

### Note for PAC re Legislative Base for Employment of Teachers

The position regarding the legislative basis for the employment arrangements of teachers in primary and post primary schools is as follows:

#### 1. The Constitution

The relevant articles of the Constitution of Ireland provides that:

*“The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.” Article 42.4.*

*“Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.” Article 44.4.*

*“Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.” Article 44.5.*

#### 2. The Education Act

The Act covers Primary and Post Primary education and in keeping with the phrasing of Article 42.4 above, the title to the 1998 Act includes the following description:

*“AN ACT TO MAKE PROVISION IN THE INTERESTS OF THE COMMON GOOD FOR THE EDUCATION OF EVERY PERSON IN THE STATE, INCLUDING ANY PERSON WITH A DISABILITY OR WHO HAS OTHER SPECIAL EDUCATIONAL NEEDS, AND TO PROVIDE GENERALLY FOR PRIMARY, POST-PRIMARY, ADULT AND CONTINUING EDUCATION AND VOCATIONAL EDUCATION AND TRAINING; TO ENSURE THAT THE EDUCATION SYSTEM IS ACCOUNTABLE TO STUDENTS, THEIR PARENTS AND THE STATE FOR THE EDUCATION PROVIDED, RESPECTS THE DIVERSITY OF VALUES, BELIEFS, LANGUAGES AND TRADITIONS IN IRISH SOCIETY AND IS CONDUCTED IN A SPIRIT OF PARTNERSHIP BETWEEN SCHOOLS, PATRONS, STUDENTS, PARENTS, TEACHERS AND OTHER SCHOOL STAFF, THE COMMUNITY SERVED BY THE SCHOOL AND THE STATE; TO PROVIDE FOR THE RECOGNITION AND FUNDING OF SCHOOLS AND THEIR MANAGEMENT THROUGH BOARDS OF MANAGEMENT; TO PROVIDE FOR AN INSPECTORATE OF SCHOOLS; TO PROVIDE FOR THE ROLE AND RESPONSIBILITIES OF PRINCIPALS AND TEACHERS; TO ESTABLISH THE NATIONAL COUNCIL FOR CURRICULUM AND ASSESSMENT AND TO MAKE PROVISION FOR IT, AND TO PROVIDE FOR RELATED MATTERS.”*

Section 7(2)(a) provides that the following is a function of the Minister under the Act:

*“to provide funding to each recognised school and centre for education and to provide support services to recognised schools, centres for education, students, including students who have a disability or who have other special educational needs, and their parents, as the Minister considers appropriate and in accordance with this Act”*

Section 15 of the Act provides:

*“(1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that board has responsibility.*

*(2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall—*

*(a) do so in accordance with the policies determined by the Minister from time to time,”*

Under Section 23(1) of the Act, the Principal of a recognised school shall—

*“(a) be responsible for the day-to-day management of the school, including guidance and direction of the teachers and other staff of the school, and be accountable to the board of the school for that management,*

*(b) provide leadership to the teachers and other staff and the students of the school,”*

Under Section 24(1)(b):

*“the board of a recognised school may appoint such and so many persons as teachers and other staff of the school as the board from time to time considers necessary for the performance of its powers and functions under this Act.”*

Section 24(11) makes further provision as follows:

*“The board of a recognised school may, in accordance with procedures determined from time to time by the Minister following consultation with bodies representative of patrons, recognised school management organisations and with recognised trade unions and staff associations representing teachers or other staff as appropriate, appoint, suspend or dismiss any or all of the Principal, teachers and other staff of a school, who are remunerated or who are to be remunerated out of monies provided by the Oireachtas.”*

Section 24(5)(b) provides that:

*“A teacher or other member of staff redeployed in accordance with paragraph (a) shall, in accordance with the redeployment procedures determined under that paragraph, become an employee of (i) the board of, or (ii) the education and training board which maintains the recognised school to which he or she is redeployed.”*

In relation to the terms and conditions of employment, Section 24(3) of the Act provides that:

*“The terms and conditions of employment of the teachers and other staff of a recognised school, appointed by the board and who are, or who are to be, remunerated out of monies provided by the Oireachtas, shall be determined from time to time by the Minister, with the concurrence of the Minister for Public Expenditure and Reform.”*

Department publications are issued pursuant to this Act and therefore form part of the contract of employment for teachers. These publications define ‘employer’ in relation to teachers to mean:

*“an Education and Training Board (ETB) for vocational schools/community colleges, community national schools and a Board of Management/Manager in the case of primary (excluding community national schools) voluntary secondary, community and comprehensive schools.”*

### **3. Payment of Wages Act 1991**

Since the July 1997 Determination of the Employment Appeals Tribunal in **Sullivan and the Department of Education**, Case PW2/97, taken under the Payment of Wages Act, the Department has accepted the role of employer for the limited purposes of that Act. In that case, the EAT was *“satisfied that the Department is the employer for the purposes of the Payment of Wages Act, 1991.”*

For the purposes of the Payment of Wages Act contract of employment means:

- (a) a contract of service or of apprenticeship, and*
- (b) any other contract whereby an individual agrees with another person to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract) whose status by virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual, and the person who is liable to pay the wages of the individual in respect of the work or service shall be deemed for the purposes of this Act to be his employer.*

### **4. Superior Courts on the employment status of teachers**

The superior courts have looked at the issue of employer in respect of teachers, paid out of funds provided by the Oireachtas, on a number of occasions. In setting out the position that the Minister does not employ teachers, the Department relies on Supreme Court decisions in **O’Keeffe v Hickey and the Minister for Education, Ireland and the Attorney General, Crowley v Minister for Education** and the High Court decision in **Tobin v Cashell**, each of which recognised that no contract of employment existed between the teacher in question and the State.

As recently as the 24<sup>th</sup> February 2017, Mr. Justice Gerard Hogan delivered judgment on behalf of the Court of Appeal in **The Minister for Education and Skills v Anne Boyle**. In reaching that decision, the Court of Appeal considered in detail the legislative position and also reviewed the jurisprudence to date.

While that case is currently on appeal to the Supreme Courts, the Court of Appeal decision is nonetheless instructive in this regard and the extracts below give an understanding of how the courts have viewed the employment of teachers to date:

*53. Before considering the merits of this issue, it is, however, necessary to examine in some detail the relevant constitutional and statutory provisions and the case-law to date which has been thereby generated.*

*54. Article 42.4 of the Constitution reads as follows:*

*“The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate education initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, to the rights of parents, especially in matters of religious and moral formation.”*

*55. The historical background, and the reasons why Article 42.4 is worded in this manner, were most recently examined by the Supreme Court in **O’Keeffe v Hickey** [2008] IESC 72, [2009] 2 I.R. 302. All three members of the Court who delivered judgments (Hardiman, Geoghegan and Fennelly JJ.) explored in great detail the precise historical circumstances which had prevailed in the 19th century which led to the present state of affairs whereby – in essence – the school hires the teacher, while the teacher’s salary is paid for by the State. As Hardiman J. explained, this was brought about by the fact that in the wake of Catholic Emancipation, the various individual churches opposed plans by the British Government to have non-denominational schooling. This ultimately led to a situation whereby both prior to and after 1922 the vast majority of national schools were under the patronage and management of the various churches, while the teachers were in turn paid by the State.*

*56. In O’Keeffe the plaintiff contended that the State was vicariously responsible for the conduct of the principal of a national school in respect of sexual assaults perpetrated upon her by the latter while she attended the school as a young pupil. A*

majority of the Court concluded that the State was not vicariously liable, largely because they concluded that it was the school itself which employed the principal and which was responsible for supervising him. The Court concluded that in these circumstances that it would be unjust to hold the State vicariously liable given the extent to which it was removed from the employment relationship.

57. All members of the Supreme Court - including Geoghegan J. in his dissent - accepted the contention of the State that the principal was employed by the manager of the school and was not employed by the State. Thus, for example, Geoghegan J. said ([2009] 2 I.R. 302, 345-346) said that it was clear that a teacher in a national school was in a contractual relationship with the manager of the school:

*“In other words the manager is the employer...What is certainly beyond argument is that the State is not in a contractual relationship of any kind with the teacher, including the principal.”*

58. Fennelly J. spoke to like effect ([2009] 2 I.R. 302,366):-

*“It is the manager and not the Minister who decides on which teacher to employ and the contract of employment is between the manager and the teacher. The manager may dismiss a teacher without the sanction of the Minister.”*

64. This issue was also in view in **Crowley v. Ireland** [1980] I.R. 102... Central to this appeal was the issue of the role of the State and the Minister. Delivering the judgment of the majority, Kenny J. referred to this State’s historical experience as being ([1980] I.R. 102, 126):

*“one of the State providing financial assistance and prescribing courses to be followed at schools; but the teachers, though paid by the State, were not employed by and could not be removed by it. This was the function of the manager of the school who was almost always a clergyman. So Article 42.4 prescribes that the State should provide for free primary education. The effect of this is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager or trustees, to provide means of transport to the school if this is necessary to avoid hardship and to prescribe minimum standards.” (emphasis supplied)*

65. It can be seen from **Crowley** that Kenny J. stressed that the contractual relationship was between the school and the teacher.

Having considered the case-law, the decision of the Court of Appeal in Boyle observed:

78. This survey of the case-law demonstrates that there is no straightforward answer to the problem presented on this appeal. Specifically, the nature of the triangular pact identified by Gibson J. in **Fox** over 100 years ago still defies any standard conceptual analysis, at least for the purposes of the general law of contract.

*79. There is no doubt, of course, but that there is in part a conventional contract of employment between the school and the teacher. The decision to hire the teacher remains that of the school and the teacher is subject to the day to day control and direction of the principal of the school and its board of management (however described).*

## **5. Pensions**

Payment of pensions to recognised teachers has long been considered a function properly undertaken by the State – the first reference to this is in the Teacher’s Superannuation 1928 which was described as "*An Act to make provision for the formulating and carrying out of schemes for the provision and gratuities for or in respect of teachers and certain former teachers [30th November, 1928.*". The Act was enacted by the Oireachtas of Saorstát Eireann and contained the following definitions:

1. In this Act the word “teacher” includes a person who was a secondary teacher on the 1st day of January 1927 and ceased to be such teacher after that date and before the passing of this Act, and also includes a person who was formerly a teacher and while he was a teacher was appointed to a pensionable post in the Civil Service of Saorstát Eireann and at the passing of this Act holds the same or a similar post in the said Civil Service.

Preparation of superannuation scheme.

2. (1) The Minister for Education may, with the consent of the Minister for Finance, prepare in relation to any particular class or classes of teachers a scheme (in this Act referred to as a superannuation scheme) with the object of providing pensions and gratuities for or in respect of the class or classes of teacher to whom such scheme applies and (subject to confirmation thereof under this Act) carry such scheme into execution.

(2) Different superannuation schemes may be prepared and (subject as aforesaid) be carried into execution by the Minister for Education in relation to different classes of teachers.

The 1928 Act was subsequently amended by the Teachers Superannuation (Amendment) Act 1990. Further amendments were made in the case of primary school teachers in the Primary School Teachers Pension Scheme 2009 (S.I. No 434 of 2009) and in the case of teachers of secondary, community and comprehensive school teachers in the Secondary, Community and Comprehensive School Teachers Pension Scheme 2009 (S.I. No 435 of 2009).

The Statutory Instruments of 2009 define those eligible for entry to the scheme as:

In the case of a primary school teacher (part 2, 4 – Membership)

Each of the following is automatically a member of this Part:

- (a) a person appointed as a teacher in a primary school on or after 1 September 2001;
- (b) a person appointed as a teacher in a primary school to full time or part-time service (provided that such part-time service constitutes quasi-permanent employment) on or after

1 September 1996 and before 1 September 2001 and who, when appointed, was a qualified teacher;  
and

(c) a person appointed as a teacher in a primary school to full time service before 1 September 1996 at the age of not less than 18 years and who, when appointed, was a qualified teacher.

Under the definitions primary school *"means a school providing primary education to its students that is in receipt of funds provided by the Oireachtas for the education activities of students in that school or for the remuneration of teachers in that school and, in the case of a school operating on or after 22 December 2000, is recognised under section 10 of the Education Act 1998"*.

In the case of a teacher of a secondary, community and comprehensive school (Part 2, 4 - Membership)

Subject to paragraph (2), each of the following persons is automatically a member of this Part:

(a) a person appointed on or after 1 September 2001 as a teacher in a secondary school, community school or comprehensive school or a chaplain in a community school or comprehensive school;

(b) a person appointed to full time or part-time service (provided that such part-time service constitutes quasi-permanent employment) on or after 1 August 1996 and before 1 September 2001 and who is—

- (i) a qualified teacher in a secondary school, community school or comprehensive school, or
- (ii) a chaplain in a community school or comprehensive school.

Under the definitions "secondary school" means *"a school providing post-primary education to its students and which—*

*(a) is in receipt of funds provided by the Oireachtas in respect of the education activities for students of that school or the remuneration of teachers in that school, and*

*(b) in the case of a school operating on or after 22 December 2000, is recognised under section 10 of the Education Act 1998"*

In relation to the education sector, other than teachers employed in primary and secondary, community and comprehensive schools the Minister for Education and Skills, with the consent of the Minister for Public Expenditure and Reform has also provided for regulations governing pensions matters in those areas. In the case of teachers employed by Education and Training Boards these can be found in S.I. No. 292/2015 - Education and Training Board Teachers Superannuation Scheme 2015 and for non-teaching staff in S.I. No. 290/2015 - Education Sector Superannuation Scheme 2015.

In all of the cases, while the Minister for Education and Skills is not the employer of these staff, the Minister has made regulations governing the rules of the pension schemes of which these education staff are members.

## **6. Conclusion**

Therefore in accordance with the provisions of the Constitution and Education Act 1998, teachers are employed by the management of each individual recognised school. The Principal is responsible for the day to day running of the school and is answerable to the school board. The school board acts on behalf of the school patron. Accordingly, appointment, suspension and dismissal of teachers are matters for the management authority concerned, in accordance with any regulations put in place by the Minister, in exercise of statutory powers under the Act. Recognised schools nominate eligible teachers for the payment of incremental salary grant by the Department and likewise withdraw such nominations on the departure of a teacher for whatever reason.