



IRELAND by Dr. Conor O'Mahony, Senior Lecturer School of Law, University College Cork

Overview

In a volume comparing education law and policy across a variety of jurisdictions, the case of Ireland offers much food for thought. In spite of having one of the oldest and most detailed constitutional provisions concerning education in Europe (dating back to 1937), Ireland is in truth a relative newcomer to the area of education law, having regulated the area of education almost entirely at a policy level until the late 1990s. Since then, a range of controversies have arisen from the interaction between the constitutional framework concerning education and religion and the newly enacted legislative framework, coupled with extensive litigation surrounding the rights of children with special educational needs. More recently, tensions have arisen from the increasing mismatch between Ireland's overwhelmingly denominational education system and a more multicultural and secular society. This contribution aims to elucidate the basic legal structure of the Irish primary and secondary education system, and to highlight the central points of controversy and concern that have arisen in recent years.

The structure of schooling

The Irish education system, particularly at primary level, is something of a curiosity by international standards. Although primary schools in Ireland are referred to as 'National Schools', as a matter of fact they are in no way national or public. What would, in other countries, be referred to as the public school system is, in Ireland, a system of privately

owned and managed schools that are funded by the State. These schools are overwhelmingly owned and managed by religious denominations, with the small remainder owned and managed by organizations committed to the provision of a multi-denominational alternative. Only a handful (less than 1%) are actually State-owned and managed. In effect, the State has outsourced its primary education function, with each school having a 'Patron' (most often a local Bishop, but occasionally a private company or vocational education committee) who appoints a board of management to manage the school on his or its behalf. The roots of this system are historical and pre-date the 1937 Constitution quite considerably; they can be traced to the very beginning of the system of State funded education in Ireland in 1833 and a document known as the 'Stanley Letter' (Mawhinney 2009, 17-22). Upon independence in 1922, the newly formed State had neither the desire nor the resources to disturb this arrangement, while the religious denominations were content to retain the influential role given to them through the primary education system.

Accordingly, when Eamonn de Valera and his advisors came to draft the educational provisions of the 1937 Constitution, one of their greatest concerns was the maintenance of the status quo – so much so that when de Valera was presented with a draft of Article 42.4 that referred to a duty on the State to 'provide free primary education', he altered this to 'provide for' in his own handwriting (Constitution Review Group 1996, 344; Farry 1996, 13). This was intended to keep the State at one remove from the actual provision of education, and copper fasten the arrangement whereby primary education was funded by the State but managed and delivered by religious denominations. Article 44.2.4^o further reinforced this arrangement by expressly authorizing State funding of denominational schools on a non-discriminatory basis. In *Crowley v Ireland* (1980), Mr. Justice Kenny in the Supreme Court confirmed that the effect of the phrase 'provide for' in Article 42.4 'is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager or trustees, to provide means of transport to the school if this is necessary to avoid hardship, and to prescribe minimum standards.' The historical system established in 1833 and constitutionalized in 1937 has endured to this day. As of 2019, the great majority (89%) of primary schools are Catholic denominational schools; most of the remainder are under the control of either one of the Protestant denominations or Educate Together, a multi-denominational education provider (Mawhinney 2009, 50). At the time of writing, there are two Muslim schools and one Jewish school.

At secondary level, the majority (53%) of schools are also privately owned but State-funded schools, many of which are owned by religious denominations. However, there is far greater diversity at secondary level, with a significant number of these private schools being owned by non-religious entities such as private companies providing commercial private education, as well as a greater level of direct State involvement, with 47% of secondary schools being owned and run by the State, and in that sense being more in line with international concepts of 'public' education. These types of school include vocational schools, which are State owned, run by statutory local vocational educational committees, and non-denominational in their ethos (although religion is included as one subject in the curriculum); and community and comprehensive schools, which are State-owned schools which are run in conjunction either with religious denominations or local boards of

management. A small number (less than 10%) of secondary schools charge fees, but nonetheless still receive State funding to cover core costs such as teachers' salaries (Flynn 2011a). In order to cater for the geographically-dispersed Protestant community, an arrangement was put in place in the 1960s whereby additional funding was given to Protestant boarding schools at secondary level (of which there are approximately 20), so that members of that community could still benefit from free secondary education in a denominational environment without being hindered by cost or distance. During the financial crisis that followed the banking crash of 2008, cuts to this funding led to some controversy and debate as to whether the Constitution requires the provision of such funding in order to protect the religious freedom of the Protestant community, or alternatively prohibits the provision of such funding as a breach of the constitutional prohibition on non-discrimination (Daly, 2010).

At a macro level, the control of schooling in Ireland rests centrally with the Minister for Education, who has responsibility for curriculum design, school recognition and inspection, and funding allocation. However, as will be seen below, individual school patrons and boards of management are given significant autonomy in the areas of teacher employment, pupil admission, curriculum delivery and use of resources. Educational functions are not devolved on a structural basis to local government in Ireland as they are in, for example, the UK (where Local Education Authorities are legally responsible for educational provision); however, 35% of secondary schools are operated under the patronage and management of local vocational education committees established under the Vocational Education Act 1930.

The legal framework

The Irish Constitution of 1937 contains extensive provisions (by constitutional standards) regarding education, both in Article 42 (Education) and Article 44 (Religion). Article 42 provides that the State shall provide for free primary education and ensure that every child receives a certain minimum education; but its main focus is on parental rights and freedom of choice. It emphasizes the right of parents to provide for the religious, moral, intellectual, physical and social education of their children, and protects the right to establish private schools and to educate children at home, while expressly prohibiting a State monopoly in education provision. Article 44 builds on this by providing that State funding for denominational schools must be non-discriminatory, and protecting the right of children to attend a school receiving public funds without attending religious instruction at that school. The core right of the child to receive free primary education received comparatively little attention until the 1990s, when the High Court in *O'Donoghue v Minister for Health* (1993) interpreted Article 42.4 as guaranteeing that right to all children, including the most severely disabled, with the educational provision to be varied to meet the needs of the child. This led to a deluge of litigation, raising difficult issues regarding the power of the courts to enforce a right that has extensive implications for the allocation of public resources (O'Mahony 2006, 156-178).

Nonetheless, constitutional litigation brought about a significant improvement in the provision made for children with special educational needs, showing that there are

distinct advantages associated with having a justiciable constitutional right to education. However, some of the administrative issues brought to light by this litigation also demonstrated that constitutional documents are, by their nature, unsuited to making comprehensive provision for a legal framework for education (O'Mahony 2008, 141-144). For many years, education in Ireland was administered almost entirely on the basis of administrative memoranda and policy documents, with no legal provisions to build on the constitutional foundation. This was less than ideal, and led to many ambiguities and grey areas, not to mention demarcation disputes and bureaucratic wrangling between government departments as to who was responsible for various aspects of service provision, and associated delays in service delivery to children. Finally, the Education Act 1998 was enacted to provide a detailed framework for the regulation and funding of the primary and secondary education system. This was followed by the Education (Welfare) Act 2000, which dealt with issues surrounding school attendance, and the Education for Persons with Special Educational Needs Act 2004, which established a dedicated framework for making provision for children with special educational needs.

The Education Act 1998 sets out the functions of the Minister for Education in section 7, which include making appropriate education available to each person resident in the State, determining national education policy, providing funding to schools and monitoring the quality, economy, efficiency and effectiveness of the education provided in such schools. Section 30 authorizes the Minister to prescribe the school curriculum in consultation with patrons of schools, national associations of parents, school management organizations and trade unions and staff associations representing teachers. Section 10 empowers the Minister to designate schools as recognized schools for the purposes of the Act, having regard to a variety of factors, including: the numerical viability of the school; local diversity in school provision; whether the needs of students attending or likely to attend the school cannot reasonably be met by existing schools; undertakings given by the patron regarding curriculum delivery and compliance with inspections and regulations; and health and safety compliance.

The Act also gave statutory footing to the patronage model, providing in section 8 that the patron of a school is either the person who was recognized as such at the commencement of the Act or who applied for recognition of the school, with vocational education committees automatically becoming patrons of schools established or maintained by them. Patrons are obliged by section 14 to establish a board of management to manage the school on their behalf, and are empowered to remove members from the board or, where the board is not performing its functions, dissolve the board, either of their own initiative or at the direction of the Minister. The Board of Management has a variety of functions under the Act, some of which will be discussed in more detail below, and is obliged by section 15 to consult with and keep the patron informed of decisions and proposals of the board.

The Education (Welfare) Act 2000 makes provision for compulsory school attendance up to age 16, as well as for dealing with students who fail to attend school or have been excluded from a school on disciplinary grounds. Section 22 of the Act obliges school boards of management to prepare a school attendance strategy. The Act established the National Educational Welfare Board, which is charged with dealing with all matters

concerning school attendance, including liaising with schools and parents, commissioning and conducting research, and appointing educational welfare officers. (The functions of the Board were transferred to the Child and Family Agency by the Child and Family Agency Act 2015.) Education welfare officers are required under section 21 to be informed by the school of cases of persistent absenteeism, suspensions of more than 6 days or exclusions. Section 24 requires educational welfare officers to make all reasonable efforts to ensure that provision is made for the continued education of a student who is excluded from school, including consultation with the principal of the school, the student and his parents, and convening a meeting between any or all of such persons as agree to attend. Under section 27, the Child and Family Agency is required to make all reasonable efforts to have a child who is permanently excluded from a school enrolled in another school, or if this is not possible, to make such other arrangements as it considers appropriate to ensure that the child receives a certain minimum education. The Agency is also obliged to offer advice and assistance to parents who are experiencing difficulty in ensuring that their children attend school regularly.

The Education for Persons with Special Educational Needs Act 2004 adds an additional layer of law and policy for dealing with children who have special educational needs. The Act provides for a variety of mechanisms for initiating an assessment of children who are suspected as having special educational needs, including at the instigation of a school principal, the Health Services Executive or the National Council for Special Education, or at the request of the parents. Where a child is found to have special educational needs, an education plan is to be prepared for that child, either by the school or by the National Council for Special Education. The Education Plan is to set out details of the child's special educational needs and the provision to be made to meet those needs, and is to be reviewed on an annual basis. The Minister for Education is obliged under section 13 to provide the resources necessary for the preparation and implementation of education plans. The Act establishes the Special Education Appeals Board to provide a quick and informal expert dispute resolution body to hear a variety of appeals relating to the procedures established by the Act. The 2004 Act represents significant progress in the area of special educational needs (O'Mahony 2006, 184-199); unfortunately, although it was initially intended to be fully operational by 2009 after a 5-year preparatory period, its full commencement was indefinitely postponed following the banking crash of 2008 (O'Mahony 2015). Disappointingly, over ten years later, no plans have been announced for re-starting this process. The United Nations Committee on the Rights of the Child expressed its concern about this delay in its concluding observations in 2016 (United Nations Committee on the Rights of the Child 2016, §47).

Freedom to establish non-state schools

It was noted above that the vast majority of schools in Ireland are non-State schools, so clearly the freedom to establish such schools is strongly protected. Article 42.2 of the Irish Constitution expressly provides that parents 'shall be free to provide... education in their homes or in private schools or in schools recognised or established by the State.' As already seen, primary schools in Ireland are exclusively non-State; the manner in which the State funds primary education is to fund recognized schools that are established in

response to parental demand where a sufficient critical mass exists. However, the State is clearly entitled to place conditions on such funding; parents are not automatically entitled to receive support for a private school established in pursuit of the preference of a group of parents. In *O'Shiel v Minister for Education* (1999), a case concerning an application for State funding for a Steiner school, Ms. Justice Laffoy stated that '[f]ulfilment 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.' In that particular case, a requirement that teachers at the proposed school be qualified to teach the Irish language (which is stated to be the first official language in Article 8 of the Constitution, and is a compulsory part of the curriculum) was found to be a permissible criterion for funding. As seen above, section 10 of the Education Act 1998 prescribes a number of other criteria.

The overwhelming reliance of the primary school system on State-funded private schools (which are predominantly denominational in nature), coupled with the absence of a universal public alternative provided by the State and the fact that the onus rests on parents to establish new schools, has been identified as problematic from the perspective of religious liberty and pluralism. Given the limited availability of resources, the effect is that members of large religious groups are invariably able to access publicly-funded denominational education attuned to their beliefs, whereas members of minority religions and of none are only able to do likewise if they are able to muster critical mass within a discrete geographical area. Where this is not possible (as it often is not in Ireland, given the overwhelming dominance until quite recently of the Catholic faith), many families are left with no option other than to avail of a school operating under a religious ethos to which they do not subscribe. As will be seen below, this is problematic given the strong legal protections in place for school ethos (Daly, 2008 and 2009).

Homeschooling

As seen above, Article 42.2 of the Irish Constitution equally protects the right to educate children at home in addition to the right to establish non-State schools. The main qualification on this is contained in Article 42.3.2°, which stipulates that '[t]he State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.' Section 14 of the Education (Welfare) Act 2000 requires that a register be maintained of all children who are receiving education in a place other than a recognized school. Parents wishing to educate a child at home must apply to have the child registered; applications are assessed by the Child and Family Agency in light of the education being provided, the materials being used, and the time being spent in the provision of education, so as to determine whether the child is receiving a certain minimum education. The Agency may make such registration conditional on complying with specified requirements, or refuse to register the child; in cases of refusal, parents are then obliged under section 17 to cause the child to attend a recognized school.

The term ‘certain minimum education’ is not defined either in the Constitution or (more curiously) in the 2000 Act. In *O’Shiel*, Ms. Justice Laffoy stated that the ‘certain minimum education’ contemplated by Article 42.3.2° is a lower standard of education than the primary education which the State is obliged to provide for under Article 42.4. In *DPP v Best* (2000), Mrs. Justice Denham pointed out that since the Constitution is a living document to be construed in light of prevailing standards and conditions, the standard will vary from time to time. This is a view which is reinforced in Article 42.3.2° by the use of the phrase ‘in view of actual conditions’. Mrs. Justice Denham considered that this latter phrase encompassed such considerations as the primary school curriculum, the circumstances of the child and family involved in a given dispute and the circumstances of the community as a whole, including the general educational standard of the times. In this regard, the learned judge referred to the prevalence of computers in schools and society, thus giving rise to the possibility that a certain degree of computer literacy may one day be regarded as a component of the ‘certain minimum education’ required by the Constitution. In relation to the actual standard of education contemplated by Article 42.3.2°, Mrs. Justice Denham stated that it must be ‘conductive to the child achieving intellectual and social development and not such as to place the child in a discriminatory position.’ Mr. Justice Keane commented that it was not to be equated with the primary school curriculum, which was above the constitutional minimum.

A significant issue is whether or not the teaching of the Irish language constitutes an integral part of the certain minimum education. In *Best*, rather than holding that Irish is an essential element of the certain minimum education contemplated in Article 42.3.2°, or that the State is not entitled to require the teaching of Irish at all, the Supreme Court adopted a position somewhere in between these two black and white extremes. Mr. Justice Keane stated that ‘it would be going too far to say that its absence would, of itself, mean that the constitutional standard had not been reached, since that standard is to be determined in view of “actual conditions”...But given the status of Irish as the first official language and the fact that a knowledge of it is a precondition to at least some forms of employment, it could not be said that its absence from a curriculum cannot be taken into account in determining whether the education of the child reaches the constitutional standard.’ In that particular case, the absence of Irish language lessons, along with a general lack of structure in the curriculum, led to a determination that the children were not receiving the required ‘certain minimum education’ at home.

School choice not limited by family income

The discussion to date has shown that freedom of parental choice is at the heart of Article 42 of the Irish Constitution. In addition to the guarantees discussed above in relation to establishing private schools and home schooling, Article 42.3.1° stipulates that ‘[t]he State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.’ The courts have interpreted these provisions as guaranteeing to parents the right to choose the type of school at which their children shall be educated, although not necessarily the particular school (Farry 1996, 66 and 78; O’Mahony 2006, 124-125). This constitutional right has been bolstered by section 6 of the Education Act 1998, which

provides that every person concerned with the implementation of the Act shall have regard to the objectives of the Act, which include, inter alia, ‘to promote the right of parents to send their children to a school of the parents’ choice having regard to the rights of patrons and the effective and efficient use of resources’. Clearly, this right will be qualified by both the admissions policies of schools and by the availability of resources.

However, it is equally clear from the discussion to date that the lack of religious diversity in the primary school system in Ireland is increasingly at odds with the concept of freedom of parental choice in contemporary Irish society. As regards income as a factor in parental choice, primary education is available free to all, and income level is not a direct factor in freedom of choice of school except insofar as it may prevent a family from residing in the catchment area of schools in affluent neighborhoods. Where income level becomes more relevant at primary level is in its interaction with the restrictions imposed by the overwhelmingly denominational nature of the primary school system. Families who are not Catholic and cannot (or would prefer not to) avail of the predominant Catholic denominational primary schools, may be unable – due to their income level – to establish a school of their own or to home school. To put it at its most simple: if you cannot afford anything other than what the State is offering for free, then there is over a 90% chance (or 100% in many rural areas) that you will have to send your children to a Catholic denominational school. In this sense, income level may potentially conspire with religion to limit the choice of primary schools available to families, which would appear to run contrary to the emphasis placed in the constitutional provisions on freedom of parental choice of type of school.

In 2012, the Forum on Patronage and Pluralism recommended that 250 schools be examined for divestment from Catholic patronage, with 50 to be divested. Even if implemented, this would only have effected a 2% swing in the make-up of the Irish primary school system. Article 44 of the Irish Constitution includes specific protection for the property rights of religious denominations, meaning that the Government has been dependent on their co-operation to bring about divestment. Such co-operation has not been forthcoming on any meaningful scale. As a result, seven years later, even this rather unambitious target has not been met. In 2017, the Government announced plans to increase the number of multi-denominational and non-denominational schools from 111 to 400 by 2030. Achieving this would require a significant increase in the pace of reform; and even then, Catholic schools would still account for well over 80% of all primary schools. Clearly, the challenges posed by the legacy of Ireland’s historical reliance on religious denominations to deliver primary education, and the rapidly changing demographic and social trends in Ireland, will not be fully overcome for some time.

At secondary level, the greater diversity of schools means that religion is less of a factor, but income level is a more direct factor, since fee-paying private schools are far more common than at primary level. Secondary education, while not a constitutionally guaranteed right like primary education, is nonetheless available free to all; however, families unable to afford the fees charged by private secondary schools will clearly have a narrower choice of secondary schools available to them. This is no different to many other countries, and is less concerning than the issues raised at primary level, particularly since fee-paying private secondary schools account for less than 10% of the schools at that level.

School distinctiveness protected by law and policy

As the Irish education system has grown up around an assumption that most schools will be overtly religious in character, it is unsurprising that the legal framework provides extensive protection for the distinctive character – generally referred to as ‘ethos’ – of individual schools. At a general level, Article 44.2.5° of the Constitution provides that ‘[e]very 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 Education Act 1998 approaches the issue in a broader sense, using language that is not exclusively religious in nature. Under section 15, a school board of management, in performing its functions, is required to ‘uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school.’ As can be seen, religion is just one of a variety of factors which may determine the characteristic spirit of a school (although ‘moral’ and ‘spiritual’ factors will clearly be cognate to religion).

Section 15 also stipulates that school admissions policies must have regard to the school’s characteristic spirit, and even the Minister for Education is required to have regard to a school’s characteristic spirit when performing his functions under section 30 with respect to prescribing the curriculum. More specifically, the Minister is also required to ‘ensure that the amount of instruction time to be allotted to subjects on the curriculum as determined by the Minister in each school day shall be such as to allow for such reasonable instruction time, as the board with the consent of the patron determines, for subjects relating to or arising from the characteristic spirit of the school’. More detailed provision relating to the protection of the religious ‘ethos’ of religious schools has been made with respect to both pupil admissions and teacher employment, as will be discussed in the next two sections.

Decisions about admitting pupils

School admissions are a matter for individual schools in Ireland, although the legal regulation of this issue has been increasing in recent years. The Education Act 1998 requires schools to establish and maintain an admissions policy which provides for maximum accessibility to the school (section 9) and which respects principles of inclusion and equality (section 15). The policy should also have regard to the right of parents to send children to the school of the parents’ choice and to the characteristic spirit of the school (section 15). A refusal by a school to admit a child can be appealed by the parents of the child to an appeals committee appointed by the Minister for Education (sections 29-29F). The role of the courts in this area is quite limited; in *Ó hÚallacháin v Burke* (1988), Mr. Justice Murphy held that the sole function of the courts in any such dispute is to determine whether the decision of the Board was reached on a fair and rational basis; the courts will not under any circumstances substitute their judgment for that of the Board.

The Education (Admissions to Schools Act) 2018 inserted a new Part X into the Education Act 1998, providing by far the most detailed legal regulation of school admissions in Ireland to date. Section 61 requires schools to include in their admissions policies a statement that school admissions shall not discriminate on grounds of gender, civil or family status, sexual orientation, religion, disability or special educational needs, race or membership of the Traveller community (subject to certain exceptions). Section 62 provides additional detail on the format and content of admissions policies. It specifically precludes a number of admission criteria which have potential for indirectly discriminatory impact, such as waiting lists or priority for children of past pupils (which would work to the disadvantage of immigrants or anyone who has recently moved to an area). Section 64 prohibits schools other than designated fee-charging schools from charging fees or seeking payments or contributions (howsoever described) as a condition of an application for admission, admission or continued enrolment.

In addition to Part X of the 1998 Act, further regulation of school admissions is set down in the Equal Status Act 2000, section 7 of which requires that educational establishments shall not discriminate on any of ten separate grounds in relation to the admission or the terms and conditions of admission of a person as a student in the establishment. The grounds of discrimination set out in section 3 of the Act are gender, marital status, family status, sexual orientation, religion, age, disability, race, membership of the Traveller community and victimisation. Like Part X of the Education Act 1998, section 7 contains exemptions to the gender ground for schools that cater to one gender only, and to the disability ground where admitting a student would have a seriously detrimental effect on the provision of services to other students.

In the case of religious discrimination, section 7 originally included an exemption for cases where denominational schools admit coreligionists in preference to non-coreligionists, or where they refuse to admit a non-coreligionist (provided that such refusal is reasonably necessary to uphold the ethos of the school). Empirical evidence indicated that there was a low incidence of schools exercising the right to refuse admission on grounds of religion, but that it was common for denominational schools to give priority to children from their own religion and to request a baptismal certificate as part of an admission application. In urban areas where schools are oversubscribed, this provision, combined with the predominance of Catholic schools, often made it difficult for non-Catholics to secure a school place within a reasonable distance of their home. A related effect was that many parents (mostly lapsed Catholics) had their children baptized for the purpose of securing a school place, where otherwise they would have chosen not to (Mawhinney 2009, 135-142; Quinn 2010). This clearly raised serious concerns from the perspective of religious freedom, since State education policy is generating an insidious pressure on some parents to (at least superficially) convert to and practise a religion that does not conform with their beliefs.

Following extensive lobbying by civil society groups, the Education (Admissions to Schools Act) 2018 amended the Equal Status Act 2000 to significantly narrow the scope of the exemption to the prohibition on religious discrimination. Schools can now only give priority in admissions to students of a certain religion if they are either fully private schools not in receipt of State funding, or if they are catering for a minority religion

(defined as less than 10% of the population). The practical effect of this is that Catholic schools can no longer give preference to Catholic students, with the logic being that Catholic schools are so predominant that no situation could arise whereby a Catholic family would be unable to access a Catholic school, whereas a Protestant family (for example) might not be able to access another Protestant school if their child was refused admission to the nearest one. The separate provision allowing schools to refuse to admit a non-coreligionist where it is proved that the refusal is essential to maintain the ethos of the school remains in place; as noted above, this has rarely been invoked to date, and it remains to be seen whether schools might seek to invoke it more frequently now that the rule on preference in cases of oversubscription has been narrowed to such an extent.

Separate provisions govern the admission of children with special educational needs. Section 2 of the Education for Persons with Special Educational Needs Act 2004 establishes a presumption that children with special educational needs shall be educated in mainstream schools except where the nature and degree of the child's needs are such that to do so would be inconsistent with the best interests of the child (as determined in an assessment of his educational needs) or the effective provision of education for other children. Under section 10 of the Act (which remains uncommenced), the parents of a child in respect of whom an education plan has been prepared are permitted to request the National Council for Special Education to designate a school in the plan. In making any such designation, the Council is to have regard to the needs of the child concerned, the wishes of the child's parents and the capacity of the school to accommodate the child and to meet his needs. Section 10 specifically provides that the school shall admit the child as a student upon being directed by the Council to do so. Parents are given a right of appeal to the Special Education Appeals Board if their requested school is not designated; conversely, the board of management can appeal against the designation of their school in an education plan, or appeal for the level of additional resources for the school stipulated in a child's education plan to be increased. This is just one of many examples of provisions of the 2004 Act which are well drafted and have potential to make a positive impact, if only the Government would take the final step of commencing the legislation.

Decisions about staff

As with pupil admissions, the hiring and firing of teachers is a matter for individual schools.

In 2009, in a case concerning the liability of the State for sexual abuse committed by a teacher, the Supreme Court confirmed that teachers are, in the eyes of the law, the employees of the school and not of the State, and that the State has no role in either hiring or firing teachers (albeit that the Department of Education could effectively bring about a teacher's dismissal if it withdrew its recognition of that teacher). The corollary of this is that the State was found to have no vicarious liability for the abuse committed by the teacher, a point which was criticized in light of the lengthy history of child abuse in educational institutions in Ireland and the failure of the State to take effective child protection measures to prevent same (O'Mahony, 2009). In 2014, the European Court of Human Rights held that while the State was not vicariously liable for the teacher's actions,

it was directly liable for its own inactions in failing to implement an effective child protection framework (O'Mahony & Kilkelly, 2014).

The law regulating discrimination in teacher employment is quite similar to that on pupil admissions. The Employment Equality Act 1998 prohibits discrimination in employment matters on the same grounds (with the exception of the victimization ground), but section 37 of the Act permits denominational schools to engage in religious discrimination – in both hiring and firing – where reasonably necessary to uphold the ethos of the school. When these provisions were referred to the Supreme Court to test their constitutionality on judicial preview, the Court reiterated the point made in earlier case law that it is constitutionally permissible to create a legislative distinction on grounds of religion if this is necessary – but only insofar as is necessary – to give effect to the guarantee of free profession and practise of religion. The Court thus held that provisions allowing for religious discrimination against teachers may be permitted if reasonably necessary to protect the free practise of religion of those who seek to have their children educated through a particular religious ethos, with the question of what is to be deemed 'reasonably necessary' being an objective test to be determined on a case-to-case basis (*Re Article 26 and the Employment Equality Bill, 1996* (1997)).

Given that the overwhelming majority of schools in Ireland operate under a Catholic ethos (particularly at primary level), this provision gave rise to potential flashpoints in relation to a variety of issues, including teachers who are cohabitees, divorcees or homosexuals, and whose lifestyle could potentially be seen as undermining the ethos of the school. In the only case on point to come before the courts (under older legislation), a school was found to be entitled to dismiss a teacher who was in a cohabiting relationship with a separated married man (*Flynn v Power* (1985)). Given the overwhelmingly denominational nature of the Irish primary school system, the majority of teachers work in denominational schools; and research has documented the fact that teachers felt pressured to avoid disclosing lifestyle details which may be seen to conflict with the ethos of the school in which they teach (Mawhinney 2009, 166-176).

In the same year that Ireland introduced marriage equality, section 11 of the Equality (Miscellaneous Provisions) Act 2015 amended the 1998 Act to provide that publicly-funded denominational schools could only discriminate against their staff on grounds of religion in situations where 'the religion or belief of the employee or prospective employee constitutes a genuine, legitimate and justified occupational requirement having regard to the institution's ethos'. The discriminatory action must be 'objectively justified by the institution's aim of preventing the undermining of the religious ethos of the institution', and the means of achieving that aim must be appropriate and necessary. This test will only be met where the action taken is proportionate, 'rationally and strictly related to the institution's religious ethos', and is a response to conduct undermining the religious ethos of the institution rather than a response to that employee's or prospective employee's status. The intention of this amendment was to avoid a situation where (for example) a Catholic denominational school could seek to legally dismiss a gay teacher simply because they got married to a person of the same sex. No cases have yet arisen that have tested the limits of this amendment.

Accountability for school quality

Section 13 of the Education Act 1998 establishes the education inspectorate, with the Minister being obliged to appoint a Chief Inspector and so many inspectors as the Minister considers appropriate. The functions of an inspector include supporting and advising recognized schools; visiting schools to evaluate the organization and operation of those schools and the quality and effectiveness of the education provided there, including the quality of teaching and effectiveness of individual teachers; reporting to the Minister, the patron, the board of management and the teachers on such matters; advising teachers and boards of management on the performance of their duties; and advising parents and parents' associations. The Act provides that an Inspector shall have all such powers as are necessary or expedient for the purpose of performing his or her functions and shall be accorded every reasonable facility and co-operation by the board and the staff of a school.

Teaching of values

In light of the discussion which has taken place above, it is clear that the teaching of values plays a major role in Irish schools, and most particularly in denominational primary schools, which account for approximately 95% of all primary schools in Ireland. It was seen above that Article 42.1 of the Irish Constitution guarantees to parents the right to provide for the religious, moral, intellectual, physical and social education of their children, while Article 44.2.4^o provides for the right of children to attend a school receiving public funds without attending religious instruction at that school. In addition to this, the Education Act 1998 specifies in section 30 that the Minister, in prescribing the curriculum, shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student. Rule 69 of the 1965 *Rules for National School* (which remains in force) provides that '[n]o pupil shall receive, or be present at, any religious instruction of which his parents or guardians disapprove', and that '[t]he periods of formal religious instruction shall be fixed so as to facilitate the withdrawal of pupils' from such instruction.

In theory, therefore, this exemption mechanism means that the many children and parents in Ireland who avail of denominational schools operating under a religious ethos to which they do not subscribe are still guaranteed their rights under Articles 42 and 44 of the Constitution with respect to religious freedom in education. However, for many years, the reality was rather different, due to another provision of the *Rules of National School* – Rule 68 – which established what was known as the 'integrated curriculum':

'Of all the parts of a school curriculum Religious Instruction is by far the most important, as its subject-matter, God's honour and service, includes the proper use of all man's faculties, and affords the most powerful inducements to their proper use. Religious instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school.'

Rule 68 went on to state that the teacher ‘should constantly inculcate’ various Catholic values in their students and that the primary duty of the educator is to habituate the students to observe the laws of God. Under this structure, the predominant approach was that while Irish primary schools delivered 30 minutes per day of formally timetabled religious instruction, religious values permeated the entire school day.

The integrated curriculum made it impossible for a child to attend the vast majority of primary schools in Ireland without being exposed to, and influenced by, Catholic teachings. This system quite obviously impinged on the religious freedom of non-Catholic children and parents within the education system – and yet the scant case law that exists in this area to date would seem to indicate that the courts did not consider this to be unconstitutional. In *Campaign to Separate Church and State Ltd v Minister for Education* (1998), Mr. Justice Barrington examined this issue and stated:

‘The Constitution therefore distinguishes between religious “education” and religious “instruction” – the former being the much wider term. A child who attends a school run by a religious denomination different from his own may have a constitutional right not to attend religious instruction at that school, but the Constitution cannot protect him from being influenced, to some degree, by the religious ‘ethos’ of the school. A religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school.’

When read in the isolated context of a constitutionally sanctioned system of non-discriminatory State funding for denominational education, this passage is unobjectionable; however, the empirical reality of the overwhelmingly denominational nature of the Irish primary school system, combined with the operation of the integrated curriculum, had the effect that it was virtually impossible for some parents and children to fully exercise their rights with respect to religious freedom in education. They were faced with no realistic freedom of choice of school, an issue which was compounded by a partial and ineffective opt-out mechanism that left the children subject to a significant degree of religious influence, raising questions regarding compliance with the decision of the European Court of Human Rights in *Folgerø v Norway* (2007). Given the small number of multi-denominational schools available, and the fact that these are concentrated in the major cities, the only possibility of non-Catholics avoiding exposure to Catholic denominational education would have been through the establishment by their parents of a private school or through home education (neither of which may be practicable in many cases).

Empirical research (Mawhinney 2009) confirmed the challenges presented by the combination of the integrated curriculum with the *de facto* denominational nature of the Irish primary school system. A typical comment from one of the parents interviewed was that ‘religion is not a subject that they do for a half-hour. It’s constantly brought up again and again like prayers here and there, colouring in pictures, say of the nativity. It was 24/7!’ The teachers interviewed confirmed this impression, with one stating that ‘[i]t would be near nigh impossible’ for a child to effectively opt out. Perhaps more serious still evidence suggesting that an opt-out of even timetabled religious instruction was often not

available in any meaningful way, with children left to amuse themselves in the library or sometimes in the same classroom due to a lack of resources. In some cases, schools only allowed an opt-out if the parents collected the child from school (which is often impractical). These facts are reinforced by clear evidence that parents who did not wish their child to be exposed to doctrinal religious instruction were reluctant to exercise whatever opt-out was available due to fears concerning their child being stigmatized or even bullied by other pupils or by teachers.

The report of the Forum on Patronage and Pluralism in 2012 recommended that Rule 68 be abolished, and this recommendation was implemented by a Department of Education Circular in 2016. However, it is unclear what the response on the ground has been in denominational schools, and whether this has resolved all issues relating to accommodating children from other religious backgrounds. The legislative provision discussed above protecting school ethos still allow denominational schools to have an overtly religious ethos or characteristic spirit, which will inevitably have implications outside of timetabled religious instruction. Moreover, there is still evidence that effective opt-out arrangements are not always available during timetabled religious instruction.

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*Note: All legislation cited is available at www.irishstatutebook.ie. More recent case law is available at www.bailii.org.