

Chapter 4

Education

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4.1 Introduction

4.1.1 The legal foundations

The present-day place of religion in schools in Scotland is principally governed by the [Education \(Scotland\) Act 1980 \(c 44\)](#).¹ The contents of this Act in respect of religion reflect the two main phases of nationalisation of church schools in Scotland. Nevertheless, in respect of non-denominational schools, arrangements concerning religious observance are not prescribed in detail in law, but are often a matter of general government guidance, local authority policy, head teachers' discretion, and local custom.

The first phase of nationalisation occurred in respect of the schools of the old "Established" Church of Scotland and the Free Church of Scotland by virtue of the **Education (Scotland) Act 1872 (c 62)**. The 1872 Act formally abolished the jurisdiction of the presbyteries of the old "Established" Church of Scotland over Scottish schools, and transferred the oversight of the schools nationalised in 1872 to parochial school boards. These schools were known as non-denominational schools. Although formal legal ties between the Protestant churches and the nationalised non-denominational schools were severed, those churches continued to exercise a strong degree of control over the transferred schools by virtue of their *de facto* presence on school boards, and by virtue of the statutory recognition of the ongoing custom of religious observance and instruction in such schools. Within the context of a strongly Presbyterian country, it was presumably felt that more formal statutory rights were not required on the part of the Protestant churches in order to guarantee the ongoing Protestant character of such schools. There was no statutory obligation in respect of religious observance imposed upon non-denominational schools until the passage of the [Education \(Scotland\) Act 1946 \(c 72\)](#). It would also appear that the Church of Scotland and other denominations enjoyed no statutory right to representation on school boards, nor on the 36 local education authorities by which such boards were replaced by the **Education (Scotland) Act 1918 (c 48)**. Only when local government was re-organised by the [Local Government \(Scotland\) Act 1973 \(c 65\)](#) were advisory local education committees created on which the Church of Scotland and other denominations enjoyed a statutory right of representation.

¹ Where legislation is available online, links are included. Otherwise, where there is no open access version readily available, key sections have been quoted in the text.

The second phase of nationalisation of church schools in Scotland occurred with the passage of the Education (Scotland) Act 1918, by virtue of which the schools of the Roman Catholic Church in Scotland were transferred to the then newly created 36 *ad hoc* local education authorities. The statutory language used in the 1918 Act did not refer explicitly to the schools of the Roman Catholic Church, but rather to schools run by denominations which had not previously been nationalised. In this, while the vast majority of schools nationalised by the 1918 Act were Catholic, these schools were designated “denominational” schools, and it was possible for any school run by any denomination to be transferred to the state under the terms of the 1918 Act. Denominational schools were subject to a markedly different arrangement in respect of religious observance and instruction when compared to the non-denominational schools. In the latter, the Presbyterian churches relied upon the maintenance of the customs of what had been their old church schools, whereas in the former, the denomination in whose interests a denominational school was run by a local authority enjoyed substantial statutory controls over religious aspects of such schools. In practice this usually meant that the Hierarchy of the Catholic Church in Scotland enjoyed the right to examine appointees to teaching posts within Catholic denominational schools as to their religious beliefs and character, to appoint un-remunerated chaplains to such schools, and to determine the religious education curriculum. Denominational schools run by local authorities in the interests of other denominations, such as the Scottish Episcopal Church, were subject to similar controls by virtue of the neutral statutory language employed in the 1918 Act. Various denominations continue to enjoy statutory rights over denominational schools which are not afforded to the Church of Scotland in respect of the non-denominational schools, following the abolition of the “educational” jurisdiction of Church of Scotland presbyteries in 1872.

4.1.2 Structure of the chapter

The main focus of this chapter is on the legal framework which underpins the distinct categories of denominational (4.2) and non-denominational schools (4.3) and the development of the concepts of religious education and religious observance. In addition, the chapter also highlights specific aspects of the legal regulation of education where religion features: the rights of parents and children in respect of education (4.4); the place of representatives of religious organisations in the structure of governance (4.5); the training and employment of teachers (4.6) and the role of chaplains (4.7).

4.2 Non-denominational public schools

4.2.1 The Education (Scotland) Acts 1872 and 1980

The Education (Scotland) Act 1872 created a temporary Board of Education for Scotland,² charged with overseeing the creation of elected School Boards in every parish and burgh throughout Scotland.³ These school boards were bodies corporate,⁴ in which were to be vested “the parish and other schools which have been established and now exist in any parish under the recited Acts [see Preamble to 1872 Act], or any of them, together with teachers houses and land attached thereto”.⁵ At the same time “all jurisdiction, power, and authority possessed or exercised by presbyteries of other church courts with respect to any public schools in Scotland” was abolished.⁶ All schools vested in the newly created elected School Boards were declared to be public schools,⁷ and were to be funded by means of a local rate.⁸

Section 68 of the 1872 Act prescribed that:

Every public school, and every school subject to inspection and in receipt of any public money as herein-before provided, shall be open to children of all denominations, and any child may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school: and no child shall in any such school be placed at any disadvantage with respect of the secular instruction given therein by reason of the denomination to which such child or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects.

The requirement for public schools to make provision for religious instruction and religious observance was contained in the Preamble to the 1872 Act:

Whereas it has been the custom in the public schools of Scotland to give instruction in religion to children⁹ whose parents did not object to the instruction so given, but with

² Education (Scotland) Act, 1872 (c 62), s3.

³ Education (Scotland) Act, 1872 (c 62), s8ff.

⁴ Education (Scotland) Act, 1872 (c 62), s22.

⁵ Education (Scotland) Act, 1872 (c 62), s23.

⁶ Education (Scotland) Act, 1872 (c 62), s23.

⁷ Education (Scotland) Act, 1872 (c 62), s25.

⁸ Education (Scotland) Act, 1872 (c 62), s44.

⁹ This clause in the Preamble to the 1872 Act was subsequently replaced in section 8 of the Education (Scotland) Act 1946 by the clause ‘for religious observance to be practiced and for instruction in religion to be given to

liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not receive such instruction, and it is expedient that the managers of public schools shall be at liberty to continue the said custom.¹⁰

Detailed regulations concerning the frequency of religious observance and instruction were not laid out in the 1872 Act, but rather were remitted to the Scotch Education Department,¹¹ defined by the Act as “the Lords of any Committee of the Privy Council appointed by Her Majesty on Education in Scotland”.¹²

The key features of the 1872 Act in relation to non-denominational public schools are substantially retained in the current Education (Scotland) Act 1980, as amended. They have passed through various statutes, notably the [Education \(Scotland\) Act 1946, and minor reforms of language and scope, but broadly, the principles of the 1872 Act](#) remain the basis of the contemporary law concerning religious observance and instruction in non-denominational public schools: the custom of religious instruction has continued, albeit expanded to include explicit reference to religious observance and religious instruction; the conscience clause concerning withdrawal of children from the same has been retained; the frequency and content of religious observance and instruction remains a matter of policy, not legislation. Specifically, the following should be noted:

The Education (Scotland) Act 1980, section 8(1) retained a lightly revised version of the Preamble to the 1872 Act, which revised version had been first used in the Education (Scotland) Act 1946, section 8, in respect of the custom of public schools to give instruction in religion to children:

pupils”, which remains the wording used in section 8(1) of the Education (Scotland) Act 1980. To what extent the clause “to give instruction in religion to children” in the 1872 Act was interpreted in the light of section 68 of the 1872 Act, which makes explicit reference to “instruction in religious subjects” and to “religious observance” has not here been determined.

¹⁰ It may be noted that this clause was repeated word for word in the Education (Scotland) Act 1918, s7, with the additional words “subject to the provisions of section 68 (Conscience Clause) of the Education (Scotland) Act 1872”.

¹¹ Education (Scotland) Act, 1872 (c 62), s68.

¹² Education (Scotland) Act, 1872 (c 62), s1.

Whereas it has been the custom in the public schools of *Scotland for religious observance to be practised and for instruction in religion to be given to pupils*¹³ whose parents did not object to *such observance or instruction*¹⁴, but with liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not *take part in such observance or receive such instruction*¹⁵, *be it enacted that education authorities*¹⁶ shall be at liberty to continue the said custom, *subject to the provisions of section 9 of this Act*¹⁷ [emphasis added]

But whereas the 1872 Act had simply granted liberty for the custom of Scottish public schools in relation to religious instruction to be continued, the [1980 Act, section 8\(2\)](#), imposes a statutory obligation – first introduced in the Education (Scotland) Act 1946, section 8 (2) – on education authorities to continue with the provision of religious observance and instruction. At the same time the 1980 Act retains the mechanism, first introduced in 1946 Act, by which education authorities might discontinue the same via a local election. Thus the Education (Scotland) Act 1980, section 8 provides:

(2) It shall not be lawful for an education authority to discontinue religious observance or the provision of instruction in religion in terms of subsection (1) above, unless and until a resolution in favour of such discontinuance duly passed by the authority has been submitted to a poll of the local government electors for the education area taken for the purpose, and has been approved by a majority of electors voting thereat.

(3) A poll under subsection (2) above shall be by ballot and shall be taken in accordance with rules to be made by the Secretary of State, which rules may apply with any necessary modifications any enactments relating to parliamentary or local government elections.

The wording of both these subsections was taken directly from the Education (Scotland) Act 1946, section 8 (2) and (3), as also retained by the [Education \(Scotland\) Act 1962, section 8 \(2\) and \(3\)](#).

¹³ “to give instruction in religion to children” in 1872 Act.

¹⁴ “the instruction so given” in the 1872 Act.

¹⁵ “receive such instruction” in the 1872 Act.

¹⁶ “and it is expedient that the managers of public schools” in the 1872 Act.

¹⁷ There was no similar cross-reference to s68 of the 1872 Act in the 1946 Act, although this too was a “conscience clause”.

The conscience clause contained in the 1872 Act (section 68) is repeated almost word for word in section 9 of the 1980 Act, and in this the 1980 Act follows section 9 of the Education Acts of 1946 and 1962:

Every public school [*and every grant-aided school*]¹⁸ shall be open to *pupils*¹⁹ of all denominations, and any *pupil*²⁰ may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; and no *pupil*²¹ shall in any such school be placed at any disadvantage with respect to the secular instruction given therein by reason of the denomination to which such *pupil*²² or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects. [emphasis added]

Just as the 1872 Act had left the formulation of detailed regulations concerning the frequency of religious observance and instruction to the Scotch Education Department,²³ detailed provisions as to the meaning of the statutory obligation in respect of religious observance and instruction, imposed by the 1980 Act, continues to be a matter of policy, rather than statutory regulation. As the Stair Memorial Encyclopaedia, Education (Re-issue), para 310 concerning “requirement for religious instruction and observance”, notes, “religious observance and instruction in schools is the subject of guidance by the Scottish Ministers”.

4.2.2 Religious Observance in Non-denominational Schools

In 1991 the then Scottish Office Education Department issued [SOED Circular 6/91](#) stating that “all primary pupils ‘should take part in religious observance not less than once a week’ and that all secondary pupils ‘should take part in religious observance at least once a month and preferably with greater frequency’”, and stating that “‘non-denominational schools’ religious observance should be of a ‘broadly Christian character’”.²⁴

¹⁸ Words substituted by Standards in Scotland’s Schools etc. Act 2000 asp 6 (Scottish Act) Sch.2 para. 3(3). These words read “and every school subject to inspection and in receipt of any public money as herein-before provided” in section 68 of the 1872 Act.

¹⁹ “children” in the 1872 Act.

²⁰ “child” in the 1872 Act.

²¹ “child” in the 1872 Act.

²² “child” in the 1872 Act.

²³ Education (Scotland) Act, 1872 (c 62), s68.

²⁴ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 4.

Following Scottish devolution, Her Majesty's Inspectorate of Education issued a report stating that many non-denominational schools were failing to provide time for religious observance as set out in SOED Circular 6/1991.²⁵ In the wake of this report, the then Minister for Education, Europe and External Affairs, Jack McConnell, established a Religious Observance Review Group, which Group issued its findings in 2004.²⁶ The findings contained in [*The Report of the Religious Observance Review Group \(Edinburgh: The Scottish Executive, 2004\)*](#) were accepted by the then Scottish Executive (a Labour-Liberal Democrat coalition) and informed that administration's [*Scottish Executive Education Department Circular 1/2005 concerning the Provision of Religious Observance in Scottish Schools*](#). The findings of the 2004 Report were also subsequently accepted by the Scottish Government in 2011 (an SNP minority government) and informed that administration's [*Learning Directorate's 2011 Circular 'Curriculum for Excellence – Provision of Religious Observation in Schools'*](#). The 2005 and 2011 Circulars are close as to tenor and content.

Turning to the 2004 *Report of the Religious Observance Review Group* the following ought to be noted. Perhaps most importantly, the Report adopted a definition of the phrase “religious observance” as found in the Education (Scotland) Act 1980, which definition was explicitly accepted in the 2005 and 2011 Scottish Executive/Government Circulars concerning Religious Observance. The definition of “religious observance” as far as the Scottish Government is concerned is therefore “community acts which aim to promote the spiritual development of all members of the school community and express and celebrate the shared values of the school community”.²⁷ The 2004 Report also offered definitions of the aims of religious observance, and of the term “spiritual development”;²⁸ although these aspects of the Report have not been explicitly accepted by Scottish ministers in either 2005 or 2011.

The consultation paper upon which the 2004 Report was founded made a distinction between “religious observance” and “organised acts of worship”, stating that “an organised act of worship is based upon the assumption that those present share [various elements concerning

²⁵ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 1.

²⁶ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 1.

²⁷ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 12; cf SOED Circular 1/2005, para. 6; cf 2011 Circular “Curriculum for Excellence – Provision of Religious Observation in Schools”, para. 7.

²⁸ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 12.

‘focus of worship’, ‘desire to worship said focus of worship’, ‘commitment to life stances related to focus of worship’]. Religious observance does not assume these elements”.

Nevertheless, the Report at the same time also allowed that “whilst religious observance as defined in the consultation paper is not an act of organised worship, it does not preclude the possibility of worship as the free response of individuals to the stimulus offered”.²⁹ This is explained by reference to the fact that some school communities are continuous with a faith community, in which cases “that community’s faith in ‘the focus of worship’ may be assumed and worship may be considered to be appropriate as part of the formal activity of the school.” The Report then added that “where, as in most non-denominational schools, there is a diversity of beliefs and practices, the Review Group believes that the appropriate context for an organised act of worship is within the informal curriculum as part of the range of activities offered for example by religions, groups, chaplains, and other religious leaders”.³⁰

In this, the 2004 Report maintained that the statutory obligation imposed by the 1980 Education Act anent “religious observation” did not mean that “organised acts of worship” were part of the statutory obligation. Rather, the Report allowed for a diversity of approaches depending upon the relation between the school and local community. On the one hand, it might be presumed that in some schools on, for example, the Isle of Lewis, children, parents, and teachers might for the most part happen to be Presbyterians, in which case “religious observance” would probably involve acts of Presbyterian worship. On the other hand, a school in, for example, suburban Edinburgh might choose to remove acts of worship from religious observance, preferring rather to permit pupils and parents belonging to the same faith group to participate in their own organised acts of worship as part of “the informal curriculum” of a school.

In addition to these various distinctions, the 2004 Report also distinguished religious observance from religious and moral education (RME). The report went on to define RME within the context of both non-denominational and denominational schools, but for the present position on this head it is best to consult the Scottish Government Circulars issued in 2011 along with the [‘Curriculum for Excellence – Provision of Religious Observation in Schools’](#), namely Education Scotland’s [‘Curriculum for Excellence – Provision of religious](#)

²⁹ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 15-16.

³⁰ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 16.

[and moral education in non-denominational schools and religious education in Roman Catholic schools](#)'. The contents of this Circular are discussed further, below.

As to the frequency of religious observance in non-denominational schools, the 2004 Report recommended that, while the Scottish Office Education Department Circular 6/91 stated that religious observance should occur weekly in primary and monthly in secondary schools, "every school should provide opportunities for religious observance at least six times in a school year in addition to traditional celebrations central to the life of the school community".³¹ This recommendation was accepted by the Scottish Executive in 2005, and by the Scottish Government in 2011.³²

Determining the content of religious observance is a matter firmly devolved to individual schools, with general support from education authorities. In the 2011 Circular *Curriculum for Excellence – Provision of Religious Observation in Schools*, para. 11, it was stated that "The precise form of religious observance will be determined by each school's policy within the local authority's framework, but these might include opportunities for class, year, stage or whole school observance as well as involvement by pupils and other, including school chaplains and other faith leaders, in planning and presentation".³³

In respect of the involvement of chaplains in the life of schools, this is also a matter devolved to schools, specifically to head teachers. Both Circular 1/2005, para. 16, and the 2011 Circular *Curriculum for Excellence – Provision of Religious Observation in Schools*, para. 18, contain the same provision: "Scottish Government Ministers value the important and varied contributions that chaplains and other faith group leaders make to the life of the school, for example in their involvement in religious observance, acts of worship, religious and moral education and a broader pastoral role. Head teachers are encouraged to engage in full discussion with chaplains and other faith group leaders in the planning and implementation of religious observance." The appointment and place of chaplains in non-

³¹ *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 18.

³² SOED Circular 1/2005, para. 12; 2011 Circular "Curriculum for Excellence – Provision of Religious Observation in Schools", para. 13. Both used the following sentences: "Every school should provide opportunities for religious observance at least six times in a school year, in addition to traditional celebrations central to the life of the school community, a preferably with greater frequency. We recognise that many primary schools value weekly religious observance as part of their regular assembly programme and will wish to continue with this. The school community should be involved in making decisions about frequency."

³³ This clause was taken word for word from Circular 1/2005, para. 9.

denominational and denominational schools is discussed at 4.7, below.

In respect of organised acts of worship in schools, this too is a matter devolved to schools, principally to head teachers. Both the 2005 and 2011 Circulars accept the recommendations of the 2004 Report of the Religious Observance Review Group anent distinguishing religious observance and organised acts of worship, without precluding the latter being part of the former, and state that “Members of the school community, including pupils, parents and representatives of faith groups and communities, may wish to have opportunities for organised acts of worship within the informal curriculum of the school. [Scottish Government] Ministers would encourage head teachers to consider these requests positively and make suitable arrangements if appropriate support arrangements can be provided”.³⁴

Generally then, the statutory duty imposed upon local authorities to provide religious observance in Scottish non-denominational public schools by the Education (Scotland) Act 1980 is still in force today, but the definition of that duty, and the ways in which it may be discharged by local authorities and schools has been given a broad interpretation by Scottish Government policy in conformity with the 2004 Report of the Religious Observance Review Group. Central to this policy is a continuation of the fact that both the 1872 and 1980 Education Acts state that “religious observance” is based upon “custom”, without defining what that custom, or customs, were or are. In this, broad scope has been given to local authorities and schools to continue with and evolve their own customs in respect of religious observance, and thereby to fulfil their statutory duty. As the Stair Memorial Encyclopaedia, Education (Re-issue), paragraph 310, notes, “the ‘custom’ of modern education may no longer reflect the ‘custom’ referred to in the legislation”.

4.2.3 Religious and Moral Education in Non-denominational Schools

The [Education \(Scotland\) Act 1980, section 8](#), continues to impose a statutory obligation on local authorities in respect of religious instruction, as well as religious observance, as first introduced by [section 8 of the Education \(Scotland\) Act 1946](#). In non-denominational schools, religious instruction presently takes the form of “religious and moral education”. The curriculum content for RME is not a matter dealt with by the 1980 Act, but is, like the content

³⁴ 2011 Circular “Curriculum for Excellence – Provision of Religious Observation in Schools”, para. 21: cf SOED Circular 1/2005, para. 18.

of religious observance, a matter of government policy, which policy tends to be devolved to education authorities and schools. The most recent Scottish Government Circular on the subject of RME in both non-denominational and denominational schools, was issued in 2011, at the same time as the 2011 circular anent religious observance. The 2011 “religious instruction” Circular, [‘Curriculum for Excellence – Provision of religious and moral education in non-denominational schools and religious education in Roman Catholic schools’](#), makes a distinction between “religious and moral education” in non-denominational schools (RME), and “religious education” in Roman Catholic schools (RERC). The distinction is a little misleading, since although the majority of denominational schools in Scotland are Roman Catholic, there are three Episcopal and one Jewish denominational schools in Scotland.

Nevertheless, the 2011 Circular treats of RME and RERC separately. Thus, in respect of religious instruction in non-denominational schools (RME) the following may be noted, at paragraph 11:

In order to meet statutory requirements and the principles and practices of Curriculum for Excellence, schools should plan and deliver religious and moral education as both a specific subject discipline and one which contributes to high quality interdisciplinary learning, as they do with each of the eight curriculum areas. *Every child and young person can expect their education to provide them with a broad general education, and within religious and moral education this includes well planned experiences and outcomes across Christianity, world religions and developing beliefs and values...* Religious and moral education should also contribute to learning and development through the other contexts for learning, that is the ethos and life of the school community and the opportunities provided for personal achievement. Schools and local authorities will have policies detailing their rationale and practices for the delivery of religious and moral education which are available and shared with parents, learners and the wider community. [Emphasis added]

4.3 Denominational public schools

4.3.1 The Education (Scotland) Acts 1918 and 1980

The Catholic Church in Scotland, which historically ran its own system of voluntary schools,³⁵ declined to transfer its schools to the state in 1872, possibly because the Catholic Church in Scotland was still not at ease with the British State; and perhaps also because of the pronounced anti-Catholic traditions within Scottish Presbyterianism,³⁶ with attendant unease at entrusting the education of Catholic children to a public school system still strongly influenced by Presbyterianism, notwithstanding the Conscience Clause contained in the Education (Scotland) Act 1872. Historically, following the Scottish Reformation, Roman Catholics had been subject to various civil and penal disabilities and sanctions; in respect of education, seventeenth-century Scottish legislation had forbidden Roman Catholics from sending their children abroad for a Catholic education, and had prohibited Catholics from educating their own children.³⁷ While Catholic emancipation had been a marked feature of nineteenth-century Catholic-British State relations, the Catholic Church in Scotland appears to have been still sufficiently wary of the British State in Scotland in 1872 to persist in the maintenance of its own system of voluntary schools in Scotland.

Despite the Catholic Church in Scotland's persistence in maintaining its own system of schools outwith the public school system created by the 1872 Act, it became clear that educational outcomes for Scottish children were better in the state schools than in the underfunded voluntary Catholic schools³⁸ and, as such, the Education (Scotland) Act 1918

³⁵ There were more than 200 voluntary Catholic schools in Scotland by 1918 (Alex Salmond, Cardinal Winning Lecture, 2008, <http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/cardwinlecture>).

³⁶ I.e. only in 1986 did the General Assembly of the Church of Scotland issue a declaratory act by which it ceased to affirm the anti-Catholic clauses of the Westminster Confession of Faith (General Assembly 1986 Act 5, Declaratory Act Anent the Westminster Confession of Faith, http://www.churchofscotland.org.uk/about_us/church_law/acts).

³⁷ Stair Memorial Encyclopaedia, volume 3, para. 1660, citing the Perverts to Papacy Act 1609 (*RPS*, 1609/4/16) and the Mass Act 1661 ("Likewise his majesty, considering how dangerous it is that children are educated by persons popishly affected, do therefore, conforming to former acts of parliament, appoint that children under popish parents, tutors or curators shall be taken from them and committed to the education of some well-affected and religious friend, at the sight and by order of his majesty's privy council", *RPS*, 1661/1/56).

³⁸ Some examples of the discrepancies between private Catholic schools and Scottish public schools were highlighted in 2008 by the then First Minister, Alex Salmond: "What did such inequalities of funding mean in practice? A graphic picture was painted during a Commons "Supply Day Debate" on Scottish finances in August 1917. We are indebted to figures provided by Mr Boland - the MP for South Kerry. Which in itself is a reminder of the certainty of political change. I know there are some local Headteachers here so let me give you the Glasgow figures. The salary for a "board school" Headteacher was £366 (that's per annum, not per week). Meanwhile for a Headteacher in a voluntary Catholic school, the figure was £181. A child at a Glasgow board school had £3 and 16 shillings per annum spent on their education. A child at a Catholic school, less than half of that. At the end of that Commons debate Robert Munro, the Secretary for Scotland (the post wasn't elevated to Secretary of State until some years later) asked whether Scotland's Catholic community was: "willing to bring schools under public control, subject to suitable safeguards both in the matter of the choice of teachers and

made extensive provision for the transferral of these voluntary Catholic schools to the public school system.³⁹ This scheme was not compulsory, but any such school not availing itself of the provisions of the Act within two years would lose any state funding in which it had been in receipt via the provision of education grants from the state.⁴⁰ In order to satisfy both the Catholic Church and the trustees of the various voluntary Catholic schools in Scotland, the 1918 Act contained various guarantees for state-funded Catholic schools as to ethos, the vetting of teachers, and religious observance and instruction. This arrangement has been described by the former First Minister of Scotland, Alex Salmond, as “an unprecedented concordat between church and state in the provision of education”.⁴¹

This, then, was the main historical context in which denominational state schools (hereafter denominational schools) were first created in Scotland. Nevertheless, one of the striking features of the 1918 Act, and the subsequent legislative provisions to which it has given rise concerning denominational schools, is that it contains neutral statutory language, and was not passed explicitly in favour of the Catholic Church. Rather the statutory language used refers to “denominational schools” and the churches or denominations in whose favour such schools are run. Thus, while the majority of schools nationalised by the 1918 Act were Roman Catholic, the provisions of the 1918 Act and its successor legislation may be applied to any “church or denominational body” in Scotland. This term “church or denominational body” has been given a sufficiently broad definition to allow creation of a Jewish denominational primary school in Scotland. How far this definition may be construed or reformed is considered further, below.

In respect of voluntary schools transferred to the education authorities created by the

religious instruction, and so enjoy the benefit of rate aid?’ If so, Munro went on to say, “the position of the schools would in every particular, immediately improve.” He wasn’t wrong!”

(Alex Salmond, Cardinal Winning Lecture, 2008, <http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/cardwinlecture>).

³⁹ The 1918 Act in fact replaced the elected school boards created by the 1872 Act with education authorities, to which new education authorities voluntary denominational schools were to be transferred.

⁴⁰ Education (Scotland) Act 1918, section 18(5): “After the expiry of two years from the passing of this act no grant from the Education (Scotland) Fund shall be made in respect of any school to which this section applies unless the school shall have been transferred to the education authority, and as from the expiry of that period the Education (Scotland) Act, 1897, shall cease to have effect: Provided, That the department may extend the said period in any case where, in the opinion of the department, further time is required for the completion of a transfer.”

⁴¹ Cardinal Winning Lecture, 2008, <http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/cardwinlecture>

Education (Scotland) Act 1918, c 48, section 18(3) made provision for teachers in denominational schools to be approved by representatives of the churches or denominational bodies in whose interest a denominational school was being conducted by an education authority:

the education authority... shall have in respect thereto the sole power of regulating the curriculum and of appointing teachers : Provided, That –

(ii) All teachers appointed to the staff of any such school by the education authority shall in every case be teachers who satisfy the department as to qualification, and are approved as regards their religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted.

Section 18(3)(iii) made provision for religious observance and instruction in public denominational schools in the following terms:

Subject to the provisions of section 68 (conscience clause) of the Education (Scotland) Act, 1872, the time set apart for religious instruction or observance in any such school shall not be less than that so set apart according to the use and wont of the former management of the school, and the education authority shall appoint as supervisor without remuneration of religious instruction for each such school, a person approved as regards religious belief and character as aforesaid, and it shall be the duty of the supervisor so appointed to report to the education authority as to the efficiency of the religious instruction given in such schools. The supervisor shall have the right of entry to the school at all times set apart for religious instruction or observance. The education authority shall give facilities for the holding of religious examinations in every such school.

In respect of the creation of new denominational schools by education authorities, section 18(8) of the 1918 Act stated that:

In any case where the department are satisfied, upon representations made to them by the education authority of any education area, or by any church or denominational body acting on behalf of the parents of children belonging to such church or body, and after such inquiry as the department deem necessary, that a new school is required for the accommodation of children whose parents are resident within that education area,

regard being had to the religious belief of such parents, it shall be lawful for the education authority of that area to provide a new school, to be held, maintained, and managed by them subject to the conditions prescribed in subsection (8) of this section, so far as those conditions are applicable ; the time set apart for religious instruction in the new school being not less than that so set apart in schools in the same education area which have been transferred under this section.

In respect of the discontinuation of denominational schools by education authorities, section 18(9) of the 1918 Act stated that:

If at any time after the expiry of 10 years from the transfer of a school under this section or from the provision of a new school as aforesaid, the education authority by whom the school is maintained are of opinion that the school is no longer required, or that, having regard to the religious belief of the parents of the children attending the school, the conditions prescribed in subsection (3) of this section ought no longer to apply thereto, the authority may so represent to the department, and if the department, after such inquiry as they deem necessary, are of the same opinion and so signify, it shall be lawful for the education authority thereafter to discontinue the school, or, as the case may be, to hold, maintain, and manage the same in all respects as a public school, not subject to those conditions: Provided, That in the case of any school which has been transferred to an education authority under this section, that authority shall in either of those events make to the trustees by whom the school was transferred, or to their successors in office or representatives, such compensation (if any) in respect of the school or other property so transferred as may be agreed, or as may be determined, failing agreement, by an arbiter appointed by the department upon the application of either party.

These principal features of the Education (Scotland) Act 1918, section 18 – concerning the transfer, creation, and discontinuation of denominational schools to and by Scottish education authorities, with rights to denominations to approve both teachers and unremunerated supervisors of religious education in such schools as to religious belief and character, and with guarantees that the time set apart for religious observance and instruction in such schools would conform to the customs of such schools prior to their transfer to education authorities – are still in effect retained today by virtue of various sections of the Education

(Scotland) Act 1980, as amended by the Education (Scotland) Act 1981. The provisions of the 1918 Act were not interpolated directly into the 1980 Act, but rather were transmitted through various sections of the Education (Scotland) Acts of 1946 and 1962, with various additions.⁴²

The most relevant sections of the Education (Scotland) Act 1980, as amended, in relation to denominational schools are as follows:

Section 16 – The transference of denominational schools to education authorities

16 (1) It shall be lawful for the person or persons vested with the title of any school established after 21st November 1918, to which section 18 of the Act of 1918 would have applied had the school been in existence at that date, with the consent of the trustees of any trust upon which the school is held and of the Secretary of State, to transfer the school together with the site thereof and any land or buildings and furniture held and used in connection therewith, by sale, lease or otherwise, to the education authority, who shall be bound to accept such transfer, upon such terms as to price, rent, or other consideration as may be agreed, or as may be determined, failing agreement, by an arbiter appointed by the Secretary of State upon the application of either party.

Section 17 – Provision, maintenance and equipment of schools and other buildings

(2) In any case where an education authority are satisfied, whether upon representations made to them by any church or denominational body acting on behalf of the parents of children belonging to such church or body or otherwise, that a new school is required for the accommodation of children whose parents are resident within the area of the authority, regard being had to the religious belief of such parents, it shall be lawful for the education authority to provide a new school.⁴³

In respect of this provision, it should be noted that new denominational schools are subject to section 21(1) – (4) of the 1980 Act, which subsections govern denominational schools

⁴² The history of the development of statutory provisions concerning denominational schools from the 1918 Act, through the 1946 and 1962 Acts, to the 1980 Act has not been researched in any detail for this report.

⁴³ S. 17(2) substituted by the Education (Scotland) Act 1981 (c. 58), s. 7(1), Sch. 8

already in existence (as per section 21(5)), with the proviso that the time set aside for religious observance and instruction is not less than that in other denominational schools within the education authority, rather than being governed by the “use and wont” clause governing these matters in voluntary schools transferred to education authorities.

In respect of the process for approving the religious belief and character of teachers to be appointed to denominational schools, section 21 provides:

21(2) Subject to subsections (2A) and (2C) below, in any such school the education authority shall have the sole power of regulating the curriculum and of appointing teachers:

(2A) A teacher appointed to any post on the staff of any such school by the education authority shall satisfy the Secretary of State as to qualification, and shall be required to be approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted;

(2B) Where the said representatives of a church or denominational body refuse to give the approval mentioned in subsection (2A) above they shall state their reasons for such refusal in writing.

(2C) subject to the provisions of section 9 of this Act,⁴⁴ the time set apart for religious instruction or observance in any such school shall not be less than that so set apart according to the use and wont of the former management of the school.⁴⁵

In respect of section 21(2A), the procedure whereby a teacher may satisfy the Catholic Church as to religious belief and character is set out on the website of the Scottish Catholic Education Service. Roman Catholics must obtain a reference from their parish priest, while non-Catholics must provide the details of a ‘suitable professional person’ willing to provide a reference as to religious belief and character.⁴⁶

⁴⁴ Section 9 being the Conscience Clause in respect of withdrawal of pupils from religious observance and instruction. In this respect the Scottish Government Circular issued in 2011 “Curriculum for Excellence – Provision of Religious Observation in Schools”, para. 17 noted that “Where a parent chooses a denominational school for their child’s education, they choose to opt in to the school’s ethos and practice which is imbued with religious faith and religious observance. In denominational schools, it is therefore more difficult to extricate a pupil from all experiences which are influenced by the school’s faith character.”

⁴⁵ It should be noted that this section of the Act as it appears here has been variously amended and expanded by the Self-Governing Schools etc. (Scotland) Act 1989 (c.39).

⁴⁶ <http://www.sces.uk.com/approval.html>

In respect of the appointment of supervisors of religious instruction, section 21(3) provides:

For each such school the education authority shall appoint as supervisor of religious instruction, without remuneration, a person approved as regards religious belief and character as aforesaid, and the supervisor so appointed shall report to the education authority as to the efficiency of the religious instruction given in such school, and shall be entitled to enter the school at all times set apart for religious instruction or observance.

Section 22 – Discontinuance and moves of educational establishments

22(4) If at any time after the expiry of ten years from the transfer of a school under section 16 of this Act, or from the provision of a new school under section 17(2) of this Act, the education authority by whom the school is maintained are of opinion that the school is no longer required, or that, having regard to the religious belief of the parents of the children attending the school, the conditions prescribed in subsections (1) to (4) of section 21 of this Act or in the said subsections so far as applicable and having effect by virtue of subsection (5) of that section, as the case may be, ought no longer to apply thereto, it shall, subject to sections 22C and 22D of this Act and the Schools (Consultation) (Scotland) Act 2010 (asp 2),⁴⁷ be lawful for the education authority thereafter to discontinue the school, or, as the case may be, to hold, maintain and manage the same in all respects as a public school not subject to those conditions: Provided that—

- (i) in the case of any school which has been transferred as aforesaid to an education authority, that authority shall in either of those events make to the trustees by whom the school was transferred, or to their successors in office or representatives, such compensation (if any) in respect of the school or other property so transferred as may be agreed, or as may be determined, failing agreement, by an arbiter appointed by the Secretary of State upon the application of either party; and
- (ii) if before the expiry of ten years from the transfer of any such school, the education authority are of opinion as aforesaid and so represent, and the trustees by whom the school was transferred, or their successors in office or

⁴⁷ Which concerns the requirement of local authorities to consult in respect of a range of proposals, including changing a denominational school into a non-denominational school etc.

representatives, formally intimate to the authority that they concur with the authority in their opinion as represented, then in such case, it shall, subject to sections 22C and 22D of this Act and the Schools (Consultation) (Scotland) Act 2010 (asp 2), be lawful for the education authority forthwith to discontinue or to hold, maintain or manage the school as aforesaid, subject to the like provision with respect to compensation.

Note that in respect of the payment of compensation in section 22(4)(i), the Stair Memorial Encyclopaedia comments that when denominational schools transferred to education authorities are discontinued “compensation must be paid to the trustees, or their successors or representatives, by whom the school was transferred.”⁴⁸

In respect of any proposal put forward by an educational authority by which a denominational school may be changed so as to remove the possibility of religious observance and instruction for the children of parents of religious faith at the school in question, it is provided that:

Section 22C - Consent for certain changes affecting denominational schools.

(1) An education authority shall submit to the Secretary of State for his consent any proposal of theirs to which this section applies and shall not implement such a proposal without his consent.

(2) A proposal to which this section applies is one which—

(a) relates to a school transferred to an education authority under section 16(1) or provided by them under section 17(2) of this Act; and

(b) will, if implemented, have the effect that all or some of the pupils who attend the school will no longer receive school education in a school of the kind referred to in paragraph (a) above or that all or some of the children who would, but for the implementation of the proposal, have been likely to attend it will not be likely to receive such education in a school of that kind.

(3) The Secretary of State shall not grant consent under this section unless he is satisfied that adequate arrangements have been made for the religious instruction of pupils and children who would, as a result of implementation of the proposal, no longer receive or be likely to receive school education in a school of the kind referred to in paragraph (a) of subsection (2) above.

⁴⁸ Stair Memorial Encyclopaedia, volume 3, para. 1665.

(4) In granting consent under this section the Secretary of State may impose such conditions as he thinks fit with regard to the religious instruction of the pupils and children referred to in paragraph (b) of subsection (2) above and to related matters and conditions imposed by the Secretary of State under this section may be revoked or amended by him at any time.

(5) Any question which may arise—

(a) whether a proposal is one to which this section applies;

(b) as to the implementation of a proposal to which the Secretary of State has consented under this section;

(c) as to the fulfilment or observation of any conditions upon his consent imposed under subsection (4) above shall be determined by the Secretary of State and the education authority shall perform their duties under this Act in accordance with any such determination.

(6) In this section, the reference to section 16(1) or 17(2) of this Act shall include a reference to the corresponding provision of the Act of 1918, the Act of 1946 and the Act of 1962.

In respect of the consent of Secretary of State for Scotland required for any proposal put forward by an educational authority by which a denominational school may be discontinued, amalgamated with another school, moved to another site, have its admissions arrangements altered, or be changed into a non-denominational school, in those cases where agreement has not been reached by the education authority and the representatives of the church or denomination in whose interest the school is conducted, it is provided:

Section 22D - Further provisions relating to denominational schools

(1) An education authority shall submit to the Secretary of State for his consent any proposal of theirs to which this section applies and shall not implement such a proposal without his consent.

(2) A proposal to which this section applies is one—

(a) which relates to a school transferred to an education authority under section 16(1) or provided by them under section 17(2) of this Act;

(b) to—

(i) discontinue the school or a part of it;

(ii) amalgamate the school or a part of it with another school;

- (iii) change the site of the school;
 - (iv) change the arrangements for admission to the school; or
 - (v) disapply to the school the conditions prescribed in subsections (1) to (4) of section 21 of this Act or in the said subsections so far as applicable and having effect by virtue of subsection (5) of that section;
- and

(c) in relation to which the Secretary of State, having consulted any education authority affected by it, is satisfied, upon written representations made, in the case of any church or denominational body in whose interest the school is conducted other than the Roman Catholic Church, by a person authorised for that purpose by that church or denominational body and, in the case of the Roman Catholic Church, by the Scottish Hierarchy of that Church, that –

- (i) if implemented, it will have any of the results specified in subsection (3) below; and
- (ii) the education authority submitting the proposal under subsection (1) above and the church, denominational body or Hierarchy, as the case may be, have, after discussion, failed to reach agreement that it should be implemented.

(3) The results referred to in subsection (2)(c)(i) above are—

- (a) a significant deterioration for pupils belonging to the area of the education authority submitting the proposal under subsection (1) above; or
- (b) a significant deterioration for pupils belonging to the area of any other education authority; or
- (c) where neither paragraph (a) nor paragraph (b) above applies, such a deterioration for pupils as mentioned in the said paragraph (a) and pupils belonging to the area of another education authority as, taken together, amounts to a significant deterioration, in the provision, distribution or availability of school education in schools of the kind referred to in subsection (2)(a) above compared with such provision, distribution or availability in other public schools.

(5) The Secretary of State shall not grant consent under this section in relation to a school unless he is satisfied that adequate arrangements have been made for the religious instruction of the children who will no longer receive or be likely to receive

school education in a school of the kind referred to in subsection (2)(a) above.

(6) In granting consent under this section in relation to a school the Secretary of State may impose such conditions as he thinks fit with regard to the religious instruction of the children who will no longer receive or be likely to receive school education in a school of the kind referred to in subsection (2)(a) above and to related matters and, in doing so, he shall have regard to the duties imposed by section 21 of this Act on education authorities in relation to schools of that kind, and conditions imposed by the Secretary of State under this section may be revoked or amended by him at any time.

(7) Any question which may arise—

(a) whether a proposal is one to which this section applies;

(b) as to the implementation of a proposal to which the Secretary of State has consented under this section;

(c) as to the fulfilment or observation of any conditions upon his consent imposed under subsection (6) above shall be determined by the Secretary of State and the education authority shall perform their duties under this Act in accordance with any such determination.

(8) In this section the reference to section 16(1) or 17(2) of this Act shall include a reference to the corresponding provision of the Act of 1918, the Act of 1946 and the Act of 1962.

The provisions made by section 22 of the Education (Scotland) Act 1980 in respect of the discontinuation of denominational schools by a local authority were considered by the House of Lords in an appeal from the Inner House of the Court of Session in 1987, namely *Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council*. Highland Regional Council proposed to discontinue two Roman Catholic primary schools within the region, and obtained the consent of the Secretary of State for Scotland to that effect. The Hierarchy of the Roman Catholic Church petitioned the Court of Session for judicial review of the Secretary of State for Scotland's decision in the matter, on the ground that the Secretary had acted *ultra vires*. This argument was rejected by both the Inner and Outer House, and eventually by the House of Lords. Nevertheless, Lord Mackay of Clashfern's judgment in the House of Lords provides a helpful summary of section 22 of the 1980 Act thus:

My Lords, the judges in the Court of Session and counsel before your Lordships were agreed that in these provisions Parliament had not described its intentions with

conspicuous clarity. However, in my opinion, it is clear that the legislature intended, by the amendments introduced in 1981 to s. 22, to authorise education authorities generally to use the powers affected by the amendments without reference to the Secretary of State. On the other hand, Parliament appreciated that certain proposals to exercise these powers might have particular consequences which make it expedient that the Secretary of State's consent to such proposals should be required before they could be implemented. I take the example of the power to close a school which is in issue in the present case. Ordinarily the authority, after the necessary consultation prescribed under s. 22A, could give effect to the proposal without recourse to the Secretary of State. If, however, the school proposed for closure had a primary department and the nearest primary school was more than five miles away the authority could not give effect to that proposal without the consent of the Secretary of State. If the school was a denominational school and its closure meant that some or all of its pupils would no longer be educated at such a school its closure required the consent of the Secretary of State. If the school was a denominational school and its closure involved a significant deterioration in the provision by the education authority of denominational schools as compared with non-denominational schools its closure would require the consent of the Secretary of State. The criteria established under s. 22B and s. 22C are relatively clear cut. Whether or not a significant deterioration would result under s. 22D is very much a matter of opinion and therefore called for a preliminary ruling whether the proposal did involve such a significant deterioration. If it does, the consent of the Secretary of State is required.⁴⁹

In addition, the case reveals various interesting details in respect of the conditions the Secretary of State for Scotland can attach to the giving of his consent for a denominational school to be discontinued. In the instance of one of the two denominational schools, which the Secretary gave his consent to the local authority's proposal to discontinue, the following conditions were applied. Since the pupils who had formally attended the denominational school were to be transferred to a non-denominational school, a teaching position was guaranteed in that school for a teacher approved by the Hierarchy of the Catholic Church, provision was made for the transferred pupils to receive religious instruction four times a week from a representative (i.e. chaplain) appointed by the Hierarchy, and one hour a week

⁴⁹ *Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council*, 1987 S.L.T. 708.

of religious observance. From this, it may be the case that various non-denominational schools in Scotland have specific provisions made by virtue of decisions made by former Secretaries of State for Scotland by which they are rendered in effect quasi-denominational schools.

While the specific arrangements reached in Scotland in respect of faith schools have been driven, historically and principally, by the situation of the Catholic Church, statutory provisions are couched in terms of “churches and denominational bodies” and, as such, faith schools may be provided by the state for any religious group. At present “Scotland has 370 state-funded faith schools - 366 Catholic, one Jewish and three Episcopalian”.⁵⁰

At present, the regulations governing the creation of new denominational schools make no explicit provision for belief bodies. This may be because no belief body has petitioned a local authority to the effect that a “denominational” school be established and carried on in its interests. Nevertheless, it is unlikely that a local authority would reject a petition from a belief body in such a case on the ground that the petitioning body was not a denomination or religious body. It is already well established in the jurisprudence of the European Court of Human Rights that the term “religion” should be interpreted broadly, so as to include non-religious belief and there are specific examples in Scots law of this approach being applied: Scots marriage law⁵¹ and Scots charity law⁵² hold belief bodies and non-religious forms of belief to be directly analogous with and equal to religious bodies and religious belief.

4.3.2 Admissions Policies for Denominational Schools

Admissions policies for denominational schools are a matter for individual local authorities, and as such are not determined by the Scottish Government or by individual schools. Local authorities may alter their admission policies in respect of denominational schools, but must only do so following a public consultation,⁵³ and with the consent of the Secretary of State for Scotland.⁵⁴ In effect, local authorities may tighten or relax admission procedures

⁵⁰ <http://www.scotland.gov.uk/Topics/Education/Schools/FAQs>

⁵¹ i.e. Marriage (Scotland) Act 1977, s. 8(1)(a)(ii).

⁵² Charities and Trustee Investment (Scotland) Act 2005, s. 7(3)(f).

⁵³ Conform to the Schools (Consultation) (Scotland) Act 2010.

⁵⁴ Education (Scotland) Act 1980, s. 22D(2)(iv). The Secretary of State for Scotland must consult the representatives of the denominations in whose interests denominational schools are being carried on within the

depending upon the capacity and occupancy levels of denominational schools within its jurisdiction. So, if Catholic schools are oversubscribed, admission policies may be tightened so as to permit the admission to denominational schools only of those children in possession of a valid baptismal certificate.⁵⁵ Conversely, admission policies presumably may be relaxed where there are declining numbers of Catholic families within a school catchment area.

The admissions policies of local authorities in respect of denominational schools may not directly discriminate against potential pupils not of the religion in whose interests the schools in question are carried on, but they may prioritise potential pupils who are of the religion in question. The selection of pupils for admission to denominational schools by having regard to their or their parents' religion is not considered to be unlawfully discriminatory under the terms of the Equality Act 2010. So, the [Equality Act 2010, s. 85](#) (1) and (2) (a) to (d) states that:

- (1) The responsible body of a school to which this section applies must not discriminate against a person—
 - (a) in the arrangements it makes for deciding who is offered admission as a pupil;
 - (b) as to the terms on which it offers to admit the person as a pupil;
 - (c) by not admitting the person as a pupil.
- (2) The responsible body of such a school must not discriminate against a pupil—
 - (a) in the way it provides education for the pupil;
 - (b) in the way it affords the pupil access to a benefit, facility or service;
 - (c) by not providing education for the pupil;
 - (d) by not affording the pupil access to a benefit, facility or service;

Notwithstanding that, Scottish denominational schools are exempt from these provisions by virtue of [schedule 11, paragraph 5](#) to the same Act, concerning religion or belief-related discrimination, which states that the section just cited:

so far as relating to religion or belief, does not apply in relation to—

local authority in question prior to giving his consent, as per s. 22D(2)(c). In granting such consent, the Secretary of State for Scotland may impose certain conditions, as per s. 22D(6).

⁵⁵ For example see the recent consultation undertaken by Falkirk Council in this respect at <http://www.falkirk.gov.uk/services/council-democracy/consultations-surveys/previous-consultations/schools-admissions-policy.aspx>

- (c) a school transferred to an education authority under section 16 of the Education (Scotland) Act 1980 (transfer of certain schools to education authorities) which is conducted in the interest of a church or denominational body;
- (d) a school provided by an education authority under section 17(2) of that Act (denominational schools).

The UK Government's Department of Education 2014 [*The Equality Act 2010 and Schools*](#) advice document, pages 12 to 13, offers a discussion of a faith school's admissions policies and the Equality Act 2010. Although this document concerns English, rather than Scottish, schools, the discussion of the provisions and exemptions contained in the 2010 Act is nevertheless helpful:

Schools with a religious character

2.3 Schools with a religious character (commonly known as faith schools) have certain exceptions to the religion or belief provisions which allow them to discriminate because of religion or belief in relation to admissions and in access to any benefit, facility or service.

Admissions

2.4 Schools with a religious character may give priority in admissions to members of their own religion. The Admissions Code provides that this may only be done when a school is oversubscribed – schools subject to the Code are not permitted to refuse admission to pupils not of their faith if they have unfilled places.

For example, a Muslim school may lawfully give priority to Muslim pupils when choosing between applicants for admission. However, the Admissions Code will not allow it to refuse to accept pupils of another or no religion unless it is oversubscribed.

The exception is not in fact confined to preferring children of the school's own faith. It would, for example, allow a Church of England school to allocate some places to children from Hindu or Muslim families if it wanted to ensure a mixed intake reflecting the diversity of the local population. It would not, however, allow the school to base this selection on ethnic background rather than faith.

Benefits facilities and services

2.5 In addition to the admissions exception, schools with a religious character also have exceptions for how they provide education to pupils and in the way they allow access to other aspects of school life which are not necessarily part of the curriculum.

For example:

A Jewish school which provides spiritual instruction or pastoral care from a rabbi is not discriminating unlawfully by not making equivalent provision for pupils from other religious faiths.

A Church of England school which organises visits for pupils to sites of particular interest to its own faith, such as a cathedral, is not discriminating unlawfully by not arranging trips to sites of significance to the faiths of other pupils.

A child of a different faith could not claim, for example, that they were being treated less favourably because objects symbolic of a school's faith, such as the Bible, were given a special status in the school.

What is not permissible

2.6 These exceptions allow such schools to conduct themselves in a way which is compatible with their religious ethos. But the Equality Act does not permit less favourable treatment of a pupil because they do not (or no longer) belong to the school's religion. For example, it would be unlawful for a Catholic school to treat a pupil less favourably because he rejected the Catholic faith and declared himself to be a Jehovah's Witness or an atheist.

2.7 Nor does it allow them to discriminate on religious grounds in other respects, such as excluding a pupil or subjecting a pupil to any other detriment. It also does not permit them to discriminate in relation to other protected characteristics, for example a school with a religious character would be acting unlawfully if it refused to admit a child because he or she was gay – or their parents were.'

4.3.3 Religious Education in Denominational Schools

As noted above, the Scottish Government makes a distinction between religious instruction in non-denominational schools (RME) and religious instruction in denominational, or as the

2011 Circular somewhat misleadingly designates them, Roman Catholic schools (RERC). In respect of Roman Catholic schools, the [Scottish Government's 2011 Circular on religious instruction](#) differentiates between “Religious and Moral Education and Religious Education in Roman Catholic Schools within Curriculum for Excellence” (paras. 4. to 8.) and “Religious Education in Roman Catholic Schools” (paras. 12. to 14.).

In respect of the former the following extracts in particular may be noted:

Paragraph 4 mentions views which are independent of religious belief, but also uses explicitly theological language: [RERC] increases children and young people's awareness of the spiritual dimension of human life through exploring the world's major religions and views, including those which are independent of religious belief, and considering the challenges posed by those beliefs and values... Specifically, the process of learning in religious education in Roman Catholic schools assists children and young people to make an informed mature response to God's call to relationship. This encourages children and young people to act in accordance with an informed conscience in relation to matters of morality through developing their knowledge and understanding of significant aspects of Catholic Christian faith.

Paragraph 6: In Roman Catholic schools the experiences and outcomes should be delivered in line with the guidance provided by the Scottish Catholic Education Service.

Paragraph 7: Under section 9 of the Education (Scotland) Act 1980, the conscience clause advises that parents have a statutory right to withdraw children from participation in religious and moral education and religious education in Roman Catholic schools.

Paragraph 8: An additional factor which parents should consider is that in choosing a denominational school for their child's education, they choose to opt in to the school's ethos and practice which is imbued with religious faith and it is therefore more difficult to extricate a pupil from all experiences which are influenced by the school's faith character.

In respect of the latter the following may be noted:

Paragraph 12: All Catholic schools are expected by the Bishops' Conference of Scotland to follow guidelines established by the Catholic Education Commission on the provision of adequate time for religious education within the school curriculum. These guidelines indicate a requirement for a minimum of 2.5 hours per week in primary school and 2 hours per week in all stages of secondary school. In all secondary stages this minimum time allocation is expected by the Commission to be provided through 2 periods of religious education classes per week and enriched by additional activities throughout the school year.'

Paragraph 13 concerning the relevant legislation on the management of denominational schools in Scotland states that:

A teacher appointed to any post on the staff of any such school by the education authority shall be required to be approved as regards religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted. For those teaching posts which impact on the teaching of religious education, teachers will, in addition, be expected to have obtained an appropriate teaching qualification in Catholic Religious Education.'

Paragraph 14: The role of the wider parish community plays an important part in the delivery of religious education. Active learning approaches to learning and teaching, including collaborative learning, will encourage children and young people to discuss and share ideas, experiences and moral challenges in a variety of ways. Such opportunities are not only provided by the teacher but by parents and families and in local parish and community settings. Schools are encouraged to use the rich resources available from the local, national and global community when planning their programmes of study.

4.4 Rights to education

Both parents and their children have various rights in respect of education: international and European human rights and legal rights set out in domestic legislation. To some extent these rights take account of religion, although generally subject to restrictions which recognise the

overriding requirements of providing efficient instruction and training and avoiding unreasonable public expenditure.⁵⁶ Equality rights also operate to protect against discrimination between different religions and beliefs and these are relevant in moves towards greater diversity of beliefs in the context of education. A detailed exploration of these various areas of law is beyond the scope of this review⁵⁷ and what this section aims to do is simply to outline the key provisions and protections which exist and to highlight some of the issues to which they may give rise.

4.4.1 The European Convention on Human Rights (ECHR)

The *European Convention on Human Rights*, First Protocol, Article 2 states that:

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

The European Court of Human Rights has stated that the second sentence of Article 2 aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the “democratic society as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.”⁵⁸

It is clear that the right to respect for religious and philosophical convictions belongs to the parents of a child and not to the child or to any religious organisation or association.⁵⁹ This approach is followed in Scots domestic law, as set out below. It fits well with the general tenor of respect for private and family life.⁶⁰

At the time of ratification of the treaty, the United Kingdom made a reservation to the effect

⁵⁶ Human Rights Act 1998, Sched 3.

⁵⁷ See for further detail R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland* (3rd ed) Bloomsbury, 2008, 6.153 – 6.157 and for discussion of children’s rights and education law in Scotland, L-A Barnes, “The Child’s Right to Education” in A Cleland and EE Sutherland, *Children’s Rights in Scotland* (3rd ed), W Green, 2009, 209-231.

⁵⁸ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976), (1979-80) 1 E.H.R.R. 711.

⁵⁹ *Jordebo Foundation of Christian Schools and Jordebo v Sweden* (1987) DR 51.

⁶⁰ Art 8

that the obligation under Article 2 only applies in so far as “it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure”.⁶¹ In *X and Y v United Kingdom*,⁶² it was made clear that the Article did not place an obligation on a state to establish or support any establishment supporting any particular set of religious or other beliefs. The right operates in respect of access to the education which is being provided rather than requiring a state to make special educational provision in respect of particular religious or other beliefs.

4.4.2 The UN Convention on the Rights of the Child (UNCRC)

While the ECHR sets out general human rights, the UN Convention on the Rights of the Child is a specialised set of rights designed specifically for children. Articles 28–30 of the UN CRC all deal with aspects of education, which can overlap in various ways with religion. Education as a fundamental developmental right is set out in Article 28 and further elaboration of the aims of education is set out as follows in Article 29:

1. States Parties agree that the education of the child shall be directed to
 - (a) the development of the child’s personality, talents and mental and physical abilities to their fullest potential;
 - (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) the development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; ...

The religious rights of children in minority communities have specific protection in terms of Article 30. In contrast to the individual focus of many of the other Articles, Article 30

⁶¹ Human Rights Act 1998, Sched 3.

⁶² (1982) DR 31, 210.

highlights in particular the right of the child “in community with other members of his or her group ... to profess and practise his or her own religion.”

Although the CRC sets out individual rights for children, it proceeds on the basis that children are best situated within families and again there is clear respect for parents within the context of education. Article 5 provides that:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

4.4.3 Domestic law

The provisions of Scots law in respect of the right to education and rights in respect of religious education are largely consistent with these various human rights.

Section 28(1) of the Education (Scotland) Act 1980 provides that:

In the exercise and performance of their powers and duties under this Act, the Secretary of State and education authorities shall have regard to the general principle that, so far as is compatible with the provision of suitable instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.

In keeping with the idea that the state provision of religious education is a benefit for religious parents rather than an independent right for children,⁶³ it is the parents who have the right to remove their child from religious education in school. The view of the Scottish Government is that “there is an intrinsic value in learning about religion as well as learning from religion” and that religious and moral education should not be simply about the delivery of information but should also allow for “the idea of ‘personal search’” and the “development

⁶³ For further discussion, see e.g. S. Grover, “Children’s right to be educated for tolerance: minority rights and inclusion” (2007) 19(1) *Education and the Law* 59.

of a child or young person’s own beliefs and values”.⁶⁴ Section 9 of the Education (Scotland) Act 1980 provides, in what is termed the “conscience clause”, that:

Every public school [and every grant-aided school] shall be open to pupils of all denominations, and any pupil may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; and no pupil shall in any such school be placed at any disadvantage with respect to the secular instruction given therein by reason of the denomination to which such pupil or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects.

The first part of this provision fits very closely with the human rights protections for individual belief and conscience set out above and the second part reflects the contemporary legal framework of equality which aims to protect against disadvantage. Section 85(2)(a)-(d) of the Equality Act 2010 imposes a duty on the “responsible body” of a school not to discriminate:

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service

but such a duty

so far as relating to religion or belief, does not apply in relation to anything done in connection with acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum)⁶⁵

There is relatively little case law relating to these provisions in the context of religious discrimination and in particular there is little that is specific to Scotland. Therefore although we have a relatively detailed statutory framework it has rarely been tested.

4.5 Governance and representation on education bodies

⁶⁴ Scottish Government, *Curriculum for excellence: religious and moral education principles and practice*, 2012, available at www.curriculumforexcellencescotland.gov.uk. In Scotland there is provision for both religious education and religious observance, with the latter involving practising religion or participating in some other form of “reflection”.

⁶⁵ Equality Act 2010, s89(12).

Provision is made for representation of churches and religious bodies in various ways in the structure for governance of education in Scotland. The following provisions show how this is legally regulated and the extent to which there is special provision for certain denominations, in particular the Church of Scotland.

4.5.1 Representatives of churches and denominational bodies on education committees appointed by education authorities

When local government was re-organised in Scotland by the Local Government (Scotland) Act 1973, [section 124](#) made provision for each of the new 32 local authorities to appoint advisory education committees. Although the wording of section 124 was subsequently re-phrased by the Local Government etc (Scotland) Act 1994 (c 39), section 31, its tenor remained effectively the same. Section 124(4) is concerned with the appointment of representatives of churches and denominational bodies on education committees, whereby one place on each such committee is expressly reserved for a representative of the Church of Scotland as nominated by the General Assembly. Other denominations also enjoy places on these education committees, most notably the Catholic Church, although only the Church of Scotland enjoys a prescribed place on all such committees. This provision remains in force at the present time.

Section 124 - **Membership of committees appointed by education authorities.**

- (1) Where an education authority appoint a committee whose purposes include—
- (a) advising the authority on any matter relating to the discharge of their functions as education authority; or
 - (b) discharging any of those functions of the authority on their behalf, the members of such committee shall, notwithstanding the provisions of section 57(3) and (4)(a)⁶⁶ of this Act, be appointed in accordance with this section.

⁶⁶ Section 57(3) runs: 'A committee appointed under subsection (1) above, other than a committee for regulating and controlling the finance of the local authority or of their area may, subject to section 59 below, include persons who are not members of the appointing authority or authorities or, in the case of a sub-committee, the authority or authorities of whom they are a sub-committee, but at least two-thirds of the members appointed to any such committee (other than a sub-committee) shall be members of that authority or those authorities, as the case may be.' Section 57 (4)(a) runs: '(4) A local authority may appoint a committee, and two or more local authorities may join in appointing a committee, to advise the appointing authority or authorities on any matter relating to the discharge of their functions, and any such committee— (a) may consist of such persons (whether members of the appointing authority or authorities or not) appointed for such term as may be determined by the appointing authority or authorities'.

- (2) Subject to the provisions of section 59⁶⁷ of this Act, an education authority who appoint a committee such as is mentioned in subsection (1) above shall secure that—
- (a) at least half of the persons appointed by them to be members of such committee are members of the authority; and
 - (b) the persons appointed by them to be members of such committee shall include the three persons mentioned in subsection (4) below.
- (3) Subject to the provisions of subsection (2) above, an education authority may appoint persons who are not members of the authority to be members of a committee such as is mentioned in subsection (1) above.
- (4) The three persons mentioned in subsection (2)(b) above (who shall not be members of the education authority appointing such committee) are—
- (a) one representative of the Church of Scotland, nominated in such manner as may be determined by the General Assembly of the Church;
 - (b) in the case of the education authority for each area other than Orkney Islands, Shetland Islands and Western Isles, one representative of the Roman Catholic Church, nominated in such manner as may be determined by the Scottish Hierarchy of the Church;⁶⁸ and
 - (c) one person or in the case of the education authorities for Orkney Islands, Shetland Islands and Western Isles, two persons, in the selection of whom the authority shall have regard (taking account of the representation of churches under paragraphs (a) and (b) above) to the comparative strength within their area of all the churches and denominational bodies having duly constituted charges or other regularly appointed places of worship there.
- (5) Where two or more authorities appoint a joint committee whose purposes include discharging any of the functions of those authorities as education authorities on their behalf, section 57(3) of this Act shall apply to such a joint committee as if for the words 'two-thirds' there were substituted the words 'one-half'.

4.5.2 The General Teaching Council for Scotland

⁶⁷ Which section concerns disqualification from membership of committees.

⁶⁸ This did not represent an alteration of the 1973 provision as originally enacted, since the Catholic Church enjoyed prescribed places only in the case of those education authorities constituted 'for the area of a region', s.1(2) of the 1973 Act stating that 'Scotland (other than Orkney, Shetland and the Western Isles) shall be divided into local government areas to be known as regions'.

The General Teaching Council contains religious representatives under the Public Services Reform (General Teaching Council for Scotland) Order 2011/215 (Scottish SI), schedule 2 [membership of the General Teaching Council for Scotland], para.3, the 11 members of the GTC are to include one “nominated by the Church and Society Council of the General Assembly of the Church of Scotland” and one “nominated by the Scottish Hierarchy of the Roman Catholic Church”.

4.5.3 Parent Councils and Combined Parent Councils

Parent councils in denominational schools include religious representatives. Under the Scottish Schools (Parental Involvement) Act 2006 asp 8, section 7, denominational schools “must provide for at least one of the council's members to be so co-opted and to be a person nominated by the church or denominational body in whose interest the school is conducted”. Under section 16(13 &14) of the same Act, where a:

Combined Parent Council is being established and one or more of the represented schools is a denominational school, the constitution of the Combined Parent Council must provide for (a) the church or denominational body in whose interest a represented school is conducted, or (b) where there is more than one such church or denominational body, each church or body, to nominate at least one person to be a co-opted member of the council.

4.6 Teacher training and Universities

4.6.1 University teachers of Christian theology and divinity

Under the Universities (Scotland) Act 1932, the appointment of professors of theology in faculties of divinity or theology in Scottish universities was transferred from the Crown and other bodies to the University Courts with special provision for the approval for appointments by the General Assembly of the Church of Scotland (and special provision for professors at former United Free Church Colleges, which Church united with the Church of Scotland in 1929). Section 4 of the Act, a provision entitled “Anent Scottish Universities entering into agreements with Churches and Associations”, stipulated that:

Nothing in this Act contained shall restrict any University Court from entering into agreements with any Christian Church or Association of Christians whereby teachers of theology may be admitted to University status or privileges.

Separate provisions were enacted for named positions in the Universities of Aberdeen and St Andrews. Provision was made also to ensure specific bursaries remained used for theology students. This Act effectively created, or regularised, the appointment by Universities of theology and divinity professors acceptable to churches or associations of Christians which bodies traditionally recognised, and to this day still recognise, specific university qualifications for appointment of graduates in the work of Christian churches or associations. This could in principle be used to ensure, for example, that teaching of Christian theology may only be undertaken by Christians. However, this provision only applies to faculties of theology or divinity, and not to faculties of education which train school teachers.

4.6.2 Catholic Teacher Training in Scotland

In order to supply Catholic schools with suitably qualified teachers, Notre Dame College of Education, Bearsden, Glasgow, was set up in 1895 and Craiglockhart College, Edinburgh, opened in 1919. These Catholic teacher training colleges were merged into St Andrew's College of Education in 1981, which was designated as a Catholic Institute of Higher Education, and its qualifications were validated by the Council for National Academic Awards. This Council was discontinued in 1993, from which time, St Andrew's College of Education's qualifications were validated by the University of Glasgow. On 11 April 1999 St Andrew's College of Education merged with Glasgow University and formed the main part of a new University Faculty of Education (renamed School of Education upon University of Glasgow re-structuring in 2010).⁶⁹ The teacher training of Catholic teachers for employment in Scotland's denominational Catholic state-funded schools is presently carried on under the auspices of the St Andrew's Foundation for Catholic Teacher Education within the University of Glasgow's School of Education.⁷⁰ This arrangement may be considered as analogous to the position of the Church of Scotland in relation to the Schools of Divinity at Scotland's four ancient universities.

4.7 Chaplains

Chaplains in denominational and non-denominational schools

⁶⁹ Historical information taken from http://www.gashe.ac.uk:443/public_docs/isaar/C0738.htm

⁷⁰ <http://www.gla.ac.uk/schools/education/standrewsfoundation/>

The role of chaplains in Scotland's state funded schools is relatively straightforward for denominational schools, but rather more complex for non-denominational schools, the latter taking up the majority of this section.

4.7.1 Denominational schools

In denominational schools, the [Education \(Scotland\) Act 1980, s.21\(3\)](#) states that:

For each such [i.e. denominational] school the education authority shall appoint as supervisor of religious instruction, without remuneration, a person approved as regards religious belief and character as aforesaid,⁷¹ and the supervisor so appointed shall report to the education authority as to the efficiency of the religious instruction given in such school, and shall be entitled to enter the school at all times set apart for religious instruction or observance.

In this, chaplains to denominational schools are effectively presented by the denomination in whose interests a school is run (usually, but not always, the Catholic Church), rather than selected by a school's head teacher, which is in marked contrast to practice in non-denominational schools.

4.7.2 Non-denominational schools

In non-denominational schools, the fulfilment of the statutory obligation concerning religious observance is a matter for head teachers, acting within the general frameworks set out in Scottish and Local Government policy documents, and with a view to local custom. In this, non-denominational schools may have long-standing customary arrangements with local parish ministers in respect of religious observance, and may also appoint ministers as chaplains. But there are no statutory obligations placed upon non-denominational schools to appoint chaplains, nor to favour the ministry of the Church of Scotland in relation to religious observance, and it appears from anecdotal evidence that at least some non-denominational schools do not appoint chaplains at all.

The fact that the appointment of chaplains is a matter for head teachers, whose decisions may reflect local customary arrangements, may explain why Freedom of Information requests to

⁷¹ That is 'approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted' (Education (Scotland) Act, s. 21(2A)).

local authorities in Scotland as to which chaplains etc have access to non-denominational schools have not previously received satisfactory answers. Such requests may in effect have been seeking information which local authorities did not possess, as local authorities have not historically compiled such information. As is discussed below, South Lanarkshire Council certainly now appear to be compiling such information annually.

That said, local authorities are supposed to produce policy guidance for head teachers within their authority in respect of religious observance. While a systematic search has not been made in respect of the chaplaincy policies of Scotland's 32 local authorities, various insights have been obtained from [Glasgow City Council's 2009 Religious Observance Policy document](#), and also from [Argyll and Bute Council's 2010 Education Management Circular No 1.43](#) concerning the role of chaplains in non-denominational schools. To this evidence may be added the [Guidance for Schools Regarding Chaplains and Chaplaincy Teams in Non-denominational Schools](#), recently approved by the Education Resources Committee of South Lanarkshire Council.

Various aspects of these documents are cited below, and these policy documents clearly provide various examples of good practice. The appointment of chaplains to Catholic schools is in the hands of members of the Hierarchy of the Catholic Church, and it may be presumed that parents who send their children to such schools have enjoyed a relatively clear understanding of what the religious aspects of such schools are likely to be. The appointment of chaplains to non-denominational schools remains in the hands of individual head teachers, and it would appear that, as traditional customs have altered, greater clarity and transparency surrounding chaplains and their roles in non-denominational schools has been required. The guidance issued by South Lanarkshire Council provides an example of best practice, and has been welcomed by the Scottish Secular Society,⁷² by the Presbytery of Hamilton (Church of Scotland),⁷³ and by the Free Church of Scotland.⁷⁴

4.7.3 Some examples of policy

⁷² <http://www.scottishsecularsociety.com/south-lanarkshire-education-resources-committee-implements-the-ssss-recommendations-in-full/>

⁷³ <http://www.presbyteryofhamilton.co.uk/news/2015/02>

⁷⁴ <https://theweeflea.wordpress.com/2015/01/23/response-to-guidelines-issued-by-south-lanarkshire-council-on-chaplains-and-religious-observance/>

What follows is a sample of key provisions from three recent Policy documents.

Glasgow City Council's 2009 Religious Observance Policy

This policy document confirms that in non-denominational schools, head teachers are responsible for the content of religious observance in their own schools. Glasgow City Council recommend at page 15 that:

Schools should establish a Religious Observance Planning Group, which would be remitted to consider the following:

School Policy development and review

School Religious Observance Annual Programme of Events

Developing good practice and identifying / delivering appropriate training

Such a group may include within its membership, staff members (including Senior Staff members with Religious Observance remit), chaplains, children and young people and parents / carers. The school's Pupil Council may also be engaged in leading and / or developing good practice in Religious Observance.

Detailed guidance is also provided concerning the "Role of Chaplaincy" (pp. 20-23).

(i) Appointment of Chaplains

In Roman Catholic schools, chaplains are appointed by the Archbishop of Glasgow, whilst in the non-denominational sector they are invited to participate in school life by the Headteacher. (p. 20).

(ii) Role of Chaplains in non-denominational schools (Religious Observance)

Chaplaincy teams are a core resource for schools...The chaplaincy may of course support a wide range of curricular areas in the school including Religious and Moral Education and Personal and Social Developments. Consequently it is the expectation of the authority that all schools will have a chaplaincy in place. (p. 20).

The Headteacher should discuss with the chaplain(s) how Religious Observance should be planned in light of the above advice to address the needs of the whole school community...Amongst the appropriate functions of the chaplaincy are the following: assisting with curricular delivery within particular units or courses; membership of the school's Religious Observance Planning Group. (p. 20).

Chaplains may or may not be involved in Religious Observance in the non-denominational sector depending on the programme approved by the Head Teacher. In the denominational sector the chaplaincy will of course play a key role. The role of chaplains in both sectors is to add further substance to the agreed national definition of religious observance.

An approach seeking to convert an audience to one faith group or another is not appropriate in the non-denominational sector, however [sic] it is important that Christian clergy are able to participate with integrity in an religious observance experience when invited to do so by the Headteacher. The opportunities for this will be explored as part of the programme of Chaplains' meeting organised by the Authority.

Within the context of organised acts of worship within schools, the chaplain will be addressing members of their own faith communities. In this context a confessional approach is appropriate. (p. 21).

(iii) The Pastoral Role of the Chaplaincy

As an integral part of the chaplaincy's involvement with the shared community values of the school, the chaplaincy exists to benefit and support all staff, children and young people and their families...

Chaplains may be invited to support school excursions, events and celebrations out with the assumed context of chaplaincy involvement (pp. 21-22).

(iv) Curricular Support

Chaplains can be useful contacts to enable schools to form relationships with local religious communities. Visits to churches and religious buildings can complement the study of religious belief in school and the involvement of the chaplaincy and local churches or religious buildings in developing anti-sectarianism or an understanding of

ecumenism can similarly add to greater understanding of key concepts for children and young people. (p. 22).

(v) Chaplaincy Teams

To deliver a quality input into the educational sector a team chaplaincy approach would be the favoured option in terms of constructing a school chaplaincy...

Many schools have chaplaincy teams which include representatives from a range of traditions who cooperate with other members of staff and young people in the planning, preparation and presentation of acts of Religious Observance.

Argyll and Bute Council's 2010 Education Management Circular No 1.43 concerning the role of chaplains in non-denominational schools

(i) Appointment of Chaplains

Chaplains to non-denominational schools are appointed at the invitation of the head teacher / campus principle and endorsed by the education authority. Not all chaplains need be Christian or of one Christian denomination. A school can decide to appoint a chaplaincy team if this is considered appropriate...When a chaplaincy changes the head teacher / campus principle must inform the Executive Director of Community Services. Standard disclosure procedures must be followed; see education management circular 1.56. (p.1).

(ii) Chaplains and Religious Observance

There are many different ways in which schools make arrangements for religious observance. Normally this will be at a school assembly, but not all assemblies need be occasions for religious observance. Religious observance and the assembly are the responsibility of the head teacher/campus principal and the school staff. Where this is appropriate provision may be made for religious observance of faiths other than Christianity. Chaplains are not always necessarily involved. Where chaplains are involved the extent of their involvement varies greatly...

Through religious observance (and possibly through the religious and moral education

programme) schools should offer chaplains the opportunity to speak about their faith and the search it initiates; to speak about their own experience; to tell of other faith explorers; and to counter religious stereotypes, whether they be of Christian, Jewish or any other faith community.

Chaplains should acknowledge that religious observance should be inclusive and should safeguard at all times the freedom of conscience of pupils, parents and staff... (p. 2).

(iii) Chaplains as a resource

Visits to churches

The chaplain is very likely to be the minister of a local church and so visits to that church can be arranged. Where there is a team of chaplains of different denominations, visits to their different places of worship might be encouraged. It would be useful if Christian chaplains could not only explain the difference among the various branches of the Church in, for example, catholic, presbyterian and orthodox traditions, but also ensure that they emphasise what is held in common. In particular they might demonstrate how Christians of different denominations can work and worship together. (p.3)

Chaplains and RME

Whereas in the primary sector all teachers have to teach religious and moral education and may also assist with religious observance and school assemblies, in secondary schools the religious education department has its own specialist teachers who may have little or no responsibility for religious observance. Unless the chaplain is a trained teacher and currently registered with the GTC, they should not be asked to teach a class without the presence of the class teacher. However, the chaplain does have an unique range of other experiences in the field of religious education which can make a positive contribution to the quality of classroom learning, so there is merit in exploring the possibility of the chaplain sharing in the work of the class on a team teaching basis for certain units of work. (pp. 3-4).

(iv) Chaplains as representative of denominational bodies

The chaplain enters the school as the representative of religious organisations in the area.

In certain areas where the church is strongly identified with the local community, the chaplain may also represent the community and its interest in the school.

This interest may be expressed by the school chaplain participating in events which affect both the school and the community, e.g. prize giving, displays and ceremonies. In a different way the chaplain may also help the school with its role in the wider community. (p.5).

South Lanarkshire Council's 2015 Guidance for Schools Regarding Chaplains and Chaplaincy Teams in Non-denominational Schools

1.5 Chaplains in South Lanarkshire Council schools

The head teacher is responsible for the composition and size of the chaplaincy team. Chaplains are in school by invitation of the head teacher. As with all visitors to establishments, the head teacher must know who is in their establishment and what their role and function is. Chaplains for each school will be drawn from local places of worship and faith groups.

Head teachers must inform the parent council, as representatives of the parent forum, in decisions about the composition and size of the chaplaincy team.

Information about who is in the chaplaincy team and of what they do in school must be provided annually to parents.

For formal approval, schools are required to notify South Lanarkshire Council annually as to the composition of their Chaplaincy Team, using the South Lanarkshire Council pro forma.

1.6 Child Protection/ PVG

All members of the Chaplaincy Team must have full PVG.⁷⁵

Chaplains' roles will vary from school to school: present at assemblies, leading religious observance, visiting classes, engaging with small groups or any other activity agreed with the head teacher.

During visits to classes and small groups at least one member of the teaching staff must be present.

If a chaplain is delivering an extra curricular activity under the auspices of the school, such as Scripture Union, with no members of school staff present then parental permission is required.

1.7 The role of the chaplain

The chaplain's key function is to assist the establishment in the delivery of religious observance / time for reflection. The role of the chaplain can be a diverse one and may include:

- assisting the school to help support and develop the religious observance calendar of events;
- providing pastoral care and support for staff, pupils and their families, where appropriate;
- having a key role during times of extreme difficulty or crisis;
- supporting school community events;
- visiting classes at the invitation of teachers and / or head teacher to complement the curriculum;
- contributing to extracurricular clubs in consultation with the head teacher;
- leading or helping pupil groups with a particular religious, moral or citizenship interest;
- participating in school trips;
- providing a link between the school and local community;

⁷⁵ PVG refers to 'Protecting Vulnerable Groups' via Disclosure Scotland background checks, for which see [here](#).

- any other activity agreed between the head teacher and the chaplain.

The role of the chaplain may differ from school to school depending on the school community, the chaplain's particular interests and the time available.

1.8 Engagement with parents

Annually schools must inform their parent council about the composition of the chaplaincy team. This information must be updated in the school handbook each year.

Parents must be informed about the times and subject of planned activities which will be delivered by the chaplaincy team.

Under the terms of the Education (Scotland) Act 1980, parents / carers have the right to ask for their children to be withdrawn from religious observance and / or religious and moral education. A statement to this effect must be included in the school handbook. In addition, parents must be reminded on an annual basis of their right to withdraw. This should be done through the school's first newsletter.

1.9 Religious and moral education and chaplaincy

The chaplaincy team has no function to ensure that religious and moral education is carried out. The programme of religious and moral education and its delivery remains the responsibility of the head teacher and the teaching staff of the school. However, schools may involve the chaplaincy team, as a resource, in religious and moral education planning and delivery.

4.8 Conclusion

Education stands out rather distinctively in our review of religion in Scots law. For the most part, in other areas, the general trend has for some time been towards the secularisation of the law. By this we mean that in general, there has been a strong drift towards the diminution of statutory support for religion and religious influence. The major exception to this is Education. Education is an area in which the influence of religion has changed its form, but has in many ways been increasing. There is no question that education in the school classroom and the university lecture theatre has been secularising for some considerable time,

and is continuing to do so. But this is in contrast to changes in curricular and governance structures which have not diminished, but rather strengthened, the place of religion. As education has been secularising in some ways, the Church of Scotland, the Roman Catholic Church and other religious bodies, have increased the legal safeguards for their former rights and privileges and greater explicit protection for what they have perceived as their place in the overall system of education.

The general effect of this has been to increase the statutory protection for religion and church interests in education. A recent article by John Stevenson has demonstrated how this applies in the area of religious education in non-denominational schools.⁷⁶ The author shows how the legislative framework for religious education was actually extremely thin when state schooling was created in 1872; the legislation was permissive on religious instruction, and the first attempt by the Church of Scotland to make religious instruction compulsory failed in 1918. But from 1929, it required a plebiscite to remove it from the curriculum of schools.⁷⁷ After 1945, there was a move to the universal adoption of a unified RE curriculum in non-denominational schools designed by the churches and overseen by new regulations. In addition, church influence in the management of education by local authorities, which was abandoned in 1929, was given a new statutory framework only in 1973, and persists to this day.

We must add an important caveat here. The firming up of these statutory protections does not imply that the content of teaching in schools or universities has in some sense become more religious, or more militant, or more fundamentalist. Indeed, there has been considerable evidence for some decades that the teaching of religion in non-denominational schools and in university theology departments has become strongly influenced by secularising trends; including teaching on multiple faiths, the liberalisation of theology, and more recently the discussion of non-religious belief positions. There have been instances where conservative Christians have reputedly influenced religious observance and teaching in Scottish schools; but instances of liberalisation and even the decay of religious observance abound, and have done so since the 1960s.

⁷⁶ John Stevenson, "Securing religious education in non-denominational schools 1872-1972: church and school. A policy of co-operation", *Records of the Scottish Church History Society* vol. 44 (2015), pp. 74-102.

⁷⁷ *Ibid.*, p. 74.

While to some extent the place of religion in education has become more explicitly protected through statutory reform, the twin notions of "custom" and of "use and wont" continue to determine much about the place of religion in the school lives of young people, principally in non-denominational schools. Though "custom" and "use and wont" may have been subtly different, in practice they both tended to devolve control of religious instruction or education in schools to local administration: initially to school boards and education authorities, later to local authorities and, increasingly through the twentieth century, to the head teacher. This, it might be argued was facilitated, and is still facilitated, by reliance on the undefined concept of custom and the absence of clear legislative control of religious education in schools.

Other issues have been highlighted which might be of particular interest to Scottish Humanists. While parents have the right, currently in terms of the 1980 Act, to withdraw their children from religious observance and religious instruction, there is no comparable right for the child. While this Scottish approach is consistent with human rights documents, and it must be considered within the broader context of family law, which provides both for the exercise of parental responsibilities for the benefit of the child and for children to be consulted on major decisions and more generally to "be heard", it is nonetheless an area of education law which might merit further consideration. Given that the rights of the child has been something that Scottish Humanists have been extremely interested in for more than 60 years, and indeed have been pioneering for, this position of the rights of the child versus the responsibilities of the parent might be something the Society might think about looking at closely.

Since 1872, it has been a principle in non-denominational schools that religious observance and religious education should be separated in the timetable from other subjects. Thus, it is not permissible for these to intrude, for example, into science classes. Of course, there are shades of grey in this area, and things may not be clear cut in practice, especially in early years of primary schooling but the quality of enforcement of this separation of religious from secular subjects might be an area worth scrutiny for those concerned with the preservation of this longstanding principle.

Provision has been made since 1929, reinforced in 1946, for the setting aside of the statutory obligation to teach religious education, if a majority of electors within a local authority vote in favour of discontinuation of this obligation.⁷⁸ As far as is known, such a plebiscite has never been called, nor even considered, by a Scottish local authority but it may be an opportunity to be considered.

The appointment, or not, of school chaplains and the nature and frequency of religious observance are areas where there is relatively little or no statutory regulation, but instead considerable discretion rests with head teachers. Nevertheless, as local customs have altered with time, some local authorities have begun to issue more detailed guidance and this may be an area where there is potential for further reform.

It is interesting to note how few explicit guarantees, for the Church of Scotland in particular, were included in the early legislation. The fact that three places on each local authority education committee are reserved to the Church of Scotland, the Roman Catholic Church and a third representing the largest church group in the area, is for example, a curiously late addition to legal governance of education in Scotland. This lack of explicit guarantees, together with the effect of contemporary equality provisions may be seen as creating opportunities for belief organisations and others to seek recognition and a stronger place within education law and governance.

The terms of the 1918 nationalisation of Catholic schools and its successor legislation was framed in neutral statutory language, with the result that any denomination or religious body in Scotland may potentially have a denominational school or schools carried on in its interests by a local authority. Any denomination or religious body may petition a local authority to establish and carry on a denominational school. While, to our knowledge, no belief body has petitioned a local authority for a school, this may be a possibility.

Education has in many ways bucked the trend towards the general secularisation of legislation in Scotland since the nineteenth century. The story of the last 140 years has been a move from permissive, devolved attitudes to religious observance, religious education and

⁷⁸ For the contextualisation of this provision, see T.A. Fitzpatrick, *Faith in Education: The Teacher as Witness* (Glasgow, Ovada Books, 2009), pp. 115-16.

church schools, towards increasing control and regulation, with RME and RO becoming in effect compulsory inclusions in the school timetable, and with church participation in the governance of local authority schools and education re-instituted in 1973 exactly 100 years after it was, in the main, abandoned. At the same time, there is religious adaptation going on. One is the recently developed argument that children require “religious literacy”⁷⁹ - not merely of other religions, but of different faith conditions such as spirituality. This has become a reason to sustain the compulsory status of RME in the curriculum, but is not necessarily one in which non-belief positions have attained parity. There are, however, potential new roles for non-religious belief bodies - in conducting their own state-funded schools, or drawing attention to ways to transfer schools from denominational status. Still, education remains a sector in which the churches continue to inject considerable effort to retain a foothold in a society which is otherwise secularising rapidly.

⁷⁹ See for example the website <http://www.religiousliteracy.org.uk/>