos specifically attuned to their beliefs. While they would be marginally less well situated than they are at present, they would remain better situated than families in Group C. In such circumstances, it is difficult to imagine how any court would declare the proposed amendment to be “so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights”.

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