

EDUCATIONAL INSTITUTE OF SCOTLAND

Section 21(2)(A) of the Education (Scotland) Act 1980

1. Introduction

- 1.1 The following motion was remitted to Council at the June 2009 Annual General Meeting and the Executive Committee, at its meeting on 13 November 2009, asked for a paper to be prepared in order that the matter could be given further consideration prior to coming to a decision.

“That this AGM call on the Scottish Government to take steps to repeal Section 21(2)(A) of the Education (Scotland) Act 1980”.

- 1.2 Section 21 of the Education (Scotland) Act 1980 states:

“All teachers appointed to the staff of any such school by the education authority shall in every case be teachers who satisfy the Secretary of State as to qualification, and shall require to be approved as regards their religious belief and character by representatives of the Church or denominational body in whose interest the school has been conducted.”

It is for the church or denominational body alone to consider whether an applicant for a post is approved in terms of the 1980 Act. Separate approval is required for each post applied for regardless of whether the applicant is currently approved or not.

- 1.3 The relatively recent “McNab” case, although portrayed in the media as a fundamental challenge to Section 21 of the 1980 Education Act, actually centred on a very narrow point of law ie the operation of the “Strathclyde” list of posts which required church approval. The Employment Appeal Tribunal made it clear that the approval process applies to all teachers and that Section 21 of the 1980 Act does not prevent any Council from interviewing any teacher for a post in a denominational school.

2. Previous EIS Policy regarding Section 21 of the 1980 Education Act

- 2.1 The 1998 Annual General Meeting approved the following resolution:

*“That this AGM instructs Executive Council to investigate and report on:
(a) the legality of the current position as regards access to teaching posts in Roman Catholic Schools, and;
(b) the likely costs of raising a legal challenge to the current position.
This report should be submitted to the November meeting of Executive Council.”*

Legal advice was secured which, in summary, stated that “Section 21 of the Education (Scotland) Act, as amended, is not challengeable in respect of access to teaching posts in Roman Catholic Schools.” The Executive Council agreed to take no further action in respect of the AGM resolution.

- 2.2 In 1999 the following motion was remitted to Executive Council:

“That this AGM instruct the Executive Council to campaign through the Scottish Parliament for the abolition of denominational schools, subject first to obtaining

the consent of the churches, parents, or denominational bodies, in whose interests the schools are conducted, for such abolition.”

A survey of Local Associations was conducted and, as a result of the limited responses received (only one Local Association focused on the “approval” of candidates for appointment in denominational schools), it was agreed to take no further action on the remitted motion.

2.3 The 2003 AGM approved the following resolution:

“That this AGM resolves to seek revision of Section 21 of the Education (Scotland) Act 1980 to ensure the abolition of religious discrimination in the employment of teachers”

The Finance and General Purposes Committee, in September 2003, decided to subsume the matter of a revision of Section 21 of the Education (Scotland) Act 1980 in discussions with the Scottish Executive and the Catholic Education Commission.

2.4 In 2004, following the completion of discussions with the Catholic Education Commission and the (then) Scottish Executive Education Department, legal advice was sought by the EIS in relation to the inter-relationship amongst the Employment Equality (Religion and Belief) Regulations 2003, the originating EC Equal Treatment Directive (2000/78) and Section 21 of the Education (Scotland) Act 1980. Firstly, our advising solicitors pointed out that the 2003 Regulations (particularly Regulation 39) state that they are: “without prejudice to Section 21 of the Education (Scotland) Act 1980”. However, there might be some scope to attack the 2003 Regulations on the basis that they do not fully comply with article 4.2 of the Equal Treatment Directive. The Directive allows member states to retain national legislation relating to churches and other organisations with an ethos based on religion or belief and where a person’s religion or belief constitutes “a genuine legitimate and justified occupational requirement”. However, our advising solicitors’ view was that “such a challenge was by no means guaranteed”. The matter was then left to the Employment Relations Committee to give consideration to any relevant cases which were brought to its attention in line with the Committee’s usual practice.

3. Recommendation

The EIS has been involved in previous discussions relating both to the principle and practice of the application of Section 21(2)(A) of the Education (Scotland) Act 1980. It is recommended, therefore, that a formal approach is made to the Scottish Government requesting that the Working Group established in 2002 (involving the Catholic Education Commission, COSLA, the Scottish Government and Teacher Unions) be re-established to consider, inter alia, the application of the “approval process” across the country. In the first instance it is suggested that a letter is sent to the Cabinet Secretary for Education and Lifelong Learning proposing the resurrection of this government sponsored Working Group.
