EQUAL STATUS (ADMISSION TO SCHOOL) BILL 2016

EXPLANATORY MEMORANDUM

Purpose of Bill

Article 42.4 of the Constitution states that the State shall provide for free primary education. The State is not obliged to be itself an education provider but it must ensure that arrangements are in place to ensure that primary education is provided, free of charge.

Article 42.3.1° provides that the 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.

Article 44.2.4° states that legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations. Nor may such legislation affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

The Constitution makes it clear that the State is entitled to fund schools under the management of religious denominations and also that schools may give religious instruction during the school day.

But it is also clear that every child has the right to attend a State-funded school without attending religious instruction at that school.

The rule has been spelled out in the Intermediate Education (Ireland) Act 1878, the Government of Ireland Act 1920 (which continues to apply in Northern Ireland), the Anglo-Irish Treaty and the Saorstát Éireann Constitution of 1922.

The Constitution Review Group reported in 1996 and pointed out that Article 44.2.4° had the potential to give rise to difficulties.

> "Suppose that there is one small national school (and therefore in receipt of public funds) which is run by a Catholic religious order and where the school population heretofore consisted exclusively of Catholic pupils. Members of the Islamic community move into the area and have no realistic alternative but to send their children to the local national school. The parents of these children not only insist on withdrawing their children from formal religious instruction but also object to the Roman Catholic ethos which permeates instruction in other subjects in the school and is also reflected in, for example, religious pictures and school holidays for religious feast days. Must a school which is in receipt of public moneys accede to these objections, or may it give preference to the wishes of the majority of parents who wish the school to retain its Catholic ethos?"

The CRG report lists further difficulties. For example, may a school in receipt of public money retain its religious ethos by appointing co-religionists only as teachers, or by giving preference to children of co-religionists in enrolment?

But, if religious preference was not permissible, then how could a school, particularly one established to cater for a minority, protect itself against being overwhelmed by those of other persuasions?

And what purpose would be served by having religious participation in education provision – as the Constitution envisages – if denominational schools are unable to reserve places for members of their own faith and so preserve the religious character of their schools?

There is an obvious tension here, between different provisions of the Constitution dealing with denominational education. The tension is between the right of the child (exercised through its parents) not to be coerced to attend religious instruction at a State-funded school and the right of denominational schools in receipt of public funds to provide for the fullness of denominational education through measures designed to preserve the religious ethos of their school.

Does a denominational school, in order to receive public funds, have to change its character so radically that it could no longer remain truly denominational?

The Constitution Review Group concluded in 1996 that the denominational character of the school system does not accord with the Constitution. "The situation is clearly unsatisfactory. Either Article 44.2.4° should be changed or the school system must change to accommodate the requirements of Article 44.2.4°."

Faced with the choice between amending the Constitution or the school system, the CRG did not favour a change to this part of Article 44.2.4°. The group argued that the provision was a limited exception to the general constitutional prohibition on State endowment of religion. If a school under the control of a religious denomination accepted State funding, it must be prepared to accept that this aid is not given unconditionally. Requirements that the school must be prepared in principle to accept pupils from denominations other than its own and to have separate secular and religious instruction are not unreasonable or unfair, according to the CRG.

Second, the CRG also argued that, if Article 44.2.4° did not provide these safeguards, the State might be in breach of international obligations, since a significant number of children of minority religions, or those with no religion, might be coerced by force of circumstances to attend a school which did not cater for their religious views or their conscientious objections. This would also mean that the State would be in breach of its obligations under Article 42.3.1°: "The State shall not oblige parents in violation of their conscience and lawful preference to send their children … to any particular type of school designated by the State".

Finally, the CRG pointed out that this aspect of Article 44.2.4° reflects earlier commitments by the State in the Treaty of 1921 and Article 8 of the 1922 Constitution, which was designed to safeguard the rights of minorities. An amendment would be a retrograde step − especially in the context of Northern Ireland − and would send the wrong signal concerning pluralism in the State.

In summary, denominational education providers must accept that public money is not given unconditionally. The Constitution imposes requirements. It requires that every publicly-funded school "must be prepared in principle to accept pupils from denominations other than its own and to have separate secular and religious instruction".

Since the CRG reported, Mister Justice Barrington stated in a Supreme Court judgment that Article 44.2.4 contemplates two things: "if a school was in receipt of public funds any child, no matter what his religion, would be entitled to attend it"; and "such a child was to have the right not to attend any course of religious instruction at the school".

The judge clarified that there was a difference between the right to avoid religious instruction and avoiding any religious ethos in the school environment, which is not a constitutional right. But, while ethos of its nature can be pervasive, the rule remains that religious instruction must be separate from the rest of the school day and must be optional.

So far as admissions are concerned, some schools argue for a distinction between an admission policy that says "co-religionists only" and one that merely gives preference to co-religionists. However, Article 44.2.4 is grounded on the right of the child in question: his or her right to attend a school receiving public money without attending religious instruction. It does not matter to the child if it has been refused admission on an absolute basis or has simply been put to the end of a list that is longer than there are places. Either way, the child's rights are not being respected.

That said, it seems clear that, since the public funding of denominational schools is contemplated by the Constitution itself, any pre-conditions imposed by the State in order to receive that funding should not be such as to destroy the denominational character of the school.

If a school admission policy was required to be entirely neutral on religion, then it would run the risk of losing its denominational character – a character the Constitution entitles it to have.

A harmonious interpretation requires some compromise between the rights of the child and of the school. A denominational school's 'preference' for co-religionists can be accommodated and constitutionally justified if it is demonstrably needed, by reference to actual circumstances, in order to maintain the school's denominational religious character.

But an insistence on religious preference in circumstances where there is no conceivable threat to the denominational integrity of the school, is an unconstitutional impediment to the exercise of the child's right to a secular education in that publicly funded school. In the overall hierarchy of rights, a school's right to its denominational ethos has to yield to a child's right to an education.

The Equal Status Act 2000 contains provisions that prohibit discrimination on grounds of religion, but the Act largely excludes education from its remit. Primary and secondary schools continue to be entitled to provide education in an environment that promotes religious values. According to s. 7 of that Act, where a school's objective is to provide education in such an environment, the school does not discriminate if "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".

And this exemption applies to every school, "whether or not supported by public funds".

In the case of an outright refusal to admit, it must be proved that the refusal is 'essential to maintain the ethos of the school'. There is no such test of necessity where the school maintains a preferential admissions policy. Such a policy might, for example, provide for admissions of:

1. Catholics of the parish, then
2. Catholics from outside the parish, then
3. Local non-Catholics.

The legal sanction for such a 'Catholics first' policy runs the risk of depriving more and more non-Catholic children of education in their own neighbourhoods.

Such a policy would not survive if it was tested against a requirement of necessity. The admission of minority of non-co-religionists would not in reality threaten the ethos of a denominational school.

The purpose of this Bill is to amend the exemption provided in the Equal Status Act, so as to redress the imbalance between the right to maintain denominational schools and the rights of children to receive an education in a State-funded school.

Provisions of Bill
Section 1 provides in standard form for the short title of the Bill and for its collective citation and construction.

Section 2 makes two amendments to section 7 ("Educational establishments") of the Equal Status Act 2000. That section prohibits primary and post-primary schools, whether or not supported by public funds, from discriminating in relation to admission of students, access to courses, other terms or conditions of participation, or expulsion or other sanctions against students.

Section 7 (3) goes on to provide a series of exemptions from this general prohibition. In particular, paragraph (c) provides that, where the objective of a primary or secondary school is to provide education in an environment which promotes certain religious values, the school is not guilty of discriminating if it admits persons of a particular religious denomination in preference to others or it refuses to admit 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.

The purpose of the first amendment is to substitute a new paragraph (c). The new paragraph provides that, where a primary or secondary school is supported by public funds and its objective is to provide education in an environment which promotes certain religious values, the school is not guilty of discriminating if –

- it admits persons of a particular religious denomination in preference to others, if it is proved that such a policy is essential in order to ensure reasonable access to education for children of that denomination within its catchment area in accordance with the conscience and lawful preference of their parents, or

- it refuses to admit as a student a person who is not of that denomination, if it is proved that the refusal is essential to maintain the ethos of the school.

The second amendment made to section 7 of the 2000 Act is to insert a new subsection (3A). The new subsection provides that, in determining for the purposes of subsection (3) (c) whether an admission policy or a refusal referred to in that subsection is 'essential' for the purposes referred to, due regard must be had to –

- the constitutional right of any child to attend a school receiving public money without attending religious instruction at that school, and

- the concomitant obligation that every such school should be so organised as to enable that right to be enjoyed.

The purpose of this amendment is to give effect to the principle that, if the local State-funded school is the only reasonably available school and it is a denominational school then, notwithstanding its religious ethos, the secular and religious instruction in that school must be severable, so as to enable a child to attend that school without receiving religious instruction. Otherwise, the school does not qualify for public money.

Joan Burton TD
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