Atheist Ireland

To: Gerard Coady
Private Secretary to the
Comptroller and Auditor General

8 February 2022

Dear Mr Coady,

This is a follow-up to our complaint from December 2021, which you have sent to the unit responsible for the audit of the Department of Education and NCCA for consideration. On page 16 of our complaint we mentioned that the Burke case at the Court of Appeal had gone to the Supreme Court. We would like you to add this to our complaint now that this case has been decided. The Supreme Court judgment made a distinction between policy and the administration of that policy. It concluded:

> "45… There is a vast gulf between formulating a policy and implementing it… Any such a scheme must abide by the Constitution. That is the over-arching jurisdiction under which every organ of the State must act…
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> "48… There was no decision of Government which has been demonstrated to show any clear disregard of the Constitution. What has been established is an excess of jurisdiction in the departmental scheme through an inadvertent disregard of the rights of the home-schooled under the Constitution."

The main relevance of this to our complaint is that the Constitution and legislation recognise the rights of parents for their children to attend State-funded schools without attending religious instruction. However, the Department of Education has given no practical effect to these rights in schools notwithstanding the fact that the funding of schools is dependent on these rights being vindicated and the fact that it is the Minister who is responsible. That is a misuse of public funds.

Based on the Supreme Court judgment in the Burke case, the Department has a duty to put in place an administrative scheme that respects Constitutional rights, and it cannot go outside that jurisdiction. However, in the case of our complaint, the Department has put in place no guidelines or regulations to do this, and leaves it up to schools to decide for themselves how they administer the rights on which their funding depends.

The White Paper on Education in 1994 envisioned that guidelines would be put in place. It said:

> "A sensitive balance is required between the rights, obligations and choices of the majority of parents and students, who subscribe to the ethos of a school, and those in a minority, who may not subscribe to that ethos, but who do not have the option, for practical reasons, to select a school which reflects their particular choices. In very many instances, the concerns of the parents and students are dealt with successfully, but problems have arisen in some cases. In this regard, the Report on the National Education Convention noted that: 'The dilemmas and challenges posed for policymakers and school authorities require not only dialogue at school level but the development of 'good practice' guidelines by a suitably qualified and representative working party convened by the Department' (p. 33). Such a working party will be convened in the near future."
> https://assets.gov.ie/24448/0f3bff53633440d99c32541f7f45cfeb.pdf

However, no guidelines were developed by the Department of Education in administering these Constitutional rights. Instead, at some stage after this, the Department of Education decided that

it was up to each school how they administered the right to not attend religious instruction despite the fact that public funding of schools was dependent on these rights. The Introduction to the 1999 Primary School Curriculum simply refers to a school being flexible in relation to the constitutional right to not attend. It states that:-

> "It is the responsibility of the school to provide a religious education that is consonant with its ethos and at the same time to be flexible in making alternative organisational arrangements for those who do not wish to avail of the particular religious education it offers."

The Education Act 1998 (Section 6 - a, l, m) obliges every person involved to give practical effect to the Constitutional rights of children, to enhance the accountability of the education system and to enhance transparency in the making of decisions in the education system both locally and nationally. Legislation reflects the fact that in order to administer a Constitutional right practical effect must be given to it. That is the obligation of the Department of Education because the Constitution says it is and so does the Education Act 1998 (Section 30-2(e)) which says that the Minister is responsible.

By contrast, the Department decided to put in place no guidelines in relation to 'not attending' religious instruction. Instead it tries to redefine the terms religious instruction, education, and formation in ways that contradict the Supreme Court in the Campaign case in1998. They have also decided for Atheist, Humanist and secular parents what is suitable religious and moral education and formation for their children despite the fact that the Supreme Court has said that this is the right of parents and that right must be viewed in the context on Article 44.2.4.

Here are relevant extracts from the Supreme Court judgment in the Burke case.

> "6. What is clear is that there is a right derived from the Constitution, and stated in explicit terms, for parents to opt for education at home for their children. That is a simple right, put in simple language, as are all other rights declared in the fundamental law or in consequence thereof… The nature of a fundamental law is to state basic principles which legislation must not infringe; to declare the objectives or ideals which are paramount in guiding decisions that impact on national life; and to define the nature of a stated polity by reference to component parts of government and their interaction. As such, the Constitution of 1937 is simple in its terms but requires thought in its application. Hence, rights in the text may require elaboration and, in their application, are rarely, if ever, so absolute as to be permitted to override the public good or to undermine the true social order which is a core objective set out in the Preamble to our fundamental law."

Our comment: There is a right derived from the Constitution, and stated in explicit terms, for students to not attend religious instruction, it is a condition of state funding. That is a simple right, put in simple language. In addition to that the Supreme Court has said that the right of parents in relation to the education of their children under Article 42.1 and 42.2 must be read in the context of Article 44.2.4. This simple rights require elaboration through law and administration, although it it does not undermine the public good or to social order.

> "10… Administration assumes that there is already in existence a principle and that all the administrator has to do is to establish the facts and circumstances and then to apply the principle. 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. For, in its purest form, administration requires only a knowledge of the pre-existing principle and an appreciation of the facts to which it is being applied; it is an intellectual process involving little discretion. By contrast, policy-making is largely discretionary; the policy-maker must decide, as between two alternatives, the one which he or she considers best in the interest of the community… [taking into] account all of the relevant factors and which factors are relevant is, to a considerable extent, left to him or her."

Our comment: Clearly this requirement is not met, in the context of our complaint, by the Department telling schools that it is up to them how they administer this Constitutional right, then ignoring evidence that the schools are not in fact respecting this Constitutional right.

> "4. It is clear that a right inures to the family under Article 42.1 of the Constitution to be the "primary and natural educator of the child" and the State is required "to respect the inalienable right and duty of parents to provide … for the religious and moral, intellectual, physical and social education of their children." Hence, under Article 42.2, the mother and father of Elijah Burke and Naomi Power were "free to provide this education in their homes or in private schools or in schools recognised or established by the State." But, while under Article 42.3 the State may require, "as guardian of the common good", that "children receive a certain minimum education, moral, intellectual and social" (physical is not mentioned, and the minimum standard required is currently set at school leaver-standard for a 16 year old), the State cannot "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.
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> 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" and "when the public good requires it" towards "other educational facilities or institutions". An overall saver in the constitutional text is that the State, in providing for free primary education and in endeavouring to assist post-primary education in various forms, 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 Article 41 recognising the family as "the natural primary and fundamental unit group of" Irish society. Hence, society is built around the family."

Our comment: The Supreme Court in the Burke case has upheld the rights of parents in relation to the religious and moral education of their children (Article 42.1), and their formation (Article 42.4). In Section 1.2.2 of our complaint on page 6 we have outlined that the Supreme Court in the Campaign case has said that Article 42.1 and Article 42.2 must be read in the context of Article 44.2.4. On page 25 and 26 Justice Barrington stated that:

> "But the matter does not end there. Article 42 of the Constitution acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of the parents to provide for the religious and moral, intellectual, physical and social education of their children.
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> Article 42 S.2 prescribes that the parents shall be free to provide "this education" (i.e. religious moral intellectual physical and social education) in their homes or in private schools or "in schools recognised or established by the State". In other words the Constitution contemplates children receiving religious education in schools recognised or established by the State but in accordance with the wishes of the parents.
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> It is in this context that one must read Article 44 S.2 s.s.4 which prescribes that: "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."
> Campaign to Separate Church and State case, Supreme Court 1998

If you require any further information please let us know.

Yours sincerely,

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Human Rights Officer	Chairperson