

Freagra ar bith a sheoladh go dtí—  
[Any reply to be addressed to:—]

AN RÚNAÍ,  
An Roinn Oideachais,  
Baile Átha Cliath 1.

Faoin uimhir seo:—  
[and the following number  
quoted:—]

10 March, 1994

Mr. Albert Ó Ceallaigh,  
Chief Executive,  
National Council for Curriculum and Assessment,  
Dublin Castle,  
Dublin 2.

Dear Albert,

I understand that you have recently raised the issue of religion as a Leaving Certificate examination subject with Pat Keating and that you have asked Tom Boland to arrange a meeting at which this subject can be discussed. We will be glad to meet you at any mutually convenient time. Before we do so however, it may be useful if I set out some of the legal considerations which in our view arise from this proposal.

The most obvious issue to address in this context is the effect of section 5 of the Intermediate Education (Ireland) Act, 1878, which prohibits the holding of an examination in religious instruction and State support for such an exam. The primary aim of this provision appears to have been to prevent public funds being spent on denominational education. Although the legislation is now quite old and in many respects outdated, this particular provision has not been repealed. The Intermediate Education Board for Ireland which was established by the legislation was dissolved in 1923 and its powers and functions passed to the Minister for Education under the Ministers and Secretaries Act, 1924. The Rules and Programme for Secondary Schools issued by the Minister have their statutory basis in the Act. Our advice is that the provisions relating to examinations in religious instruction have not lapsed and would have to be repealed before examinations could be held in religion.

This statutory provision, although requiring appeal, at least has the virtue of certainty. No such certainty attends the constitutional issues raised by the proposal. Earlier proposals for the content of this course focussed on Christian religions. It could therefore be open to a non-Christian student to claim that his Christian counterparts have available to them a course which for reasons of conscience he or she cannot avail of. On these grounds it could be claimed that the examination amounted to the State, contrary to Article 44.2.3 of the Constitution, imposing a disability or making a discrimination on the grounds of religion.



*File a copy of the*  
*07/03/94*  
AN ROINN OIDEACHAIS,  
(Department of Education).

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(Marlborough Street).

BAILE ÁTHA CLIATH 1.  
(Dublin 1).

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*Dr. Peter Murray*  
*Dear Pat.*  
*o Confidential - not for circulation*  
*o Would like to discuss x with you*  
*Albert*  
*14/3*  
*1994*

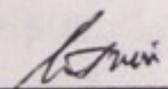
In considering a claim of discrimination in this context, a court could be expected to enquire into the **educational** need for the course, however desirable and valuable it may otherwise be. It is also unlikely that a court would be convinced by the argument that the examination came within the provisions guaranteeing free profession of religion, as it could hardly be said that the proposed course was necessary for the free practice and profession of the Christian religions. In defending the course and examination before the courts the State would need weighty, objective arguments to justify it on educational grounds. In deciding whether or not to introduce this course, it may be desirable that this Department and the NCCA marshal these arguments so that the strength of the constitutional position can be fully assessed.

In addition to this issue of discrimination, the proposed course raises issues of endowment of religion contrary to Article 44.2.2 of the Constitution. The denominational structure of our educational system is, in all probability, underpinned by the Constitution to an extent which would defeat any claim that State support for denominational schools, per se, amounted to an unconstitutional endowment of religion. A court is likely to take the view that, to the extent that such support represents endowment, the funding of denominational education and the teaching of religion is necessary to uphold the rights of parents to provide for the religious and moral education of their children and the right to freedom of religious expression. In doing so however, a court might also take the view that there should be an endowment of religion only to an extent which is objectively necessary and proportionate to the aim of inculcating moral and religious principles. A formal course of studies, leading to a formal State funded examination could well be considered to go beyond what could be considered necessary for that limited purpose.

These are preliminary views only, based largely on advice received some time ago. That advice would clearly need to be up-dated and reconsidered in the light of present proposals. Regard must also be had to the judicial review proceedings in respect of chaplains in Community Schools. The issues raised by that case are in some respects comparable to the issues outlined above. I understand however, that while this case is still making its way through the legal system it is unlikely to be heard for another twelve to eighteen months, so it is unlikely to give us much assistance in gaining an insight into the High Court's view of these issues

If you would like to discuss these issues or any other aspect of this proposal please contact Tom Boland who will make the necessary arrangements.

Yours sincerely,

  
Micheál Ó Néill,  
Assistant Secretary