



The Child Law Clinic
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**Submission to Department of Education on Role of Religion in
School Admissions**

March 20, 2017

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Executive Summary

This submission begins by outlining the protection provided under international human rights law and Irish constitutional law for the right to education and the right to religious freedom. It proceeds to examine empirical evidence of how these rights are impacted upon by the current arrangements whereby schools are permitted to give preference to children of particular religions when allocating school places, including evidence of parents baptising their children solely for the purpose of accessing a place in a publicly funded school. Finally, the submission examines each of the options put forward by the Department of Education in its consultation document. The Child Law Clinic favours Option 4, sub-option 1 (outright prohibition on the use of religion as an admission criterion), as any of the other options would still burden of the right to education and right to religious freedom of children from minority religions and from none by making their access to free primary education potentially contingent upon their religious affiliation.

1. International Human Rights Law

1.1 Convention on the Rights of the Child (CRC)

The right of the child to education is protected by Articles 28 and 29 of the CRC, which have been reinforced by the Committee on the Rights of the Child's General Comment 1 on the Aims of Education.¹ Article 28 requires that State Parties recognise that children and young people have a right to education,² and requires the school environment to "reflect the freedom and the spirit of understanding, tolerance, peace, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin."³

The UN Committee on the Rights of the Child has commented that discrimination, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining the capacity of the child to benefit from educational opportunities.⁴ The non-discrimination provision applies equally to State institutions and individuals as well as private institutions, and this must be recognised in domestic law.⁵

Article 14 of the CRC provides that State Parties shall respect the right of the child to freedom of thought, conscience and religion. This provision is of great significance from an Irish perspective, as it clearly acknowledges the existence of an independent right of the child to religious freedom. A child's freedom to express their religion or beliefs may be subject to limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, of the fundamental rights and freedom of others.

¹ United Nations Committee on the Rights of the Child, *General Comment No 1 (2001) The Aims of Education Article 29 (1) CRC/GC/2001/1*, Available: http://www2.ochr.org/english/bodies/crc/docs/GC1_3n.doc (Accessed: 10th March 2017).

² UN-General Assembly (1989) Convention on the Rights of the Child, available at: <http://www.ochrc.org/english/law/crc.htm> (Accessed: 9th March 2017), Article 28 (1).

³ United Nations Committee on the Rights of the Child, *General Comment No 1 (2001) The Aims of Education Article 29 (1) CRC/GC/2001/1*, Available <https://www.unicef-irc.org/publications/pdf/crcgencommen.pdf> (Accessed: 10th March 2017), para 19.

⁴ *Ibid*, para 10.

⁵ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (Geneva: United Nations Publications, 2007) at p.21.

Since 2005, specific comments on legislation relating to school admissions have been made on more than one occasion by the Committee on the Rights of the Child in its Concluding Observations on Ireland. In 2006, the Committee expressed concern which was previously raised by the UN Committee on the Elimination of Racial Discrimination⁶ and other treaty bodies.⁷ The Committee noted that non-denominational or multid denominational schools only represent a small portion of the total number of primary education facilities and have called upon the State to increase the number of non-denominational schools as well as prohibiting discrimination in relation to school admission.⁸ These comments were reiterated in its most recent Concluding Observations in 2016, when the Committee recommended that Ireland “[e]xpediently undertake concrete measures to significantly increase the availability of non-denominational or multi-denominational schools and to amend the existing legislative framework to eliminate discrimination in school admissions, including the Equal Status Act.”⁹

1.2 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)

Article 13 of the ICESCR recognises the right to education. The UN Committee on Economic, Social and Cultural Rights has commented that while the implementation of the right to education will depend upon the conditions existing in a particular States, education in all its forms and at all levels should reveal the essential features of availability, adaptability, accessibility (without discrimination).¹⁰ The Committee has highlighted the non-discrimination feature of the right to education enshrined in the Covenant is subject to neither availability of resources nor the progressive realization, it simply applies fully to all aspects of education and encompasses all internationally prohibited grounds of discrimination.¹¹ Also worth noting is *General Comment No. 18* on Article 2 and Article 26 of the ICCPR, which states: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights...”¹²

⁶ UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Ireland* (2005) UN doc. CERD/C/IRL/CO/2 at para 18.

⁷ UNCRD, *Concluding Observations on Ireland’s Second Periodic Report, CRC/C/IRL/CO/2*, para 61, 2006. See also UN Human Rights Committee, *Concluding Observations on Ireland’s Third Periodic Report, CCPR/C/IRL/CO/3*, para 22, CERD, *Concluding Observations: Ireland UN Doc.E/C/12/IRL/CO/3*, 2015 para 31. Available: <http://daccess-dds-ny-un.org/doc/UNDOC/GEN/G15/150/67/.pdf?OpenElement> (Accessed: 10th March 2017).

⁸ UN Committee on the Rights of the Child: *Concluding Observations, Ireland* (2006) UN doc. CRC/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fCO%2f2&Lang=en, para 61.

⁹ UN Committee on the Rights of the Child: *Concluding Observations, Ireland* (2006) UN doc. CRC/C/IRL/CO/3-4, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fCO%2f3-4&Lang=en, para 64.

¹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (1999) UN doc. E/C.12/1999/10 at para 6.

¹¹ *Ibid*, para 31.

¹² Human Rights Committee, *General Comment 18, Non-discrimination (Thirty-seventy session, 1989)*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

2. Overview of the Relevant Constitutional Standards

Article 42.4 of the Irish Constitution places a duty on the State to ‘provide for free primary education.’ The courts have recognised a corresponding right of children to receive free primary education which the State has a duty to provide.¹³ The Education Act 1998 builds on Article 42.4 of the Constitution by providing in section 7 that it is a function of the Minister for Education to ensure that there is made available to each person residing in Ireland a level and quality of education appropriate to meeting the needs and abilities of that person. Article 44.2.1 states that:

“Freedom of conscience and the profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”

This Article is not restricted to adults since there is no age restriction and it clearly has to include children as they are citizen(s) of Ireland, and there a number of Court decisions that seem to reiterate this very point.¹⁴

Article 44.2.3 further provides that:

“The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.”

Article 44.2.3 of the Irish Constitution obliges the State not to discriminate on the grounds of religious profession, belief, or status.

2. Evidence of Impact on the Rights of Children

The main difficulty presented by the baptism barrier is that, due to the dominance of Catholic denominational schools at primary level in Ireland, it is more difficult for children who are not baptised than for children who are to secure access to a publicly-funded school. Thus, their exercise of their constitutional right to free primary education is potentially undermined by their religious affiliation or lack thereof. Under current law, the solution to this problem is to be baptised; but where the child or parents would otherwise prefer not to have the child baptised, this undermines the family’s right to religious freedom. Thus, the baptism barrier forces families to choose between unfettered religious freedom and unfettered access to free primary education – a choice not forced upon Catholic families.

The issue of the ‘baptism barrier’ and the resulting pressure to baptise children purely to ensure access to free primary education is a growing problem which will continue to multiply if parents have no realistic alternative but to send their children to denominational schools that can deny admission based on the religious beliefs of the applicant. According to the 2011 census figures, there were 269,811 people who identified as no religion, which was an increase of 83,493 since the previous census.¹⁵ Currently there are 3,266 national schools in the country, and 3,140 of these are run by one of the major churches.¹⁶ However, figures show that despite the increase of citizens who identify as having no religion, the number of baptisms has remained the same. In 2014, 67,462

¹³ Crowley v. Ireland [1980] IR 102, at 122 per O’Higgins CJ.

¹⁴ See, e.g. State (M) v. Attorney General [1979] IR 73 and G v. An Bord Uchtala [1980] IR 32.

¹⁵ www.cso.ie/px/pxeirestat.Statire/SelectVarVal/saveselections.asp (date accessed: 9th March 2017).

¹⁶ www.thejournal.ie/divestment-solutions-2893668-Aug2006/ (date accessed: 7 March 2017).

babies were born, with 67,071 baptisms occurring that year.¹⁷ The figures for infant baptisms include children up to seven years of age. This implies that although the number of parents who are no longer Catholic is increasing, they are baptising their children in an attempt to secure a place in primary school.

There are multiple strands of research that substantiate this point. A major study by Dr Alison Mawhinney published in 2009 found that multiple participants (particularly in urban areas) either baptised their children themselves, or knew people who had done so, in order to ensure access to schools – even though their preference would have been not to have done so:

People I know who wouldn't believe in Catholicism still get their children baptised Catholic because it's easier. My brother-in-law got his daughter baptised just in case ...

A friend in Dublin – her child was refused as he's not Catholic, not baptised.

I knew if we didn't, it would be a problem getting them into that school.

It was in the back of my mind, will I restrict them, will I get them into school, into teacher training college. What will be excluded for them?

The only schools are Catholic ones ... You would be stuck. It's a problem. You like it or lump it ... What choice do you have? Parents know the schools aren't going to change so they tick the right boxes ...¹⁸

More recently, EQUATE, an organisation dedicated to equality in primary and secondary schools in Ireland, carried out research in 2017 on the views of parents of primary school children. This research showed that 23% of parents said that they baptised their child as it was needed for school admission.¹⁹ This is also evidenced by the experience of parents who spoke to TheJournal.ie. One mother stated that "like most of my friends, I baptised my children so that they could go to the local school, which is just as well because the only non-denominational school in the area didn't have space for them."²⁰ However, another mother who refused to give in to the pressure stated that her atheist children are "effectively banned from many Catholic primary schools."²¹

Currently, 96% of Irish schools are run by a religious patron, with 89% of these being of Catholic denomination.²² This means that 96% of Irish schools can refuse to give a child a place to maintain their ethos. The alternative is non-denominational schools, either Educate Together, or a Community National School. However at present Educate Together have 81 primary schools,²³ and there are 11 Community National Schools²⁴ national wide. This is such a small proportion of the country's schools that it gives some parents little choice but to turn to a denominational school.

¹⁷ www.thejournal.ie/sham-baptism-divestment-reasons-ceremony-2873282-Aug2016/ (date accessed 7 March 2017).

¹⁸ Alison Mawhinney, *Freedom of Religion and Schools: the Case of Ireland* (Saarbrücken: VDM Verlag, 2009), pp.36-143.

¹⁹ Religion and School: Parents' Voices, EQUATE Research 2017 at page 11. Report available at <https://www.equateireland.ie/educationandresearch> (date accessed: 9th March 2017).

²⁰ www.thejournal.ie/children-baptism-school-education-atheist-2751933-May2016/ (date accessed: 7 March 2017).

²¹ *Ibid.*

²² http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/SpotlightSchoolChoice290915_101712.pdf at page 6 (date accessed: 15 March 2017).

²³ www.educatetogether.ie/about/faq. (date accessed: 9 March 2017).

²⁴ www.cns.ie/index.php/design-and-features/who-we-are-item (date accessed: 9 March 2017).

Under the previous government, the Department of Education established a system to allow parents to choose what type of school was set up in their local area. This system resulted in 39 out of 42 of the schools established since 2011 being multi-denominational.²⁵ This was echoed by the research carried out by EQUATE which showed that 71% of parents would be interested in a multi-denominational primary school in their area.²⁶ The research also showed that 71% of parents felt that it was time for church bodies to have less influence over local schools.²⁷ However, while the demand for alternatives to Catholic denominational schools is clearly significant and growing, it is not being matched by supply, and there are clearly nowhere near enough places available in multi-denominational schools to satisfy this demand. Recent reports indicated that four multidominational schools in Dublin received more than 1,200 applications for just 335 places.²⁸ The result is that over 800 children in this area alone are left to run the gauntlet of the baptism barrier in Catholic schools, with a choice between baptism or precarious access to free primary education.

In conclusion, it is clear from the evidence that a growing number of parents are baptising their children as they feel it is the only way to guarantee their child a place in the local school. This problem is only going to deteriorate with the growing number of people who identify as atheists and the failure of the state to provide a viable alternative to the denominational primary schools.

3. Possible Approaches

With regard to the possible approaches to amending section 7(3)(c) of the Equal Status Act 2000, outright prohibition is the only option available under which Ireland will stop discriminating against individuals based on religious beliefs and finally base school admissions on equality. The only possible approach to achieve this is by outright repeal of section 7(3)(c) of the Equal Status Act 2000 ('2000 Act').²⁹

1 Catchment Area

Under a Catchment Area approach, schools would retain discretion to refuse admission to some pupils based solely on their religious affiliation or lack thereof. The scope of this discretion would be narrowed, but not eliminated: both children would live within the same catchment area, and religion would be the sole separating criterion. As such, the root of the problem that has generated this consultation process would remain, and the implication for the constitutional and human rights of the children affected would be the same as they are at present.

²⁵ www.thejournal.ie/children-baptism-school-education-atheist-2751933-May2016/ (date accessed: 7 March 2017).

²⁶ *Supra* note 4 at page 29.

²⁷ *Ibid* at page 35.

²⁸ Fiona Dillon, "Educate Together Schools massively over-subscribed", *Evening Herald*, February 18, 2015, <http://www.independent.ie/irish-news/education/educate-together-schools-massively-over-subscribed-31001877.html>.

²⁹ Equal Status Act 2000, section 7 (3) (c) which stipulates that: "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 refusal, it is proved that the refusal is essential to maintain the ethos of the school."

A further difficulty with the catchment area approach would be the issue of how to legally define a catchment area. In the consultation paper it was stated that the catchment area would have to differ in size for each denomination in order to make this system work. For example, Catholic schools would have a catchment area of a parish, but in order to ensure that all of the children of each faith were allowed admittance into the Church of Ireland and other denominational schools the catchment areas would have to encompass much larger areas. This would cause confusion, and would be very difficult to draft legislation for, as the smaller each minority is, the larger the catchment area would need to be. There would also be the problem of multiple Catholic schools in the same parish. How would it be decided which school the children attended?

2 Nearest School Rule

Under the Nearest School Rule, schools would again retain discretion to refuse admission to some pupils based solely on their religious affiliation or lack thereof. The circumstances would merely be slightly different, i.e. that the child who is admitted would have to prove that the school was the nearest denominational school to them that caters for their denomination. However, the child who is not admitted may live even closer to the school, and thus their non-admission would be based solely on their religion. Once more, the root of the problem that has generated this consultation process would remain, and the implication for the constitutional and human rights of the children affected would be the same as they are at present.

3 Quota System

As with the Catchment Area and Nearest School Rule approaches, a quota system would merely narrow the discretion of schools to discriminate on grounds of religion in school admissions; it would not eliminate it. Once the quota rules had been satisfied, schools would remain free to discriminate in the same problematic way as heretofore. In heavily oversubscribed schools, a significant number of children may remain affected. However, the issue is not the number of children affected, but the impact on the children who are affected. The rights set out at the beginning of this submission are individual rights held by every individual child; accordingly, a system that exposes any children to a situation where they have to choose between their right to education or their right to religious freedom is unacceptable.

4 Outright Prohibition

The only way to ensure that no child experiences religious discrimination in the course of accessing free primary education, or experiences a denial of education on the basis of their religion, is the outright prohibition of religious discrimination in school admissions via the repeal of section 7(3)(c). As previously stated, the preferable sub-option is option 1, which is an outright repeal of section 7 (3)(c).

Sub-option 2 The wording of this option is problematic. The right of children to opt-out of religious instruction while attending a publicly funded school is protected by Article 44.2.4° of the Irish Constitution and by the European Convention on Human Rights. There is scope for problems here whereby a request to opt out may be viewed by some schools as a refusal to support or respect the ethos of the school and admission may be refused on this basis.

Sub-Option 3 Allowing schools of a minority denomination to have a quota system is problematic for the same reasons a quota system for the rest of the schools.

4. Issues on which views are sought

A. Possible impacts on minority religions

The impact of this reform on minority religions would, on balance, be positive. Members of minority religions who do not currently manage their own denominational schools would no longer have their right to religious freedom and their right to free primary education burdened by the combination of the baptism barrier and the inadequate provision of multidenominational schools. The same benefit would be conferred on children and families who have no religious affiliation. In order to facilitate this, members of minority religions who do manage their own denominational schools would have to cede the privilege they currently enjoy in respect of preferential access to publicly funded schools that deliver education in the ethos of their own religion. However, it is important to stress that this is a privilege, and not a right. By contrast, the right to religious freedom and the right to free primary education of the first two groups are rights that are protected by the Irish Constitution and by international human rights law. The legally-protected rights of these groups should prevail over historical privileges afforded to other groups.

B. Possible Constitutional Issues³⁰

Any reform of section 7(3)(c) of the Equal Status Act 2000 would be aimed at balancing the competing rights of members of different religious groups and of none. Legislation that seeks to balance competing rights enjoys a particularly strong presumption of constitutionality,³¹ and is exceptionally unlikely to be struck down by the courts, who consistently defer to the balance struck by the Oireachtas in this regard.

The starting point for all pieces of legislation is that all laws enjoy a presumption of constitutionality, and the onus for rebutting this presumption lies on the person challenging the legislation. This was established in the case of *Pigs Marketing Board v Donnelly (Dublin) Ltd.*³²

In the case of *Touhy v Courtney*, Finlay CJ stated:

“The Court is satisfied that in a challenge to the constitutional validity of any statute on the enactment of which the Oireachtas has been engaged in a 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.”³³

³⁰ Research from O’Mahony, C, Daly, E, and Kenny, D “Opinion on the Constitutionality of Reforming s.7(3)(c) of the Equal Status Act 2000”, available at <https://www.equateireland.ie/single-post/2016/06/22/Opinion-on-the-Constitutionality-of-Reforming-s73c-of-the-Equal-Status-Act-2000> (accessed March 20th, 2017).

³¹ See *Ryan v Attorney General* [1965] IR 294 at 312.

³² [1939] IR 413 at 417, recently approved in *Curtin v Dáil Éireann* [2006] 2 IR 556 at 620.

³³ [1994] 3 IR 1 at 47.

This test is very deferential, and is used when there are two or more sets of competing rights at issue. This is the case with the proposed amendment to the 2000 Act, which means that the court would use the test from *Touhy*, and only interfere when the legislation is “so contrary to reason and fairness as to constitute an unjust attack”.

If the amendment were to be enacted, the constitutional rights which could be limited would be the right to establish and manage private schools under Article 42.2, and the right of institutions of religious denominations, under Article 44.2.5, to manage their own affairs (which include educational institutions).

If it was argued that the amendment did in fact limit the above rights, it would not be held to be unconstitutional. The amendment would be deemed to be unconstitutional only if it was disproportionate to the legitimate aim pursued. This test was set out by Costello J in the case of *Heaney v Ireland*.³⁴ He stated that for a piece of legislation to be constitutional it must satisfy four criteria; (1) it must pursue an objective of sufficient importance, (2) it must be rationally connected to that objective, and not be unfair or arbitrary, (3) it must impair the right as little as possible, and (4) the effect of the restriction on the right must be proportionate to the restriction.³⁵

(1) The amendment to the 2000 Act pursues a legitimate aim, which is the protection of freedom of choice of parents of minority religions³⁶ and the access of children education.³⁷ (2) The amendment is rationally connected to this aim. (3) It impairs the rights of others as little as possible, in that there is no less restrictive way of achieving the same aim. If any of the other proposed solutions were chosen, it would result in the rights of the minority religions still being infringed upon. Denominational schools remain free to operate under the ethos of their denomination; it would just be excluded from admissions. The rights of parents of a majority religion would not be subjected to any interference, save for the fact their children would be educated alongside children of various religious beliefs. (4) The effect on the rights of others would be proportionate to the objective, as the restriction would be partial at most.

³⁴ [1994] 3 IR 593.

³⁵ *Ibid* at 607.

³⁶ Article 44.2.1.

³⁷ Article 42.4.