Atheist Ireland

To: Sarah Cremin
Committee Secretariat
Public Accounts Committee

cc Comptroller and Auditor General

27 July 2022

Dear Ms Cremin,

Thank you for your letter dated 4 July. We are again asking you to continue examining our complaint.

1. Overview
2. Context
3. Standing Order 218
4. The Education Act 1998 and Admission to Schools Act 2018
5. The Supreme Court in the Burke Case on Policy v Administration
6. The Supreme Court in the Burke Case on Parental Authority
7. The Supreme Court in the Campaign to Separate Church and State Case

1. Overview

In your letter:

(a) You noted that there is ongoing engagement between the Department and Atheist Ireland.
(b) You suggested that the matters raised in our correspondence relate to an interpretation of the Irish Constitution, and said it is not the role of your Committee to adjudicate on such interpretations.
(c) You noted that it is not within your Committee's remit to examine the merits of Government policy that might flow from such interpretations.
(d) You suggested that we might make our enquiry to the Oireachtas Education Committee.

To address these four points:

(a) We are still waiting for the Department of Education to get back to us with a response. We have asked them to do so. However, the Department of Education should not be left to examine itself regarding its misuse of public funds.
(b) We are not asking you to adjudicate on any interpretations of the Constitution because the Oireachtas already funds and upholds the determinations of the Constitution made by the Supreme Court, whose role it is to make such determinations.
(c) We are not asking you to examine the merits of any government policy or indeed of any legislation. We are asking you to examine the failure of the Department of Education to administer Constitutional rights and legislation, with regard to state funding of schools, in accordance with the distinction made between policy and administration by the Supreme Court in the Burke case.
(d) We are also, as you have suggested, raising this issue with the Oireachtas Education Committee. However, it is your Committee's remit to examine those elements of the issue that involve the misuse of public funds.

2. Context

For context, can we recap our previous correspondence before your letter of 14 July.

You wrote to us on 17 May:
- You attached correspondence sent to you by the Department of Education and the NCCA.
- You said that as the Department indicated it was arranging to meet with Atheist Ireland, the Committee does not intend to consider the matter further at this time.

We wrote to you on 24 May:
- We asked you to continue to consider our complaint because:
- We said the meeting with the Department had now taken place, and the Department were reflecting further on our arguments and would come back to the issue.
- We said the Department and NCCA's letters to you, and your description of our complaint, misunderstood the nature of our complaint. We are not challenging the use of public funds for religious instruction, religious education, or religious formation. Nor are we challenging the right of publicly funded schools to their ethos.
- We said what we are challenging is the Department'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).

3. Standing Order 218

With regard to Standing Order 218 in relation to 'policy':

> "11(b) - The Committee shall refrain from— enquiring into the merits of a policy or policies of the Government or a member of the Government or the merits of the objectives of such policies."

Our complaint regarding the misuse of public funds is not based on the merits of policy or the merits of the objectives of such policies. The Oireachtas has passed legislation (Education Act 1998) that reflects the Constitutional rights we refer to. These rights are also reflected in various decisions which the Supreme Court has interpreted and thus are binding authority. These rights are a condition of the state funding of schools.

Our complaint is based on the misuse of public funds in relation to established Constitutional rights under Articles 42.4 and Article 44.2.4, because the Department of Education has failed to put in place an Administrative Scheme to implement legislation that reflects Constitutional rights and the will of the Oireachtas.

To repeat, we are not asking you to adjudicate on any interpretations of the Constitution. We are relying on determinations of the meaning of the Constitution made by the Supreme Court, whose role it is to make such determinations, and which are in turn reflected in legislation, the merits of which we are not asking you to enquire into.

4. The Education Act 1998 and Admission to Schools Act 2018

Here are sections of these Acts relevant to our complaint:

- Section 6(a) of the Education Act 1998 states that every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act:
  (a) To give practical effect to the constitutional rights of children,
  (l) to enhance the accountability of the education system, and
  (m) to enhance transparency in the making of decisions in the education system both locally and nationally.

- Section 7-2(a) of the Act says that one of the functions of the Minister is to provide funding to schools.

- Section 7-2(b) of the Act says that one of the functions of the Minister is to monitor and assess the efficiency and effectiveness of the education system having regard to the objects provided for in Section 6 of the Act.

- Section 7-2(e) of the Act says that one of the functions of the Minister is to perform such other functions as are specifically provided for by this Act or any other enactment.

- Section 7-2(f) of the Act says that one of the functions of the Minister is to do all such acts and things as may be necessary to further the objects for which this Act is enacted.

- Section 15-2(b) of the Act obliges Boards of Management to act in accordance with any Acts of the Oireachtas.

- Section 15-2(d) of the Act obliges Boards of Management to publish the policy of the school regarding admission and participation in the school … having regarding to the characteristic spirit of the school and the constitutional rights of all persons concerned are complied with.

- Section 15-2(e) of the Act obliges Boards of Management to have regard to the principles and requirements of a democratic society and have respect and promote respect for the diversity of values, beliefs, traditions, languages and way of life in society.

- Section 30-2(e) of the Act obliges the Minister to not require any student to attend instruction in any subject which is contrary to the conscience of the parents of the student.

- Section 62-7(n) of the Education (Admission to Schools) Act 2018 obliges Boards of Management to put in their Admission Policies the arrangements for students that do not attend religious instruction. Schools have just ignored this obligation.

Our complaint does not involve challenging the merits of any of these articles of legislation. What we are raising is the failure of the Department to put in place an Administrative Scheme (not a policy) that respects these articles of legislation and the Constitutional rights (as determined by the Supreme Court) that these articles reflect.

In practice, the Minister leaves it up to each patron body, school, principals and teachers to interpret the legislation according to their own views or ethos, when the Oireachtas had said that it is the Minister's duty and these rights are based in the Constitution.

The Oireachtas recently put in place the Education (Admission to Schools) Act 2018. Under Section 62-7(n) the Oireachtas referred to 'not attending' religious instruction. They did not put 'opt out' or 'not participate'. They clearly understood that the right is to 'not attend'. Yet no supervision is provided by schools, and therefore the right is given no practical application. Schools tell parents that it is the Department of Education that has failed to give them enough resources to provide supervision outside the religious instruction class.

In what other area are mainly private bodies given state funding that has Constitutional conditions attached that are reflected in legislation, and then told they can interpret those conditions and implement the rights that flow from them without any Administrative Scheme that respects those conditions of funding? No boundaries and objectives that reflect the Supreme Court cases are taken on board. These issues are not the affairs of schools but are Constitutional conditions for the funding of schools (Section 7–4(iv)) and are the duty of the Minister for Education to administer.

Making this point does not threaten the ethos of a school. It merely requires the school to act in accordance with the constitutional conditions of its funding.

5. The Supreme Court in the Burke Case on Policy v Administration

Since our original complaint, the Supreme Court has clarified the differences between policy, law, and administration. We quote sections of the Burke case below which support that the basis of our complaint is not about the merits of policy, but about the failure of the Department to put in place an Administrative Scheme that respects the rights of parents in the Constitution and the Education Act. We have already written to the Comptroller and Auditor General with regard to this decision of the Supreme Court.

The Supreme Court in the Burke stated that:

> "7. Similar to the text of a fundamental law, Government decisions, as the exercise of the high authority of the State as the driver of policy, tend to be short: that a strategy is to be followed to some end, that a scheme for redress is to be established, that a treaty should be ratified, that legislation be prepared to address an issue, that a local community should have improved roads or transport services. Naturally, such decisions are reached on the basis of debate and research but the actual conclusion to go one way or another on a range of possible options is typically recorded tersely. That differs from legislation, which may implement or fully realise a policy. Thus legislation requires considerable detail. With a decision, the Government is politically answerable and with legislation the assent of a majority of elected representatives is required.
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> Legislation must pass through the Oireachtas and, in contrast to a decision of Government, is, by its nature, detailed, perhaps supplemented by subsidiary elaboration through delegated authority where boundaries and objectives can properly be derived from the primary text; Bederev v Ireland [2016] IESC 34, [2016] 3 IR 1. Taxation, having no equity, meaning a background of already accepted law, is required to address all essentials. Logistics and specifics characterise legislation which sets up new bodies, for instance to enforce rights or promote obligations derived from international treaty commitments.
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> Administrative schemes are similar as to the level of detail. These are established either in consequence of legislation or through a decision of the Government, and address entitlements; who is within a scheme and on what conditions and subject to particularised qualifications. Both legislation and administrative schemes must, by nature, contain sufficient detail in the way of technicality and logistics as to define application and entitlement. In stark contrast, since under Article 28 the Government acts as a collective of 15 Ministers in exercising the executive power of the State and is answerable to Dáil Éireann, governmental decisions would typically be ones of principle as opposed to detail."

> "45.Policy, however, as declared by Government, must be turned into an Administrative Scheme. There is a vast gulf between formulating a policy and implementing it. Here, that was traversed swiftly. Any such a scheme must abide by the Constitution. That is the over-arching jurisdiction under which every organ of the State must act. Reverting to a consideration of judicial review of administrative action, as analysed above, that edifice of law rests on a foundation of jurisdiction. Can there be any more fundamental delimiting of jurisdiction than that which is set down by the Constitution?
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> The Government made no decision to exceed constitutional limits. That decision does not even mention the home-schooled. The implementation of that scheme by the Department of Education pursued that legitimate government policy through a detailed scheme in such a way, however, as interfered with home-schooling by not providing an avenue of assessment for those home-schooled which approximated with what was open to those at second level schools. With the considerable stress of keeping interested parties, including parents, administrators and teachers, within the ark of consideration, and pursuing the possible while faced by a close-to impossible situation, the Department of Education devised a scheme which inadvertently exceeded constitutional limits.
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> By implementing a scheme which, while understandably, addressed the majority of considerations in a way which respected the integrity of substituting the Leaving Certificate,

left those who were home-schooled with no possibility of advancing to third level education in 2020, the Department acted outside what the Constitution required. Thus, applying an analysis derived from administrative law, this was not a decision as to an existing scheme but the administration seeking to do what seemed possible to implement a governmental decision. Hence, the Department of Education derived an entirely new scheme based on a valid governmental policy and which required a new tier of administrative arrangement to implement. That scheme, however, left the home-schooled outside of the range of assessment for achieving a grade to progress to third level education in 2020. That was not constitutionally permissible. Hence the departmental scheme exceeded jurisdiction."

10. There is no doubt, however, that a government can administer through Cabinet decisions and that not all decisions of Government are an exercise of the executive power of the State through Article 28.2. Hogan, Morgan and Daly, Administrative Law in Ireland (5th edition, Dublin, 2019) 2, in describing administrative action, usefully sets out criteria whereby resolutions of policy may be contrasted with the kind of administrative decisions which are amenable in the ordinary way to judicial review. These distinctions focus on the nature of a governmental decision, of its essence a matter of policy and hence the pursuit of an ideal, in contrast to the precision which should be presented to an administrator who is left to apply the scheme to individual circumstances,

thus: 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."

In this context, our complaint about the misuse of public funds is based on the failure of the Department of Education to put in place an Administrative Scheme that reflects the Education Act 1998, because the Constitution makes the funding of schools conditional on these rights being given practical application.

6. The Supreme Court in the Burke Case on Parental Authority

The Supreme Court in the Burke Case stated that:

"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."

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."

In the Court of Appeal in the Burke case, the court stated that:

> "In Crowley v. Ireland [1980] I.R. 102, a case involving the effects of an industrial dispute on the ability of certain primary children to attend school, O'Higgins C.J. stated: "[11] However, the imposition of the duty under Article 42, s. 4, of the Constitution creates a corresponding right in those in whose behalf it is imposed to receive what must be provided. In my view, it cannot be doubted that citizens have the right to receive what it is the State's duty to provide for under Article 42, s. 4."
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> "165. O'Higgins C.J. gave a minority judgment in that case but, giving the majority judgment, Kenny J. also stated that the effect of Article 42 was that each child in the State has a right to receive a minimum education, moral, intellectual and social. In Sinnott v. Minister for Education, the Supreme Court confirmed that the right to free primary education was limited to children. In doing so the Supreme Court, in the various judgments delivered, interlinked the right to education set out in Article 42.4 with the balance of the provisions set out in the Article, which refer to family, parental rights and duties and children's rights."

The Supreme Court in the Burke case (Charleton) found the following in relation to Article 42.1 and also Article 42.4: that an 'overall saver' in the constitutional text in relation to the funding of schools was that the state must have due regard for the rights of parents in relation to religious and moral formation.

The Education Act already recognises this obligation, in Section 6(a), Sections 15-2(b), 15-2(d) and 15-2(e). Section 15-2(d) oblige all those concerned with the implementation of the Act to give practical effect to the constitutional rights of children.

The Oireachtas has always recognised the Constitutional rights of parents and their children in relation to religious and moral education, formation and instruction but unfortunately the Department of Education has failed to put in place an Administrative Scheme to reflect the will of the Oireachtas notwithstanding the fact that the Department still provides funding to recognised schools.

The Supreme Court found in the Burke case that the Department of Education and the Minister had failed to implement a Cabinet policy in relation to the Leaving Certificate. The Department of Education had inadvertently disregarded the rights of home schooled children under the Constitution, by failing to administer the policy of the Cabinet. Our complaint centres on the similar failure of the Department of Education to put in place an Administrative Scheme (not a policy) that reflects the Constitution, and also the will of the Oireachtas as expressed in the Education Act 1998, with regard to the Constitutional conditions for funding schools.

7. The Supreme Court in the Campaign to Separate Church and State Case

In the Campaign to Separate Church and State case in the Supreme Court in 1998, in relation to Article 42 and Article 44.2.4, Justice Barrington stated that:

> "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 of provide for the religious and moral, intellectual, physical and social education of their children. 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. (page 25) It is in this context that one must read Article 44 S.2 s.s.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."

Justice Barrington in the Campaign to Separate Church and State case found that, in funding Catholic Chaplains, the State was helping parents with the religious education of their children in Community and Comprehensive schools. This was sanctioned under Article 42 and Article 44 of the Constitution and Justice Keane said that it was also sanctioned by Article 42.4 of the Constitution.

Justice Barrington went on to say that parents have the same right to have religious education provided in the schools which their children attend. Parents were not obliged to merely settle for religious instruction in schools, and the role of the Chaplain is to help to provide this extra dimension to the religious education of the children in the general atmosphere of the school outside the religious instruction class.

Barrington said that parents have inalienable rights in relation to the religious and moral education of their children. He found that any religious education must be in accordance with the wishes of parents, and that Article 42 must be read in the context of Article 44.2.4, the right to not attend religious instruction. He also said that it was constitutionally impermissible for a Chaplain to instruct a child in a religion other than its own without the consent of their parents.

The state funds Catholic Chaplains in Community and Comprehensive schools and designated Community Colleges. It costs approx €10 million per year and is sanctioned by Article 42, Article 44, and Article 42.4. of the Constitution. The courts are quite clear that Article 42.1 must be read in the context of Article 44.2.4, the right to not attend religious instruction. The State has also funded the development and delivery of syllabus Religious Education to help parents with the Religious Education of their children.

So it is not a matter of interpretation and adjudication on such interpretations because the Oireachtas already recognises and has due regard for the rights of parents under Article 42.4 of the Constitution, and the Department implements that through an Administrative Scheme that funds Catholic Chaplains to help parents with the Religious Education of their children under Article 42.1.

The same principle applies to the requirement for an Administrative Scheme to give practical application to our parental rights under Article 42.4 and Article 44.2.4. You do not need Constitutional interpretation to conclude that we should also have these constitutional rights and that they are a condition of state funding. It is not a matter of the Committee not recognising these rights and duties as the Oireachtas has already legislated for them.

In our complaint we have set out case law that clearly shows that parents from minority religious backgrounds and parents with nonreligious philosophical convictions have the exact same right to freedom of conscience and parental rights as parents from a majority religious background. The Supreme Court is quite clear about that, and the Oireachtas has always recognised this and legislated for it.

The Supreme Court has just again determined 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. 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 uphold parental authority; a foundational pillar of the Constitution that accords with Article 41 recognising the family as "the Natural primary ad fundamental unit group of" Irish society (Section 4 - Burke case at Supreme Court).

The Taoiseach Micheál Martin was Minister for Education in 1999, and he was also very clear that the basis for Section 30-2-(e) of the Education Act 1998 and also Section 15-2(e) were in Articles 42 and Article 44 of the Constitution. The Supreme Court has just again upheld these rights in the Burke case. This is what Minister Martin said in the Dail just before Section 30 of the Education Act 1998 was enacted.
https://www.oireachtas.ie/en/debates/debate/dail/1999-02-16/212/

> "The constitutional and legal rights of students to attend schools without attending classes in religious instruction is beyond doubt. Article 44.2.4 of the Constitution provides, among other provisions, that legislation providing for State aid for schools shall not affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. This provision is supported by other constitutional provisions, notably Article 42 relating to the primary role of parents as the educators of their children and their rights in respect of any violation of their conscience.
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> These constitutional guarantees are supported by statutory provisions enacted both before and after the adoption of the Constitution. Section 7 of the Intermediate Education (Ireland) Act, 1878, provides for the withholding of State funding from schools where pupils receive religious instruction which has not been sanctioned by the parents or guardians of a pupil. This provision is given a modern restatement and support in the Education Act, 1998. Section 15 of the Act requires school management authorities to have regard to the principles and requirements of a democratic society and have respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society.
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> In addition, section 30(2)(e) provides that the Minister for Education and Science, in prescribing the curriculum for schools shall not require a student to attend instruction in any subject which is contrary to the conscience of his or her parent or of the student where he or she is 18 or over. Both of these provisions will come into effect in the near future when I make a commencement order in respect of the sections in which they are included, after necessary planning and consultation has been completed."

Yours sincerely,

Jane Donnelly	Michael Nugent	Chris Hind
Human Rights Officer	Chairperson	Teachers Officer