

OPINION

1. Introduction

1.1 This is an opinion prepared for the organisation Education Equality. I have been asked to address the issue of whether the repeal of section 7(3)(c) of the Equal Status Act 2000 would give rise to constitutional difficulties. I understand such repeal to be an objective of that organisation. Alternatively they suggest amending the section to such an extent as removes any discrimination on religious grounds for schools funded by the State. For the reasons contained in this opinion I conclude that there is no constitutional requirement for that particular section and that its repeal or substantial amendment would not give rise to constitutional difficulties. I also believe that the section is in fact currently unconstitutional.

1.2 Discrimination against children on the grounds of religion in accessing publicly funded education is currently permissible under Irish legislation. Section 7(2) of the Equal Status Act 2000 provides as follows:

“An educational establishment shall not discriminate in relation to—

(a) the admission or the terms or conditions of admission of a person as a student to the establishment,

(b) the access of a student to any course, facility or benefit provided by the establishment,

(c) any other term or condition of participation in the establishment by a student, or

(d) the expulsion of a student from the establishment or any other sanction against the student.”

1.3 Section 7(3)(c) provides that an educational establishment does not discriminate:

“...where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school.”

1.4 I understand that circa 96% of state funded schools are denominational. The discrimination against children permitted by virtue of section 7(3)(c) is evident in admission policies for publicly funded denominational schools throughout Ireland, but its effects are particularly pronounced in more populous areas where schools are oversubscribed. The practical effects of section 7(3)(c) are as follows:

(a) Discrimination against children in accessing publicly funded schools;

- (b) Children being delayed in accessing their right to free primary education or being forced to commute long distances to schools outside of their locality;
- (c) “Baptisms of convenience” (often against a parent’s conscience);
- (d) Segregation in publicly funded education in Ireland.

1.5 Unlike provisions of the Constitution, which can only be amended on foot of a referendum, section 7(3)(c) is a provision of an Act of the Oireachtas. The Oireachtas may amend section 7(3)(c) in the absence of a referendum.¹ In addition, it is important to note that it would be possible to repeal section 7(3)(c) without interfering with the integrity of the remainder of the Act.

1.6 It is to be expected that the Oireachtas would be cognisant of any competing constitutional rights which may be affected by virtue of any amendment or repeal. For reasons discussed in further detail below, I believe that such a balancing exercise in fact favours the amendment of section 7(3)(c) to remove the ability of schools to discriminate on the grounds of religion in their admissions policies, even taking into account competing constitutional rights.

1.7 The focus of this opinion is addressing the issue of competing rights which may be affected by the repeal of section 7(3)(c). Those competing rights are the most frequently cited obstacles to repealing section 7(3)(c). This opinion will also examine whether the State is obliged to fund educational establishments which operate discriminatory admissions policies.

2. **What has the government’s position been on repealing section 7(3)(c) to date?**

2.1 There have been varying, and sometimes conflicting, messages from different members of the government on this subject. It is therefore very difficult to work out precisely what the government’s stance and legal advice is on this issue. The reluctance of the legislature to remove the ability of State funded schools to discriminate on the grounds of religion in their admissions policies appears to centre on a concern that such a move may impinge on the constitutional right of a denominational school to manage its own affairs and maintain institutions for religious and charitable purposes (a right protected by Article 44.2 5° of the Constitution) and freedom of religion (a right protected by Article 44.2 1° of the Constitution).

2.2 In June 2015, then Minister for Education and Skills, Jan O’Sullivan, said that a referendum would be necessary to end the ability of Church-owned schools to give enrolment priority to children of their own faith. Minister O’Sullivan acknowledged that the Education (Admissions to Schools) Bill 2015 would allow schools to continue giving preference to children of the same religious faith in situations where there are

¹ Article 15.1 2° of the Constitution provides that “The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”

fewer places available than the number of children seeking to enrol in a given year.² While denominational schools are in the minority among newly sanctioned schools in recent years, such new schools are required under agreements with the Department of Education to allow children from a different religious background — or of no religion — within the local area to enrol ahead of children of the school’s faith who are not from the area. Minister O’Sullivan said this is a principle she would like to extend to existing schools, but the legal advice is that the Constitution would not allow her to do so retrospectively.³ In recent weeks, Minister O’Sullivan’s successor, Richard Bruton, stated that “thorny constitutional issues” were delaying the issues presented by section 7(3)(c) being addressed.⁴

- 2.3 On 2 December 2015, Aodhán Ó Ríordáin TD, then Minister of State with responsibility for New Communities, Culture and Equality, took part in a parliamentary debate during which a proposal to repeal section 7(3)(c) was debated. His statement is probably the clearest statement of the government’s advice on this subject thus far. Mr Ó Ríordáin said as follows:

... there are technical reasons this amendment cannot be accepted. I ask the Deputies to allow me the time to give a constitutional angle and the technical reasons for our arguments... The objective of the amendment is to provide for the repeal of the current section 7(3)(c) in its entirety. Section 7 generally prohibits discrimination in respect of the admission policy operated by an educational establishment except where it is a primary or post-primary school operating in an environment which promotes certain religious values. In such circumstances, under subsection 7(3)(c) the school may favour the enrolment of students from a particular religious denomination in preference to others or refuse to admit a student who is not of that denomination. However, any preferential admission policy in this regard is only permitted to the extent it is essential to maintaining the religious ethos of the particular school. The provision reflects the freedom of religion guaranteed in Article 44 of the Constitution as interpreted by the superior courts and, in particular, the right of every religious denomination to manage its own affairs and maintain institutions for religious or charitable purposes. I am advised that deleting this provision would infringe that freedom of religion for religiously run institutions.

...It was argued in the Article 26 referral hearing of the Employment Equality Bill 1996 that what became section 31 contravened the guarantees of freedom of conscience and free profession and practice of religion contained in Article 44.2.1°

² Recent comments by Minister for Education, Richard Bruton, suggest that this Bill will be substantially reworked by the current government: “Scrapping school admissions bill ‘would waste years of consultation’”, Irish Examiner, 2 June 2016.

³ “Public poll needed to end school entry rule”, Irish Examiner, 12 June 2015.

⁴ Speaking on RTE Radio One, Morning Ireland programme, 8 June 2016.

.....and that it contravened the ban on imposing any disabilities or making any discrimination on the ground of religious profession, belief or status. Effectively, not to delay the issue further, the point is that a constitutional issue is at play here. It is not in any way our intention to have a situation persist where children are precluded from attending their local school. It is my firm belief and personal view that the issue at the heart of the education system is that it is one which is dominated by patronage and not child-centred.⁵

- 2.4 While Mr Ó Ríordáin notes that section 7 “generally” prohibits discrimination, this prohibition on discrimination is by no means general in its application to the Irish education system. The section 7 ban on religious discrimination is only applicable to circa 4% of Irish primary schools i.e. the small proportion of schools that are not denominational in character.

3. **The Employment Equality Bill case**

- 3.1 The relevant case law would appear to support the view that to repeal section 7(3)(c), removing the ability of denominational schools to discriminate on religious grounds in their admissions policies, would not be an unconstitutional interference with the constitutional rights of denominational schools.
- 3.2 Article 44 of the Constitution contains an unqualified prohibition on religious discrimination. The Supreme Court has accepted that this precludes all distinctions based upon religious belief, profession or status. Accordingly, a divergence from this guarantee can only arise in circumstances where a potential conflict arises between this provision and another provision of the Constitution. For example, the Supreme Court previously confirmed that distinctions should be made in favour of Jewish congregations arising from the fact that the Jewish Sabbath fell on a Saturday and not a Sunday. Hence, legislation on commercial trading hours exempting Jewish Kosher shops from its ambit was permissible. The Supreme Court found that if a religious discrimination was not imposed, it would obstruct the free practice of religion.⁶
- 3.3 In a subsequent matter involving an Article 26 reference of the Employment Equality Bill 1996 (the **Employment Equality Bill case**) to the Supreme Court, the Supreme Court accepted the above rationale and subordinated the constitutional prohibition of religious discrimination to the guarantee of free practice of religion.⁷ This case surrounded the application of this principle in the context of publicly funded education. This case deserves careful consideration because it appears (from Aodhán Ó Ríordáin’s statement above) that this case is considered by the government as an authority for the proposition that section 7(3)(c) cannot be repealed or amended to end religious discrimination in access to publicly funded schools. In fact, while of assistance, this

⁵ Dáil Debates, vol 899, No.1 (2 December 2015), pg 180-181.

⁶ *Quinn’s Supermarket v Attorney General* [1972] IR 1.

⁷ *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

case is not a blue-print for assessing the constitutional issues in play when considering the repeal of section 7(3)(c). The balancing exercise to take place differs in this context.

3.4 In the Employment Equality Bill case, one of the impugned provisions was section 37 of the Bill. This provision permitted a religious institution to give more favourable treatment, on the religion ground, to an employee or prospective employee, “*where it was reasonable to do so in order to maintain the religious ethos of the institution*”, or to take action, “*which is reasonably necessary to prevent an employee or prospective employee from undermining the religious ethos of the institution*”.

3.5 In assessing section 37 of the Bill, the Supreme Court examined:

(a) the right to earn a livelihood (for example, of teachers applying for a job in a denominational school);

and

(b) the right to freedom from discrimination on the grounds of religion in employment and in access to employment/ equality before the law;

against

(c) the right of free profession and practice of religion (of religious denominations).

3.6 The Supreme Court acknowledged that it is not generally permissible to make any discrimination, or even to make any distinction, between citizens on the grounds of religious profession, belief or status. However, the Supreme Court found, in allowing for discrimination on the religion ground, that the Oireachtas had engaged in a reasonable balancing between the right of free profession and practice of religion on the one hand and the right to equality before the law and the right to earn one's livelihood on the other. The legislative objective behind section 37(1) authorised a form of positive discrimination to afford protection to the religious ethos of various religious denominations, and in so doing, gave effect to Article 44 of the Constitution.

3.7 The Supreme Court found that the provisions enacted represented a reasonable balancing by the Oireachtas between conflicting constitutional principles. They further noted:

“It would therefore appear that it is constitutionally permissible to make distinctions or discriminations on grounds of religious profession belief or status insofar—but only insofar—as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution.” [emphasis added]

4. **Article 44.2 5° - a religious denomination's right to manage its own affairs**

4.1 Article 44.2 5° of the Constitution provides:

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

- 4.2 It is clear that Article 44.2 5° does not restrict the State from imposing a myriad of rules and regulations upon educational establishments who wish to receive public funding (such as those imposed pursuant to the Education Act 1998 and regulations made thereunder). The State can and does set standards with which such establishments must comply. A prohibition on discrimination in access to education should be one such requirement. While legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations,⁸ there is no constitutional impediment to the State requiring that all publicly funded schools cease discriminating on the grounds of religion in their admissions policies. Thus, there are no ‘*thorny constitutional issues*’ at play in this context.
- 4.3 Simply put, nothing in the Constitution obliges the State to fund or continue to fund educational establishments which choose to operate discriminatory admissions policies.
- 4.4 It is interesting to note that while references to Article 44.2 5° of the Constitution have crept into the government’s narrative regarding proposals to repeal or amend section 7(3)(c) (as is evident from Aodhán Ó Ríordáin’s statement above), it was not considered a factor in the balancing exercise performed by the Supreme Court in the Employment Equality Bill case, even though the impugned provision in that case affected denominational educational establishments.

5. **The Equal Status Act 2000 – section 7(3)(c)**

- 5.1 Legislation allowing for religious discrimination in employment was followed by the Equal Status Act 2000, section 7(3)(c) which, as noted above, allowed publicly funded denominational schools to operate discriminatory enrolment policies where necessary to uphold their ethos. The rationale for section 7(3)(c) appears to be that since the Constitution protects freedom of religion, religious schools, even where State funded, cannot be required to limit or restrict the role of their religious ethos in any aspect of their schools and, accordingly, cannot be forced to adopt admission policies which undermine the ethos of the school.
- 5.2 The genesis of the Equal Status Act 2000 was the Equal Status Bill 1997. This Bill was referred to the Supreme Court pursuant to Article 26 of the Constitution and was struck down as unconstitutional.⁹ There was, however, no examination of the provision which would ultimately become section 7(3)(c) in these proceedings. The Equal Status Bill 1999 replaced the Equal Status Bill 1997. This Bill was ultimately enacted as the Equal

⁸ Article 44.2 5° of the Constitution.

⁹ *Re Article 26 of the Constitution and in the matter of The Equal Status Bill, 1997* [1997] 2 IR 387.

Status Act 2000. Accordingly, the constitutionality of section 7(3)(c) has never been tested by the Supreme Court.

5.3 If the constitutionality of the Equal Status Act 2000 was to be tested following an amendment of section 7(3)(c) to remove the ability of State funded schools to discriminate on the grounds of religion in their admissions policies, a different balancing of rights would come into play involving a consideration of, *inter alia*, the following:

- (a) the right to free primary education,
- (b) the right to freedom from discrimination,
- (c) the right to freedom of conscience and to the free practice and profession of religion (of children of no religion and belonging to marginal religions)
- (d) The right to free practice of religion (of religious denominations)

The right to free primary education

5.4 Article 42.4 obliges the State to “provide for free primary education”. This right is undermined if children who are not baptised are denied access to the institutions through which the State almost wholly discharges its obligation to provide for free primary education

The right to freedom from discrimination on the grounds of religion

5.5 This right is protected by Article 44.2 3° of the Constitution.

The right to freedom of conscience and to the free practice and profession of religion (of children of no religion and belonging to marginal religions)

5.6 In a jurisdiction where non-denominational schools are not available to the majority of citizens, the operation of discriminatory admission procedures by publicly funded denominational schools could render the exercise of the right to free practice of religion unfeasibly difficult. Parents belonging to marginal religions or of no religion may, and in practice do, feel coerced into baptising their children in order to gain access to education, even where it is against their conscience to do so. If they do not baptise their children, they are effectively penalised in the sense that their children are refused access to local schools. Penalisation for the choice of one’s religious beliefs is, in my view, contrary to the principle of freedom of religion.

5.7 Proponents of section 7(3)(c) often say that there is no real evidence that baptisms of convenience take place. The following statistics lend quantitative support for the fact that they are, and in large numbers:

- (a) The rate of baptisms in Ireland remains stable and there continues to be a strong correlation between the birth rate and rate of baptisms.¹⁰
- (b) Meanwhile, 33.7% of couples opted for a non-religious marriage ceremony in 2015, a growing trend.¹¹ The rate of church weddings continues to decline year on year. The rate of Catholic marriage ceremonies (in a jurisdiction where circa 90% of schools are Catholic in denomination) has declined year on year as follows for the past 5 years.¹² (see figure below). Also there has been a 20% reduction in Catholic mass attendance rates between 2008 and 2014.¹³

Year	Total number of marriage ceremonies	No of Catholic ceremonies	%
2011	19,855	13,156	66.2
2012	20,713	13,497	65.2
2013	20,680	12,921	62.5
2014	22,045	13,072	59.3
2015	22,025	12,486	56.7

- (c) Circa 90% of primary schools in the State are Catholic
- (d) A report on projected Church trends over the next 15 years prepared by global consultancy firm Towers Watson in 2015 (commissioned by the Catholic Church itself) made the following assumption:

“We have assumed that the annual number of baptisms will remain stable over the period to 2030. It should be noted that some of the strong correlation between baptisms and birth rates is likely to be due to the preference given to children who are baptised when enrolling in Catholic primary schools. If this requirement is removed at any point

¹⁰ “Archdiocese of Dublin, *Projection of position in 2030, a presentation to the Priests Council*” (16 September 2015), Towers Watson: <http://www.dublindiocese.ie/wp-content/uploads/2016/01/Results-meeting-unprotected.pdf> (last accessed 9 March 2016).

¹¹ Central Statistics Office: <http://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2015/> (last accessed 16 June 2016)

¹² *ibid*

¹³ See footnote 10.

prior to 2030, we believe that there is likely to be a decline in the number of baptisms every year.”¹⁴

The right to free practice of religion (of religious denominations)

- 5.8 It was held in the Employment Equality Bill case that religious denominations, in furtherance of their right to religious freedom, may establish institutions for religious and charitable purposes. Such institutions may include educational institutions.¹⁵ Naturally, such schools may espouse a particular religious ethos.
- 5.9 It was also recognised in the Employment Equality Bill case that for many individuals, religious activity derives meaning in large measure from participation, in a collective context, in a larger religious community.¹⁶
- 5.10 Religious denominations may “manage their own affairs” when running educational institutions¹⁷ although it is clear that this is not an absolute right. The Constitution itself provides exceptions to such a right in the context of publicly funded denominational schools. For example, legislation providing State aid for schools shall not be such as to prejudicially affect the right of any child to attend a school receiving public money without attending religious instruction at that school.¹⁸
- 5.11 The State has an obligation to provide for free primary education for all children,¹⁹ however, there is no constitutional requirement on the State to provide for free primary education in a collective context in a denomination of a parent’s choosing. The State cannot be required to build schools in areas where there is no demographic need for such schools simply to facilitate a parent’s wishes in this regard. However, the State must have “due regard” to the rights of parents in matters of religious and moral formation.²⁰

Balance of the above rights

- 5.12 It is my opinion that the above assessment would produce a different outcome in the event of a constitutional challenge than that which was arrived at in Employment Equality Bill case. Such a case would not only address the right of access to education (as distinct from the right to earn a livelihood) and the right to freedom from discrimination on the grounds of religion; there is also a competing right to freedom of conscience and religious freedom of children of marginal religions and those of no

¹⁴ See footnote 10.

¹⁵ *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, pg. 354.

¹⁶ *Ibid*, pg 357-358.

¹⁷ Article 44.2 5° of the Constitution.

¹⁸ Article 44.2 4° of the Constitution.

¹⁹ Article 42.2 of the Constitution.

²⁰ Article 42.4 of the Constitution.

religion to be factored in. There was no such competing right to religious freedom addressed in the Employment Equality Bill case.

- 5.13 The Supreme Court has held that distinctions on the grounds of religion are *only permissible* insofar as it may be necessary to give life and reality to the guarantee of free profession and practice of religion. The Employment Equality Bill case condoned the practice of discrimination in employment practices where it is necessary to maintain the ethos of the school. Can discriminating against children on the grounds of religion in accessing schools ever be *essential* to the maintenance of a school's ethos? It is arguable that teachers are more likely to influence the ethos of a school than the children attending it. In addition, it is difficult to envisage how admission policies that discriminate on the grounds of religion can be considered essential to maintain the ethos of a school where denominational schools have no difficulty admitting students from different religious backgrounds in less populous areas where over-subscription is not a problem. In this context, non-religious students and students of different religions do not appear to be considered a threat to a school's ethos.
- 5.14 A law, the practical effect of which may be to coerce parents to baptise a child against their wishes in order to access education, is a law which embodies a breach of the constitutionally protected right to freedom of conscience. Such a law simultaneously breaches other constitutional rights such as the right to freedom from discrimination. This law can make a child's right to free primary education unfeasibly difficult to achieve in practice, for example, by having to travel long distances to a school outside their locality. While section 7(3)(c) may give life and reality to Article 44 guarantees for some, it tramples upon those same guarantees for others. Accordingly, the distinctions drawn by virtue of section 7(3)(c) are not a proper balance of the competing rights outlined above.

6. Conclusion

- 6.1 The focus of this opinion has been addressing the issue of competing rights which may be affected by legislative action removing the ability of State funded denominational schools to discriminate against children on the grounds of religion in their admissions policies. These competing rights are the most frequently cited obstacle to ending this discriminatory practice. It is my opinion that there is no requirement for a referendum to remove the ability of denominational schools to discriminate in this manner. A proper assessment of competing rights by the Oireachtas could only lead to the conclusion that what section 7(3)(c) gives to some in terms of religious freedom, it takes away from others. When other rights such as the right to freedom from discrimination and the right to education are factored in to this assessment, it is my opinion that section 7(3)(c) constitutes an unjust and disproportionate attack on the rights of those of no religion and those belonging to marginal religions. Distinctions such as those drawn in section 7(3)(c) are only permissible if they give life and reality to the free practice and profession of religion; this cannot be said to be the effect of this provision for parent's engaging in pragmatic baptisms of their children. Therefore, I am of the view that there

would be no constitutional difficulty in repealing section 7(3)(c). I note that the enactment of a limited provision allowing fully private schools that are not in receipt of public funds to operate their admissions policies as they see fit may be considered politically desirable, and would not pose the same constitutional difficulties as the current section 7(3)(c). However, I do not consider that the complete repeal of section 7(3)(c) without replacement would be constitutionally impermissible.

- 6.2 I also make the observation that while building more multi and non-denominational schools would be most welcome to certain families, that alone would not address the current situation created by section 7(3)(c). The pace of school building is in the ordinary course slow and it will be many years before there will be sufficient numbers of schools built to reflect the demographics and trends presented above. In addition, while the high demand for multi-denominational schools is undisputed, I understand that most children and their parents simply want an equal opportunity to attend their local primary school, along with other children from their immediate locality.
- 6.3 The final observation I make is that the extent of over-subscription in Irish schools appears to be a hotly contested subject. A study published in 2009 by the ESRI found that 80% of surveyed schools enrolled all children who presented, while 20% used selection criteria (i.e. 20% of schools were over-subscribed).²¹ A recent and much cited survey conducted by The Irish Catholic claimed that the figure is lower; less than 1.6% of Catholic schools and 5% of Catholic schools in Dublin. I note that the definition of “over-subscription” for the purposes of this survey and the criteria adopted to assess the subscription levels in the schools surveyed were not disclosed in media reports of the survey results. Even taking the survey results on their face, if 5% of Catholic schools in a heavily populated area such as the Archdiocese of Dublin are over-subscribed, and the vast majority of schools in this area are Catholic and discriminate on religious grounds in their admissions policies, the number of families impacted by this discrimination is not small by any means.²²

Michael Lynn S.C.

Law Library

Four Courts

Dublin 7

11th July 2016

²¹ “*Adapting to Diversity, Irish Schools and Newcomer Students*”, ESRI (2009)

²² “*Less than 2% of Catholic primary schools are oversubscribed – survey*”, The Irish Catholic, 11 February 2016: <http://www.irishcatholic.ie/article/less-2-catholic-primary-schools-are-oversubscribed-%E2%80%93-survey>