

Atheist Ireland



To: Tara Kelly
Clerk to Oireachtas Education Committee

5 December 2022

Dear Tara,

As you know, we have been corresponding with your Committee for over two years regarding the constitutional right to not attend religious instruction. You have asked the Minister for Education to respond to our submission and copy you on her response. You have also told us that you will take due cognisance of our submission when you are addressing the issue.

Can you please also:

- Let us know when you envisage addressing the issue.
- Examine and report on the fact that State aid is being unlawfully given to schools that do not meet the constitutional conditions for being allocated that State aid.
- Examine and report on how the Department is administering Constitutional rights under Article 42.1 and Article 42.4 and take in account the findings of the Supreme Court.
- Invite us to meet with your Committee to elaborate on our reasoning.

Since last December we have also been corresponding with the Committee on Public Accounts regarding this aspect of our complaint. That Committee has suggested that we also raise our complaint with your Committee, as the issue involves translating policy and legislation into an administrative scheme (which the Supreme Court in the Burke case has said must comply with the Constitution). Specifically, the Committee on Public Accounts has told us that:

“The Orders of Reference of the Joint Committee on Education, Further and Higher Education, Research, Innovation and Science, which are partially derived from Dáil Standing Order 95(1) provide for it to report to the Dáil on any matter relating to, inter alia:

“legislation, policy, governance, expenditure and **administration** [emphasis added] of — (i) a Government Department”.

Dáil Standing Order 95(3), which is also part of the Orders of Reference of that Committee, provides that:

“The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—
(a) for the accountability of the relevant Minister or Minister of State, and
(b) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.”

As such, policy, legislation, and administration fall within the remit of that Committee.”

In this letter we summarise our correspondence with your Committee to date, and we ask that you take account of the significance of the Burke case at the Supreme Court for the responsibility to administer the law in a way that does not breach the constitutional conditions in the Constitution.

Summary of correspondence so far

1. In Sep 2020 we asked your Committee to to examine a submission and legal opinion on the constitutional right to not attend religious instruction in schools.
2. On 21 August 2021, we wrote to your Committee regarding students not attending religious instruction in schools and a recent anti-abortion video shown in a school.
3. On 14 September 2021, your Committee forwarded our letter to the Secretary General of the Department, and asked him to respond directly to us and to copy his response to them.
4. On 26 November 2021, Martin McLoughlin, Principal Officer at the Department, responded to our letter, and copied his response to the Oireachtas Education Committee.
5. On 17 December 2021, we responded in detail to Mr McLoughlin's letter, explaining how the Department was addressing these issues outside of its Constitutional duties and using key definitions that are different to those determined by the Supreme Court. We copied this response to your Committee.
6. Since December 2022 we have been corresponding with the Comptroller and Auditor General and the Committee on Public Accounts regarding the misuse of public funds by allocating State aid to schools without the constitutional condition of enabling students to not attend religious instruction being met.
7. On 1 November 2022 we sent you an updated Report showing that a sample hundred school admission polices are still not complying with Section 62.7(n) of the Education (Admission to Schools) Act 2018.
8. The Committee on Public Accounts has now suggested that we raise with your Committee the aspect of our complaint that involves translating policy and legislation into an administrative scheme (which the Supreme Court in the Burke case has said must comply with the Constitution).

Complaint to the Comptroller and Auditor General re the misuse of public funds by the Department of Education

Atheist Ireland has made a complaint to the Comptroller and Auditor General regarding the misuse of public funds in relation to state aid affecting prejudicially the right to not attend religious instruction. We have also asked the Public Accounts committee to examine this issue. Article 44.2.4 states that:

“Legislation providing State aid for schools shall not ... be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.”

The text in the Constitution and legislation is to ‘not attend’, which means to not be physically present in the classroom. It cannot mean sitting in the back of the class for two reasons: one, it is not what the wording means, and two, sitting in the back of the class never could and does not incur any cost and therefore has no place in an Article regulating financial aid for schools.

In practice, the Department leaves it up to each school to administer this right. But the purpose behind Article 44.2.4 is to not leave this right up to school or the Department or the Executive to administer as they see fit. Its purpose is to involve the Oireachtas to ensure that State funding does not affect prejudicially the right to not attend religious instruction.

Article 44.2.4 puts a constitutional condition on the Oireachtas in relation to state aid. But the Oireachtas has no way of knowing if the state aid prejudicially affects the right to not attend religious instruction, nor does it even ask questions about the Constitutional condition of state aid. The responsibility for the implementation of that condition is left to the bodies in receipt of that aid and the Oireachtas leaves it at that. The constitutional condition for state aid to schools is rendered meaningless by the failure of the Oireachtas to take responsibility for it.

Article 42.1 and Article 42.4

In the Burke case, the Supreme Court found the Department has a duty to respect the Constitutional rights of parents while translating government policy or legislation into an administrative scheme, and that in administering the Leaving Certificate scheme during covid, the Department had failed to take reasonable account of the Constitutional rights of the Burkes. ¹

The Cabinet decided on the 'policy' in relation to the Leaving Certificate during covid, but it was in administering the scheme where the Constitutional rights of home schooled students were breached. It was the Department of Education that failed to take reasonable account of Burke's constitutionally protected rights when administering the scheme.

We recognise there is choice in how Article 42.1 and Article 42.4 are administered by the Department. However, in administering these rights the Department has failed to take due regard of our Constitutional rights in relation to the religious and moral education and formation of our children and the Supreme Court in the Campaign to Separate Church and State case in 1998.

In addition to the above, Article 42.1 and Article 42.4 impact on the right to not attend religious instruction under Article 44.2.4. We know this because the Supreme Court stated in the Campaign to Separate Church and State case in 1998 the Article 42.1 must be read in the context of Article 44.2.4 (pages 25,26 Campaign case Supreme Court J. Barrington 1998). ²

The Supreme Court in the Burke case also found that the State cannot interfere in the inalienable right of parents under Article 42.1 of the Constitution to provide the religious, moral and social education of their children. Parents have a right to provide religious and moral education to their children at home or in schools recognised or funded by the state (Article 42.2).

Also, Article 42.4 states that the State must have 'due regard' for the right of parents, especially in the matter of religious and moral formation. Parents have a Constitutional right to remove their children from religious instruction under Article 44.2.4 and they have also rights under Article 42.1.

How the Department of Education administers Article 42.1 and Article 42.4 has impacted negatively on our Constitutional rights. Despite our complaints to the Department over the years nothing has changed. Quoting Supreme Court case to the Department in order to get them to change how they administer these rights is ignored.

Section 30-2(e), Section 15-2(e) and Section 6 (a) of the Education Act 1998 reflect the will of the Oireachtas to protect the Constitutional rights of minorities in the education system. It was never the intention of the Oireachtas to ignore the Constitutional rights of minority parents or interfere in the religious and moral education of their children against the wishes of their parents.

The Department of Education have failed to administer Article 42.1 in the context of Article 44.2.4 and to take 'due regard' of our Constitutional rights under Article 42.4. The Supreme Court has said that Article 42.4 accords with Article 41 – the authority of the family.

Yours sincerely,

Jane Donnelly
Human Rights Officer

Michael Nugent
Chairperson

Chris Hind
Teachers Officer

¹ <https://www.teachdontpreach.ie/2022/10/burke-v-minister-for-education/>

² <https://www.teachdontpreach.ie/2019/10/campaign-to-separate-church-and-state-v-minister-for-education-1995/>