

# Discrimination on the ground of religion and freedom of religion rights in education

Irish Human Rights and Equality Commission



## About “Your Rights”

“Your Rights” is a service operated by the Irish Human Rights and Equality Commission (“**IHREC**”) to provide individuals with information in respect of their rights and remedies that may be available should they believe they have suffered a breach of equality and/or human rights law in Ireland. IHREC can only provide information through this service, and cannot provide advice or comment on individual cases. This is not a legal document and it is not a substitute for legal advice.

## Disclaimer

The contents of this document are provided for information purposes only and do not constitute a legal analysis of any individual’s particular situation. While we seek to ensure that the information provided is accurate and up to date, it is not a legal interpretation of the law and should not be relied on as such. For any professional or legal advice, all individuals should consult a suitably qualified person.

Published by the Irish Human Rights and Equality Commission.

Copyright © Irish Human Rights and Equality Commission 2023

The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

## Equality and Discrimination Law

The **Equal Status Acts 2000 to 2018** (“the ESA”) prohibit discrimination on ten specific grounds in the provision of goods and services, obtaining or disposing of accommodation and in relation to educational establishments.

### What is discrimination?

In Irish law, discrimination will be found to occur where a person (who has a protected characteristic) is treated less favourably than another person (who does not have the protected characteristic) is, has been, or would be treated in the same or similar situation.

The ten protected grounds of discrimination covered by the ESA are:

- gender;
- civil status (e.g. marital status or civil partnership);
- family status (e.g. parental and caring responsibilities);
- sexual orientation;
- religion;
- age;
- disability;
- race (including colour, nationality, or ethnic or national origins);
- membership of the Traveller community;
- housing assistance (in relation to the provision of accommodation services).

Only the first nine grounds are relevant in relation to educational establishments.

Discrimination in the context of education on the ground of religion comes with the remit of the ESA. The ESA contains particular provisions relating to schools in sections 7 and 7A.

### Religious discrimination in education

Discrimination by schools on the basis of a child or their parent’s religious belief is generally prohibited by the ESA, though there are some circumstances in which schools are permitted

to take into account religious belief in making decisions. ‘**Religious belief**’ in this context includes religious background, outlook or no religious belief.

There are two types of discrimination dealt with by the ESA:

- **Direct discrimination** on the religion ground occurs where a person is treated less favourably than another person is, has been or would be treated in a comparable situation, on the grounds that they have a different religious belief.
- **Indirect discrimination** on the religion ground may also occur where an apparently neutral provision puts a particular disadvantage on people with a particular religious belief, unless the provision is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

## Discrimination in admissions to schools

In general, schools are prohibited from discriminating on the basis of religion when offering school places, drawing up or implementing their admissions policies.

**Section 7(2)(a) of the ESA provides that:**

“An educational establishment shall not discriminate in relation to – the admission or the terms or conditions of admission of a person as a student to the establishment”.

However, until recently schools with a religious ethos were permitted to prioritise children of certain religious beliefs over others (by the former section 7(3)(c) of the ESA). In Ireland, almost all primary schools (89%) have a Roman Catholic ethos. This resulted in substantial difficulties for non-religious and minority religion families in securing school places for their children, a problem sometimes known as the “baptism barrier”. Even though the majority of schools are publicly funded, i.e. paid for by the State, they are operated by a school patron, which is often a religious body or, less frequently, a multi-denominational patron such as Educate Together.

The law was amended in 2018 (by the Education (Admission to Schools) Act 2018) to prohibit religious discrimination in admissions to schools in most cases. Section 7(3)(c) was amended so as to remove the exemption for primary schools to prioritise children based on

religious denomination. The ESA therefore no longer allow the vast majority of schools to give religious preferences in relation to school places.

## Can any primary schools base admissions on religious grounds now?

While amendments to the ESA in 2018 generally prohibited religious discrimination in admissions to primary schools, an exception was made in respect of minority religions. Section 7A(2) of the ESA now allows a primary school that provides religious instruction or education of a minority religion ethos to give priority to the admission of a student of the same or similar minority religion.

A 'minority' religion means a religion whose membership comprises no more than 10% of the population. As the vast majority of post-primary school patrons in Ireland have a Catholic ethos, only a small number of schools can rely on the minority religion exception to give religious preference in school admissions. Those minority religion schools that can still prioritise on religious grounds cannot rank students based on their particular religious denomination unless the school is oversubscribed.

In addition to the minority religion exemption, section 7(3)(ca) continues to allow any school with a religious ethos to *refuse to admit* a child (as opposed to prioritising one child over another) where the child is not of a particular religious denomination and it is proved that the refusal is essential to maintain the ethos of the school. In practice, the power to refuse to admit is rarely exercised, and in order to rely on this provision a school would have to be able to provide proof that admitting the particular student would undermine the ethos of the school.

The effect of the 2018 amendments to equality law is that the vast majority of primary schools are no longer permitted to prioritise children on the basis of religion. These schools can no longer operate admissions policies that categorise and prioritise children based on religious denomination, nor can they require a baptismal certificate or equivalent as a condition for admission. If a primary school operates an admissions policy or makes a decision on admission which breaches these rules, a complaint can be made to the Workplace Relations Commission ('WRC') under the ESA.

## If a person believes they have been subjected to unlawful discrimination, how and where can they seek redress?

If a primary school operates an admissions policy or makes a decision on admission which breaches these rules, a complaint can be made to the Workplace Relations Commission ('WRC') under the ESA. Information in respect of the procedures in place at the WRC and what is involved in submitting a claim can be found [here](#).

In addition to taking a complaint to the WRC under the ESA where an admissions decision appears to breach equality law, a refusal of a school place can also be appealed under section 29 of the Education Act 1998. Section 29(1) provides that where a board of management of a school or its representative (a) permanently excludes a student from a school, (b) suspends a student from attendance at a school (c) refuses to enrol a student in a school, or makes another designated decision, the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may appeal that decision to the Secretary General of the Department of Education. Where a board refuses to enrol a student in a school, the parent or the student must first follow any appeal procedures provided by the school or patron and, having done so, may appeal the decision to the Secretary General of the Department of Education. The appeal is heard by a committee appointed by the Minister for Education.

The IHREC recommends that you seek legal advice before instituting a claim under the ESA or an appeal under section 29 of the Education Act 1998.

## Can secondary schools prioritise children based on religion?

Post-primary schools are not affected by the 2018 amendments, so section 7(3)(c) of the ESA continues to permit these schools to prefer some children over others based on religion. Such decisions are exempted from the meaning of discrimination under the ESA, so a complaint cannot be made in respect of them.

# Compatibility of sections 7 and 7A of the ESA with the Constitution and the European Convention on Human Rights

## Constitutional right to equality

Article 40.1 of the Constitution provides that all citizens shall, as human persons, be held equal before the law. Article 44.2.3° also contains a specific prohibition on religious discrimination.

It states:

“The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.”

This makes religion the only ground on which discrimination is specifically banned in the Constitution. However, the right to freedom from religious discrimination has to be balanced with the constitutional protection of the free profession and practice of religion.

*Quinn’s Supermarket v Attorney General* [1972] IR 1, page 24 (Judgment of Mr Justice Walsh, Supreme Court of Ireland):

“If, however, the implementation of the guarantee of free profession and the practice of religion requires that a distinction should be made to make possible for the persons professing or practicing a particular religion their guaranteed right to do so, then such a distinction is not invalid having regard to the provisions of the Constitution. It would be completely contrary to the spirit and intendment of the provisions of Article 44, s 2, to permit the guarantee against discrimination on the ground of religious profession or belief to be made the very means of restricting or preventing the free profession or practice of religion.”

In the case of *McGrath and Ó Ruairc v Trustees of Maynooth College* [1979] ILRM 166, (Judgment of Chief Justice O’Higgins, Supreme Court of Ireland), the constitutional protection of freedom of religion was held to allow for the dismissal of two college lecturers as a consequence of their laicisation and public disagreement with Catholic teachings (see also *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 upholding religious discrimination in employment with the aim of protecting schools’ religious ethos).

## Right to freedom of religion

Article 44 of the Constitution undertakes to protect religion. Article 44.2.1° protects freedom of conscience and the free profession and practice of religion. Freedom of conscience means that everyone is free to choose their own (and their children's) religious beliefs, and that nobody should be coerced into joining a particular religion in order to avail of education.

Those without a religion are entitled to invoke the protection of Article 44.2.1° even though they are not being hindered in the profession and practice of "a religion". "Freedom of conscience" was interpreted by the Supreme Court in the case of *McGee v Attorney General* [1974] IR 284 to mean conscience in a religious sense.

Walsh J said that the right refers to:

"conscience so far as the exercise, practice or profession of a religion is concerned."

However, Walsh J made it clear that once the issue concerns a question of religious beliefs, both believers and non-believers would be protected equally. He said that:

"[T]he meaning of s. 2, sub-s. 1, of Article 44 is that no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned and, subject to public order and morality, is free to profess and practise the religion of his choice in accordance with his conscience.

Correlatively, he is free to have no religious beliefs or to abstain from the practice or profession of any religion."

The ability of schools to prioritise some children over others on religious grounds posed more of a problem in terms of freedom of religion when the vast majority of schools were permitted to do so. This made it difficult for some parents to enjoy freedom of religion without risking interference with their children's education. Whether the power of minority religion primary schools and post-primary schools to prioritise students based on religion is compatible with the constitutional right to freedom from religious discrimination has not been tested.



## What can a person do if they believe a law relating to religion in schools (or part thereof) is unconstitutional?

If a person believes that a law, for example section 7(3)(c), section 7(3)(ca) or section 7A of the ESA, is unconstitutional, they can institute legal proceedings seeking for the High Court to declare that the law or parts thereof are unconstitutional and therefore invalid and should be struck down.

In order to have “legal standing”, or the right to take such a case, a person must be able to demonstrate that they are, or may be, prejudicially affected (in other words negatively impacted or injured) by the operation of that law.

*East Donegal Co-operative v The Attorney General* [1970] IR 317, page 333 (Judgment of Mr Justice O’Keeffe, High Court of Ireland):

A person “[w]ho may possibly be prejudicially affected by the operation of a statute which is unconstitutional, need not wait until what he apprehends may happen has in fact happened before bringing proceedings to have the statute declared repugnant to the Constitution.”

The burden of proof, in other words the responsibility of proving that the legislation is unconstitutional, is on the person who institutes a claim challenging the legislation. If a person believes there may be a basis to challenge any legal provision relating to religious discrimination in education, the IHREC recommends that they seek legal advice prior to instituting proceedings.

## What does the European Convention of Human Rights (ECHR) provide in relation to religious discrimination in education?

The ECHR also protects the right to freedom of thought, conscience and religion in Article 9, and the freedom from discrimination in the enjoyment of Convention rights in Article 14.

## What can a person do if they believe a law relating to religion in schools (or part thereof) is incompatible with the ECHR?

The position is similar in respect of a challenge to legislation on the basis that it is incompatible with the ECHR. The ECHR was incorporated into domestic law by the enactment of the ECHR Act 2003. Section 5 of the ECHR Act 2003 provides the High Court with the power to declare that an Act of the Oireachtas or a section of it is incompatible with the ECHR. The effect of the High Court making such a declaration is slightly different as compared to the procedure that follows the High Court declaring that legislation does not conform to the requirements of the Constitution. When the High Court declares that legislation is not compatible with the ECHR, it has no impact on the future operation or enforcement of the legislation. Instead, when such a declaration is made, the Taoiseach brings a copy of the Order of the High Court making such declaration to the Oireachtas within a period of 21 days, and the Oireachtas then makes a decision in respect of what course of action to take thereafter.

If a person believes there may be a basis to challenge the said legal instruments on the ground that they are incompatible with the ECHR, the IHREC recommends that they seek legal advice prior to instituting proceedings.

## Attendance at religious instruction

### The Education Act 1998

Children have a right not to attend religious instruction against their parents' wishes. Section 30(2)(e) of the Education 1998 provides that a child shall not be required to attend instruction in any subject which is contrary to the conscience of their parent (or the child where they are over 18).

#### Section 30(2)(e), Education Act 1998:

“The Minister for Education “shall not require any student to attend instruction in any subject which is contrary to the conscience of the

parent of the student or in the case of a student who has reached the age of 18 years, the student.”

The IHREC is aware that in practice, the manner in which the right to “opt out” of religious instruction in schools with a religious ethos can sometimes give rise to difficulties for parents and children, for example where requests to opt out are not respected, where indoctrination occurs contrary to the parent’s preference, where participation is exempted but attendance in the classroom during religious instruction is still required, where faith formation is integrated throughout the school day, where students feel penalised or alienated due to non-participation in religious instruction, etc.

Some limited reform has occurred in an attempt to address difficulties for the growing number of families who do not share the religious ethos of the child’s school.

Section 62 of the Education (Admissions to Schools) Act 2018 now requires schools to set out in their admissions policies the arrangements to be made for children to opt out of religious instruction. However, the section does not specify the substantive requirements of such arrangements, for example that a child must not be required to remain within the classroom during religious instruction, timetabling to accommodate opting out, etc. It does require that a child’s school day is not shorted due to non-participation in religious instruction, but does not require any particular educational content to be delivered during the relevant time.

#### Section 62(7)(n), Education (Admission to Schools) Act 2018

“(7) An admission policy shall—

...

(n) provide details of the school’s arrangements in respect of any student, where the parent of that student, or in the case of a student who has reached the age of 18 years, the student, has requested that the student attend the school without attending religious instruction at the school (which arrangements shall not result in a reduction in the school day in respect of the student concerned)”

## Constitutional rights engaged

Where a child attends a school with a religious ethos different to their own or their parents' and are not provided with an effective alternative to attending and participating in religious instruction, a number of constitutional and ECHR rights may be affected.

The Constitution protects the right to freedom of religion and freedom of conscience.

### Article 44.2.1°, Constitution of Ireland:

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

Freedom of conscience protects the right not only to practice a particular religion but equally the right not to practice any religion.

*McGee v Attorney General* [1974] IR 284, page 316 (Judgment of Mr Justice Walsh, Supreme Court of Ireland):

“[T]he meaning of s. 2, sub-s. 1, of Article 44 is that no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned and, subject to public order and morality, is free to profess and practise the religion of his choice in accordance with his conscience. Correlatively, he is free to have no religious beliefs or to abstain from the practice or profession of any religion.”

The Constitution also guarantees the right of parents to choose their children's religion. The Constitution recognises the family as the “primary and natural educator of the child” and therefore vests decisions as to a child's religious education in the hands of his/her parents, not his/her school, until the child is old enough to choose his/her own beliefs.

### Article 42.1, Constitution of Ireland:

**“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 to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”

The Constitution also specifically recognises the right of any child to attend a publicly funded school without attending religious instruction.

Article 44.2.4°, Constitution of Ireland:

“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.”

Combined, these rights require that a child is not subjected to attending religious instruction in a particular religion against their wishes or their parents’ wishes.

## ECHR rights engaged

The ECHR also protects the right to freedom of thought, conscience and religion (Article 9), and, in Article 2, Protocol 1, specifically protects the right of parents to ensure their children are educated in accordance with their beliefs.

Article 2, Protocol 1, ECHR

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

The European Court of Human Rights (ECtHR) has interpreted Article 9 and Article 2, Protocol 1, as requiring that religious education is delivered in an:

“objective, critical and pluralistic manner”.

*Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-1980) 1 EHRR 711, page 730-731  
(Judgment of European Court of Human Rights):

“The second sentence of Article 2 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.”

Where a religious education programme does cross over the line from objective education into doctrinal instruction or indoctrination, states must allow children to opt out of such instruction in order to comply with Article 2, Protocol 1. Furthermore, this right to opt out has been interpreted as requiring an *effective* opt out procedure that provides a real and meaningful alternative to attending the religious instruction programme, and does not place an unduly heavy burden on parents seeking to opt out.

*Folgerø v Norway* (2008) 46 EHRR 47, page 1192 (Judgment of European Court of Human Rights)

“[T]he Court finds that the system of partial exemption was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such requests. In certain instances, notably with regard to activities of a religious character, the scope of a partial exemption might even be substantially reduced by differentiated teaching. This could hardly be considered consonant with the parents' right to respect for their convictions for the purposes of Art.2 of Protocol No.1 , as interpreted in the light of Arts 8 and 9 of the Convention. In this respect, it must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective”.”

The ECtHR has also held that a child must not be penalised for the exercise of the right to opt out, for example by not giving a mark in school reports for ‘religion/ethics’ to a child who was opted out of the school’s religious instruction programme (*Grzelak v Poland* App No 7710/02, ECtHR, 15 June 2010).

## If a person believes that a school is failing to provide an effective opt out procedure, how and where can they seek redress?

Where a person wishes for their child not to attend religious instruction and their request is not respected or effectively fulfilled, a challenge may be brought to the school's decision by way of judicial review proceedings. Judicial review proceedings are legal proceedings instituted in the High Court, challenging the actions of a public or administrative body (such as a board of management of a school). The following reliefs could be sought in judicial review proceedings in relation to a school's arrangements for opting out of religious instruction:

- An order of *certiorari*: this is an order quashing (setting aside) a decision or policy, for example that a child must remain present for religious instruction.
- An order of *mandamus*: this is an ordering compelling a body to fulfil a statutory duty, for example an order compelling a school to facilitate an opt out in accordance with section 30(2)(2) of the Education Act 1998, or an order compelling a school to provide details of its opt-out arrangements in its admissions policy in compliance with section 62(7)(n) of the Education (Admission to Schools) Act 2018. Before proceedings seeking *mandamus* are issued, a person must first write to the school calling on it to take the relevant action.
- Declarations as to a person's rights, for example, a declaration that a failure to respect a child's right not to attend religious instruction is in breach of their and/or their parents' constitutional rights and/or ECHR rights.

The IHREC recommends that any person who believes they have a legal basis to challenge the decision of a school should seek legal advice before instituting proceedings.

## Contact details for the IHREC "Know Your Rights" Service

- Call us on 018583000 or Lo call 1 890 245545
- Email us on [YourRights@ihrec.ie](mailto:YourRights@ihrec.ie)
- Or you can write to us at: Your Rights, Irish Human Rights and Equality Commission,
- 16-22 Green Street, Dublin 7.