



McCarthy, F. (2017) Children's rights in action: reforming religious observance in Scottish schools. *Edinburgh Law Review*, 21(2), pp. 257-261.(doi:[10.3366/elr.2017.0417](https://doi.org/10.3366/elr.2017.0417))

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Deposited on: 13 March 2017

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Children’s rights in action: reforming religious observance in Scottish schools

A. INTRODUCTION

The practice of religious observance in state-funded Scottish schools is currently under review. In addition to providing religious education, in which pupils learn *about* the history and tenets of various faiths, state-funded school communities in Scotland are under an obligation to *practise* religious observance as part of the curriculum, whether that school is denominational or non-denominational.¹ Doubt about the compliance of this obligation with the human rights of children and parents has led to criticism by the UN Committee on the Rights of the Child and legal action by Humanist Society Scotland.² As a result, the Scottish Government is currently consulting on how the guidance on religious observance can be revised to address these concerns.³ This note will outline the current law on religious observance, explain the issues which gave rise to the Government consultation and query whether the limited reforms likely to result go far enough to protect children’s rights in this area.

B. THE LAW OF RELIGIOUS OBSERVANCE

The Education (Scotland) Act 1980 imposes various obligations on local authorities, acting in this context as “education authorities”, in relation to the provision of state-funded schools. Unlike elsewhere in the UK, the curriculum in Scottish schools is not regulated by statute. However, section 8 of the 1980 Act specifies that:

- (1) Whereas it has been the custom in the public schools of Scotland for religious observance to be practised... be it enacted that education authorities... shall be at liberty to continue the said custom;

¹ Education (Scotland) Act 1980, section 8, discussed in detail in Part B. Outwith Scotland, the terms “faith schools” and “non-faith schools” may be more familiar.

² See Part C.

³ G Braiden and A Denholm, “Review of pupils’ rights to opt out of school religion after Government climb down” *The Herald*, 5 November 2016.

(2) It shall not be lawful for an education authority...to discontinue religious observance...unless and until a resolution in favour of such discontinuance...has been approved by a majority of electors [for the education area].

These provisions apply to both denominational and non-denominational schools. Current Scottish Government guidance⁴ on what is entailed by the practice of religious observance encourages schools to draw upon the “rich resources” of Scotland’s Christian heritage,⁵ but also notes that:

Many school communities contain pupils and staff from faiths other than Christianity or with no faith commitment, and this must be taken fully into account in supporting spiritual development. It is of central importance that all pupils and staff can participate with integrity in forms of religious observance without compromise to their personal faith (emphasis included in original).⁶

The guidance recognises that a term such as “Time for Reflection” might be a more appropriate description of the activities carried out in fulfilment of the requirement of religious observance in some schools.⁷

The 1980 Act provides parents with a right to withdraw their children from the practice of religious observance.⁸ Children are not provided with any independent right to do so, not even to the limited extent available in England and Wales where sixth-form pupils can excuse themselves from the equivalent of religious observance, known as collective worship.⁹ Both parents¹⁰ and schools¹¹ have an obligation to take the child’s views into account when making decisions which affect the child’s life, but the obligation does not require that the child’s views be followed, and particularly where the child’s beliefs conflict with those of her parents, it is likely that the parents’ views will prevail.

C. RELIGIOUS OBSERVANCE AND CHILDREN’S RIGHTS

⁴ Scottish Government, *Curriculum for Excellence – provision of religious observance in schools* (2011) available at <http://www.scotland.gov.uk/Resource/Doc/920/0113848.pdf> (accessed February 2017).

⁵ *Ibid*, para 10.

⁶ *Ibid*, para 10.

⁷ *Ibid*, para 6.

⁸ Education (Scotland) Act 1980, section 9.

⁹ School Standards and Framework Act 1998, section 71(1B).

¹⁰ Children (Scotland) Act 1995, section 6.

¹¹ Standards in Scotland’s Schools Act 2000, section 2(2).

The matrix of rights surrounding children, religion and education is complex, with the interests of parents, the child's community and the state all represented to some extent within the overlapping provisions of international conventions.¹² Freedom of thought, conscience and religion is protected for all individuals, including children, under article 9 of the European Convention on Human Rights, as enshrined in domestic law through the Human Rights Act 1998 and the Scotland Act 1998, section 57. All individuals also have the right to an education, but this right includes specific provision for parents to have their children educated in accordance with the parents' religious beliefs.¹³ Children further benefit from the rights contained within the United Nations Convention on the Rights of the Child, which has similar provision for the right to an education¹⁴ and right to freedom of thought, conscience and religion.¹⁵ In the UNCRC scheme, however, this latter freedom is explicitly subject to the right and responsibility of parents to direct the child in line with her evolving capabilities.¹⁶

Balancing parental rights and responsibilities towards a child with the child's gradually developing right to autonomy is a familiar problem within family law. The issue which arises here is that the balance may not be correctly struck in relation to participation in religious observance. Scots private law generally gives recognition to the fact that capacity evolves over the course of childhood. For example, the law does not say that a child of 15 years and 364 days has no capacity to enter a sale transaction, but on her 16th birthday has full capacity to do so. Instead, the Age of Legal Capacity (Scotland) Act 1991 provides that a child may enter into "transactions of a kind commonly entered into by persons of his age and circumstances",¹⁷ provided they are not unreasonable.¹⁸ Accordingly, even a child of 6 or 7 could have capacity to buy chocolate with her pocket money; an older child could potentially download an app or buy clothes and so on, all depending on her particular circumstances. A similar "sliding-scale" approach to capacity is taken in relation to medical treatment, where a child has capacity to consent on her own behalf if, in the opinion of the treating practitioner,

¹² For discussion, see J Mair, "Born or becoming: Children, religion and identity" in M Jänterä-Jareborg (ed) *The Child's Interests in Conflict* (2015) 31-54; R E Taylor, "Responsibility for the soul of the child: the role of the state and parents in determining religious upbringing and education" (2015) 29 IJLPF 15-35; F McCarthy, "Prayers in the playground: religion and education in the United Kingdom and beyond" in J Mair and E Orucu (eds) *The Place of Religion in Family Law: A Comparative Search* (2011) 235-262.

¹³ ECHR, Protocol 1, art 2.

¹⁴ UNCRC, art 28-30.

¹⁵ UNCRC, art 14.

¹⁶ UNCRC, art 14(2).

¹⁷ Age of Legal Capacity (Scotland) Act 1991, section 2(1)(a).

¹⁸ *Ibid*, section 2(1)(b).

she is sufficiently mature to understand the nature and possible consequences of the procedure or treatment.¹⁹ Although the position is not entirely clear, it seems in Scotland that a child with this level of maturity is equally entitled to refuse treatment, regardless of whether it is in her best interests to do so.²⁰

The gradual approach to recognition of the child's capacity taken in these areas of law is arguably at odds with the position on religious observance, where the child is reliant on her parents to exercise an opt-out if the practice conflicts with her beliefs regardless of her age and maturity.²¹ The inconsistency in treatment gives rise to the question of whether the child's right to freedom of thought, conscience and religion is being contravened. In late 2015, this concern was raised in separate reports by the AHRC Research Network on Collective Worship²² and the Commission on Religion and Belief in British Public Life.²³ In July 2016, the United Nations Committee on the Rights of the Child published its Concluding Observations on the Fifth Periodic Report of the United Kingdom²⁴ on compliance with the UNCRC, in which it recommended that children in all UK jurisdictions should be able to independently exercise the right to withdraw from religious worship at school.²⁵ The following September, Humanist Society Scotland raised judicial review proceedings in respect of the Government's decision not to introduce an opt-out for children.²⁶ In response, the Government has launched a limited consultation with key stakeholders on how the

¹⁹ Ibid, section 2(4).

²⁰ *Houston, Applicant* 1996 SCLR 943; Griffiths, Fotheringham and McCarthy, *Family Law* 4th edn (2015) paras 4-37 to 4-40.

²¹ Once a pupil reaches the age of 16, they are free to stop attending school, but if they choose to remain registered as a pupil, they have no independent right to opt out of religious observance.

²² P Cumper and A Mawhinney (eds), *Collective Worship and Religious Observance in Schools: An Evaluation of Law and Policy in the UK* (2015), available at <http://collectiveschoolworship.com/documents/CollectiveWorshipReligiousObservanceAHRNetworkReport13November2015.pdf> (accessed January 2017).

²³ *Report of the Commission on Religion and Belief in British Public Life* (2015), available at <https://corablivingwithdifference.files.wordpress.com/2015/12/living-with-difference-online.pdf> (accessed January 2017).

²⁴ UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of the United Kingdom* (2016), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en (accessed January 2017).

²⁵ Ibid, para 36.

²⁶ Humanist Society Scotland, "Humanist Society to challenge the Scottish Government in Court over Religious Observance opt-out" (September 2016), available at <https://www.humanism.scot/what-we-do/news/humanists-to-challenge-scottish-government-in-courts/> (accessed January 2017).

guidance on religious observance might be revised to bring it into line with these concerns.²⁷ It is understood that the judicial review action has been sisted pending the outcome of the consultation.

D. CHANGES TO RELIGIOUS OBSERVANCE

Predicting the outcome of a consultation can only ever be a best guess, but given the background in this particular case, one obvious possibility is the introduction of an independent opt-out for pupils. This could be restricted to pupils of a specific age, as in England and Wales, or operate based on the sliding scale of maturity recognised in other areas of family law in Scotland. Whether either of these approaches will be favoured remains to be seen.

Regardless of the specifics, Government action to address criticisms by the UN Committee in relation to children's rights is always a welcome step. Unfortunately, however, it seems this step is only the first of several likely to be required to fully resolve the human rights issues raised by the religious observance requirement. Where children are withdrawn from observance, guidance makes clear that they must be provided with a worthwhile alternative activity.²⁸ Empirical research into the operation of such opt-outs in other jurisdictions has shown that, often, this requirement is difficult for schools to fulfil, particularly where resources in terms of staff and accommodation are already stretched.²⁹ The same problem was anecdotally identified here in a Scottish Parliament petition in 2013 urging the Government to make religious observance opt-in rather than opt-out.³⁰ The risk, in short, is that by providing an opt-out, the Government will simply replace one potentially human rights contravening problem with a different one.

Full resolution of the issue may require more fundamental reform. Religious observance could be replaced by an alternate activity that provides the same benefits in terms of supporting children to explore big questions about the world and their place in it, but does

²⁷ Braiden and Denholm, n3.

²⁸ Scottish Government, *Curriculum for Excellence – provision of religious observance in schools* (2011), paras 14-17 and Scottish Government, *Curriculum for Excellence – provision of religious and moral education in non-denominational schools and religious education in Roman Catholic schools* (2011), paras 7-8.

²⁹ A Mawhinney, "The Opt-out clause: imperfect protection for the right to freedom of religion in schools" [2006] 7(2) Ed Law 102.

³⁰ PEO1487: Religious Observance in Schools (20 June 2013).

not adhere to any particular faith or non-faith viewpoint. Philosophy with children is one approach that may fit the bill.³¹ Carefully used, philosophical texts could provoke discussion and exploration without espousing a particular worldview, with the result that the right to freedom of thought, conscience and religion is not engaged. In non-denominational schools, this would avoid the need for the resource-impacting provision of worthwhile alternative activity that results from exercise of an opt-out. In denominational schools, the right of parents to have their children educated in accordance with the parents' beliefs may operate to require that religious observance continue, in which case an opt-out may be the preferable solution. However, with denominational schools making up only 370 of Scotland's 2,569 state-funded schools,³² the resource implications of an opt-out here are diminished, which may be the best compromise in the circumstances.

Welcome changes are on the horizon, then, but reform of religious observance seems likely to remain a talking point for some time yet.

Frankie McCarthy
University of Glasgow

³¹ C Cassidy, "Promoting human rights through philosophy with children" (2016) 24 *International Journal of Children's Rights* 499-521.

³² Figures available at <http://www.gov.scot/Topics/Education/Schools/FAQs> (accessed January 2017).