

# Atheist Ireland

To: Sarah Cremin  
Committee Secretariat  
Public Accounts Committee



24 May 2022

Dear Sarah,

Thank you for your letter of 17 May about our complaint, and the attached letters that the Department of Education and the NCCA sent to you. You wrote that, at the Committee meeting on 28 April, the Committee did not intend to consider the matter further at that time because the Department was arranging to meet Atheist Ireland.

That meeting has now taken place, at which we have clarified our legal arguments, and the Department has said they need to reflect further on these arguments and come back to the issue. We accept that the Department and NCCA are acting in good faith and will do this. However, the Public Accounts Committee also has an oversight duty to ensure that any constitutional conditions related to the state funding of schools are met.

We are therefore asking you to continue to consider our complaint for the following reasons:

1. Why you should continue to consider our complaint
2. The legal arguments that we presented at the meeting
3. Follow-up to our meeting: what we want to see happen
4. The significance of the Irish language version of the Constitution
5. Conclusion

We would also welcome the opportunity to appear before the Committee to answer any questions you may have about it.

## 1. Why you should continue to consider our complaint

- **The Department and NCCA's letters to you, and your description of our complaint in your letter to us, seem to misunderstand the nature of our complaint. To be clear, our complaint is not challenging the use of public funds for religious instruction, religious education, or religious formation. Nor is our complaint challenging the right of publicly funded schools to their ethos. The Constitution permits all of these things to happen.**
- What we are challenging is the Department of Education's funding of schools that do not abide by the constitutional conditions for that funding (Articles 42.4 and 44.2.4). This includes the inalienable rights of parents for their children to not attend religious instruction/teaching (44.2.4) and the right of parents to decide, and not be told, what type of religious and moral formation and education is in accordance with their conscience (42.4 and 42.1).

- The Department and NCCA wrote their letters to you before we met them, and those letters do not address fundamental aspects of our complaint that we clarified at that meeting. This includes but is not limited to the recent Supreme Court judgment in the *Burke v Minister for Education* case which places constitutional conditions on the Department's administrative schemes, and forbids such schemes from even inadvertently exceeding these conditions.
- We also discussed the Campaign to Separate Church and State case in 1998 which the Court of Appeal in the *Burke* case in 2021 said was binding authority; and the Irish version of the Constitution which takes legal precedence over the English version. Parental rights under the Irish version are far more nuanced and the Supreme Court has upheld these rights in the recent *Burke* case at the Supreme Court.
- The Department concluded by saying we were clear in setting out our legal arguments, and they needed to reflect further on those arguments, including the *Burke* case, and that we would come back to this again. We accept that the people we met are acting in good faith and will do this. However, the Public Accounts Committee also has an oversight duty to ensure that constitutional conditions on state funding are met.

## 2. The legal arguments that we presented at our meeting

Here is the summary of our legal arguments that we presented at the meeting with the Department and the NCCA. We also attach these in the slide format that we used at the meeting.

### 1. *Parents have positive inalienable rights regarding the education of their children*

Article 41.1 and 42.1 “The State recognises the Family as the natural primary and fundamental unit group of Society... The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents...”

Supreme Court, *Burke v Minister for Education, 2022* “The State, in providing for free primary education and in endeavouring to assist post-primary education in various forms [under Article 42.4], [must] have “due regard ... for the rights of parents... This provision reflects a concern for upholding parental authority; a foundational pillar of the Constitution that accords with Article 41 recognising the family as “the natural primary and fundamental unit group of” Irish society.”

### 2. *Nonreligious parents have the same positive rights as religious parents*

Article 44.2.1 “Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”

High Court, *Campaign Case, 1996* [European Convention States] “shall respect the rights of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions...”

High Court, *AB v Children's Hospital Temple Street, 2011* “There is thus no doubt at all but that parents have the constitutional right to raise their children by reference to their own religious and philosophical views.”

### *3. Two constitutional articles place conditions on state funding of schools*

Article 42.4 “The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.”

Article 44.2.4 “Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor 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.”

### *4. The Department has a duty to put in place an administrative scheme that respects these constitutional conditions*

Supreme Court, Burke v Minister for Education, 2022 “Policy... must be turned into an administrative scheme... Any such a scheme must abide by the Constitution. That is the over-arching jurisdiction under which every organ of the State must act... Can there be any more fundamental delimiting of jurisdiction than that which is set down by the Constitution? The Government made no decision to exceed constitutional limits... With the considerable stress of keeping interested parties... within the ark of consideration... the Department of Education devised a scheme which inadvertently exceeded constitutional limits.”

### *5. The Department is misusing public funds by funding schools outside the limits of its constitutional jurisdiction*

Supreme Court, Burke v Minister for Education, 2022 “Article 42.4, in requiring the State to provide for “free primary education”, also places an endeavour, but only that, before the State “to supplement and give reasonable aid to private and corporate educational initiative... An overall saver in the constitutional text is that the State [in providing for and endeavouring to assist education] have “due regard ... for the rights of parents, especially in the matter of religious and moral formation... This provision reflects a concern for upholding parental authority; a foundational pillar of the Constitution that accords with Art 41 recognising the family as ‘the natural primary and fundamental unit group of’ Irish society. Hence, society is built around the family.”

### *6. On the ground, the Department is allowing schools to administer, and forcing teachers to be complicit in, this misuse of public funds*

Supreme Court, Burke v Minister for Education, 2022 “It is of the essence of good administration that the principle must be fairly clear and precise so that, in any given situation, the result should be the same, whether it is administrator A or administrator B who has taken the decision.”

However, on the ground, the Department is allowing schools to make up their own administrative schemes that are outside the limits of the constitutional jurisdiction of the Department and every organ of the State.

And teachers are placed in a conflict of conscience between Section 6 Education Act 1998 (“Every person concerned in the implementation of this Act shall have regard to the following objects... (a) to give practical effect to the constitutional rights of children...”) and Section 37 of the Employment Equality Act, which means that teachers are legally obliged to uphold the ethos of the patron, under threat of dismissal.

### 3. Follow-up to our meeting: what we want to see happen

At the end of our meeting, the Department asked what we want to happen. We sent the Department and the NCCA a follow-up letter in which we said that we want the Department to:

Acknowledge and positively vindicate the inalienable constitutional rights of parents with nonreligious philosophical convictions to parental authority and freedom of conscience.

Acknowledge and positively fulfil your duty to abide by the constitutional conditions of the funding of schools under Articles 42.4 and 44.2.4 by:

- Having due regard to the rights of parents in religious and moral formation, which includes but is not limited to the Department not deciding and announcing for parents what is suitable for their conscience.
- Giving application to the right to not attend religious instruction, which includes but is not limited to the right to physically leave the classroom and either be supervised or given an alternative subject.

Use High Court and Supreme Court judgments when defining constitutional terms, rather than other definitions.

**Put in place an Administrative Scheme or Schemes to implement all the above, that abide by the Constitution and do not exceed constitutional limits.**

Directly ensure that any Administrative Scheme is implemented consistently across schools, and that patron bodies, schools, teachers, or the NCCA, are not permitted to decide how to define and administer constitutional rights and the Department's constitutional duties.

### 4. The significance of the Irish language version of the Constitution

In our follow-up letter to the Department and NCCA, we also elaborated on the significance of the Irish language version of the Constitution, which takes legal precedence over the English version.

Here are some relevant distinctions in the four Articles that we discussed at our meeting. They are from 'Bunreacht na hÉireann: a study of the Irish text', written by Micheál Ó Cearúil and published in 1999 by All Party Oireachtas Committee on the Constitution.

#### *Article 41.1 (inalienable rights of the family)*

- 'All positive law' is expressed as 'aon reacht daonna' or 'any human statute/law'.
- 'Indispensable' is expressed as 'éigeantach', usually translated as 'compulsory'.
- 'To protect' is expressed as 'a chaomhnú', 'to cherish'/'to preserve'.

#### *Article 42.1 (rights of parents in education)*

- The word 'educator' is expressed as 'múinteoir', which means 'teacher'.
- 'To respect' is expressed as 'gan cur isteach ar' ('not to interfere with').
- The phrase 'the religious and moral (etc) education of their children' appears as 'i gcúrsaí creidimh, moráltachta (etc)' which means 'in religious, moral (etc) affairs'.
- 'Religious' and 'moral' are separated by a comma, therefore explicitly treated as separate matters, in the Irish text.

- ‘Education’ appears as ‘Oideachas’. Dinneen’s entry under this headword includes ‘advice, instruction, teaching, education’. DIL translates ‘oidecht’ and ‘oides’ respectively as ‘teaching, training’ and ‘teaching, instruction’.

*Article 42.4 (due regard for rights of parents when funding schools)*

- ‘Endeavour’ is expressed as ‘iarracht a dhéanamh’, ‘make an effort’.
- ‘Corporate’ is expressed as ‘cumannnta’, ‘communal’.
- ‘In the matter of religious and moral formation’ is expressed as ‘maidir le múnlú na haigne i gcúrsaí creidimh is moráltachta’ (‘as regards the formation of the mind in religious and moral affairs’).

*Article 44.2.4 (right to not attend religious instruction when funding schools)*

- ‘Legislation .. shall not discriminate’ is expressed as ‘ní cead’, or ‘it is not permitted to’.
- ‘To affect prejudicially’ is expressed as ‘dhéanamh dochair do’, or ‘do harm to’.
- ‘Attend’ is expressed as ‘A fhreastal’. Ó Dónaill cites ‘an scoil a fhreastal, to attend school’ and ‘freastal ar léachtaí, to attend lectures’ as examples of ‘freastail’, ‘attend’, in the sense of ‘be present at’.
- ‘Religious Instruction’ is expressed as ‘Teagasc creidimh’. ‘Teagasc’ is translated as ‘teaching, instruction’ by Ó Dónaill, who cites ‘teagasc ábhair, teaching of a subject’.

## **5. Conclusion**

The Department of Education should not be left to itself to examine its misuse of public funds. There are constitutional conditions to the funding of schools under Art 42.4 and Art 44.2.4 that are not being recognised by the Department of Education and the NCCA, and the Public Accounts Committee has an oversight role with regard to this.

In their responses to the Public Accounts Committee, the Department and the NCCA did not take on board the Supreme Court judgement in the *Burke v Minister for Education* case which was only in February this year. This found that under Art 42.4, an overall saver in the Constitution is that the state must have due regard for the rights of parents in the matter of religious and moral formation because this provision reflects a concern for upholding parental authority which is a foundational pillar of the Constitution (Art 41) (Para 4 *Burke* Supreme Court).

Also, the Department and the NCCA have never taken on board the Supreme Court judgements in the *Campaign to Separate Church and State v Minister for Education* case in 1998 which also upheld parental rights, and the Court said that Art 42.1 (religious education) must be read in the context of Article 44.2.4 (religious instruction).

At our meeting with the Department and the NCCA it was suggested to us that the Supreme Court was right at the time of the *Campaign* case (when it upheld parental rights) but there could be a different outcome today as things have moved on since 1998. But you can’t just ignore Supreme Court judgments because you think they might have been different today. In any case, the Court of Appeal in the *Burke* case in 2021 (para 171) said that the *Campaign* case is binding authority.

The courts are clear about parental rights. There are constitutional conditions around the funding of schools in order to protect those rights, and those conditions are not being met. This is the essence of our complaint.

And those conditions apply to administrative schemes as well as to policy. The Supreme Court in the *Burke* case said: “Any such a scheme must abide by the Constitution. That is the over-arching jurisdiction under which every organ of the State must act.”

The Supreme Court found that the Department of Education had inadvertently breached the implicit constitutional rights of Burke in putting in place a leaving certificate scheme during Covid. We have a stronger case than Burke because the conditions of the state funding of schools are explicitly written into the Constitution in Articles 42.4 and Article 44.2.4.

The courts have already defined the rights of parents in relation to Religious and Moral Education (Art 42.1), Religious and Moral formation (Art 42.4) and Religious Instruction (Art 44.2.4) and have in the last year upheld these rights. It is not up to the Department of Education or the NCCA to decide for parents what is or is not suitable religious or moral education or formation for their children. It does not matter whether this is delivered through a patron's programme or an NCCA developed programme, and it does not matter what the course is called: parents' rights are inalienable.

Successive Ministers have responded to this issue by saying it is up to each school how they administer the constitutional right to not attend religious instruction. One welcome change at our meeting was that the Department said that, if we brought any cases to their attention they would address them. But this is not enough. The Department is obliged to proactively put in place a scheme that administers constitutional rights equally across all schools. As the Supreme Court said in the Burke case: "It is of the essence of good administration that the principle must be fairly clear and precise so that, in any given situation, the result should be the same, whether it is administrator A or administrator B who has taken the decision."

As citizens we expect the Department of Education to proactively administer these constitutional rights because these rights are also a condition of state funding. The Department of Education has exceeded its jurisdiction by making up definitions of Religious and Moral Education (Art 42.1), Religious and Moral Formation (Art 42.4) and Religious instruction (Art 44.2.4) and funding schools on the basis of those definitions which have no legal standing.

We therefore ask the Public Accounts Committee to continue to consider our complaint regarding the misuse of public funds, and we would welcome the opportunity to appear before the Committee to answer any questions you may have about it.

Yours sincerely,

Jane Donnelly  
Human Rights Officer  
Atheist Ireland

Michael Nugent  
Chairperson  
Atheist Ireland

Chris Hind  
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Atheist Ireland