

WHAT IS A ROMAN CATHOLIC SCHOOL?

Robert Meakin¹

Introduction

This article explains the Canonical function and requirements for a Roman Catholic school² and how these Canonical requirements are accommodated in the Civil law. The Canonical function of a Catholic school is to further the Catholic faith. It is argued in this article that a Catholic school should do this by asserting its right to establish schools, placing a duty on parents to support Catholic schools, making provision for Catholic worship, providing for religious education, having an admissions policy that admits Catholics based on their membership of the Church and setting out the rights of parents when it is proposed that a school should close. The Canon law seeks to ensure that the function of a Catholic school in promoting the faith is secured by requiring that a Catholic school is controlled by the Church through actual control or through a written document guaranteeing the Catholicity of the school. It is not clear exactly what is required in this respect and with increasing lay involvement in the running of Catholic schools guidance is needed which is clear and consistently applied by diocesan and religious order authorities.

Looking at what makes a school Catholic is a topical issue at the moment following the Bishop of Lancaster's New Year Pastoral Letter³ which questions whether a school can be Catholic if there is a high proportion of non-Catholic pupils and teachers.

Canon Law

Before going any further, some explanation is needed about how Canon and Civil law interrelate and the types of Catholic school there are in England and Wales.

¹ Robert Meakin, Partner, Charity & Education Team, Stone King Solicitors. Email: RobertMeakin@stoneking.co.uk

² Note that the Canon law refers to Catholic schools.

³ See 'Bishop sparks debate on the future of Catholic schools' The Tablet, 7 January 2012 and 'Have faith in Our Schools' The Tablet, 14 January 2012.

Canon 22, which is often described as the canonisation of Civil laws, states that Civil laws to which the Church yields are to be observed in Canon law in so far as they are not contrary to divine law and unless Canon law provides otherwise. So to the extent that Civil law implements Canon law it has the same force as Canon law.

In the context of Catholic schools this means that where the Church accepts the Civil law, the Church and its schools are bound by that Civil law. It is important that the Canon law is fully developed when dealing with the state because the state needs to know where the Church stands so that it can accommodate the Church when legislating.

Schools

In England and Wales there are three main types of Catholic school: Voluntary Aided, Independent and Academy.⁴ Voluntary Aided schools⁵ were originally created by the Education Act 1944. Typically the diocese or a religious order will be the foundation holding the land for the purposes of the school and having the right to appoint foundation governors who will form a majority. The Local Education Authority (LEA) is responsible for 90% of the capital funding and the governors 10%. Independent schools are schools generally run as charities which charge fees to generate income. They have greater freedoms than Voluntary Aided or Academy schools. Academy schools are Independent schools which are state funded⁶ under a funding agreement which covers 100% of capital funding. They do not charge fees.

Each of these types of school will be examined to see to what extent the Canon law is satisfied and to what extent it needs to be developed to make proper provision for the proposed key requirements.

1. What is the function of a Catholic School?

The Declaration on Christian Education, *Gravissimum Educationis*, states that the function of a Catholic school is:⁷

...to create for the school community a special atmosphere animated by the new creatures they were made through baptism as they develop their personalities, and finally order the whole of human culture to the news of

4 For a review of schools and their development see Debra Morris 'Building a big Society: will charity's creeping reach generate a new paradigm for state schools?' (2011) *Journal of Social Welfare and Family Law* 33:3, 209-226.

5 School Standards and Framework Act 1998, Sch 2.

6 Academies Act 2010, s 6(8)

7 *Gravissimum Educationis* 28 October 1965, para 8. The code of Canon law relating to education is based on this document.

salvation so that the knowledge the students gradually acquire of the world, life and man is illuminated by faith.

It is clear therefore that the primary function of a Catholic school is to evangelise and that education is a means to that end.

2. Right of the Church and Parents

The Canon law asserts the right of the Catholic Church to establish and direct schools.⁸ It calls for the Christian faithful to assist in their establishment and to maintain them in accordance with their means.⁹

The Civil law supports the right of parents to educate their children in accordance with their faith through the provision of state schools and the support of Independent schools.¹⁰ Further, Article 2, protocol 1 of the European Convention on Human Rights¹¹ provides for the state to respect the right of parents to ensure such education and training in conformity with their own religious and philosophical convictions.

A lack of provision for Catholic schools (either Independent or state) could lead to a challenge on the basis of discrimination as a breach of Article 2, protocol 1 and Article 14 (which provides a right not to be discriminated against on the grounds, inter alia, of religion or belief) but in England and Wales there is generally ample provision of Catholic schools. However, the closure of such schools in circumstances where Catholic education is no longer available could lead to a challenge. The Church needs to keep this point in mind as it considers the bishop of Lancaster's New Year Pastoral message which questioned the future of Catholic schools.¹² The issue of closure is discussed later in the article.¹³

3. Religious Worship

The Canon law does not specify that religious worship in a school should be Catholic. However, given the primary function of a Catholic school this can be taken as read.¹⁴ It could be argued that, for the avoidance of doubt, the Canon law

8 C 800(1). Note that Canon law 801 encourages religious institutes whose mission is educational to continue their work in Catholic schools.

9 C 800(2).

10 See School Standards and Framework Act 1998, s 124A and Academies Act 2010, s 6(8).

11 The Convention was given further effect in English law following the Human Rights Act 1998.

12 See Section 5.

13 Section 6.

14 *Gravissimum Educationis* 28 October 1965, para 8.

should specify this requirement, although the bishop does have supervisory rights in Canon law.¹⁵ The Civil law fills the gap so there is no problem in this respect.

In the case of Catholic Voluntary Aided schools the daily act of collective worship must be in accordance with the trust deed or in the case of a Catholic school, in accordance with the Catholic faith.¹⁶

Independent schools have no obligation to follow the National Curriculum¹⁷ as to collective worship. Typically, an Independent Catholic school will set out in an instrument of government, made under its governing document, provisions about religious worship being in accordance with the Roman Catholic faith. The Governors running the school will be bound by these provisions.

In the case of Academy schools the position is the same as Independent schools. As in the case of religious education, religious worship will be provided for under an agreement between the diocese or religious order and the school and the Department for Education.

4. Religious Education

The Canon law says that instruction and education in a Catholic school must be grounded in the principles of Catholic doctrine.¹⁸ This is supervised by the local bishop.¹⁹ This is reflected in the Civil law.

In the case of Catholic Voluntary Aided schools, religious education must be in accordance with the trust deed or with the tenets of the Catholic faith. There is a parental right to opt out²⁰ and request non-denominational religious education where it is not reasonably convenient for the parents to send their children to another school to receive such religious education.²¹

As in the case of any Catholic school, Independent schools are subject to the Canon law and the local bishop has a responsibility to ensure the authenticity of religious education²² and this will usually be reflected in the governing document

15 Para 8.

16 School Standards and Framework Act 1998, Sch 20, para 5.

17 Ibid, s 70.

18 C 803(2). See Section 8 of this article.

19 C 804(1).

20 School Standards and Framework Act 1998, Sch 19, para 4.

21 Ibid, Sch 19, para 4(3)-(4). Note that in 2006 faith leaders entered into a non-statutory agreement to teach children at religious schools. See R Sandberg, *Law and Religion*, CUP, 2011, p 163.

22 C 804(1).

of the school.²³ Independent schools are not bound by the National Curriculum in respect of religious education but must meet Independent School Standards²⁴ that, inter alia, enable pupils to distinguish right from wrong and to respect the law; provide pupils with a broad general knowledge of public institutions and services; and must assist pupils to acquire an appreciation of and respect for their own and other cultures in a way that promotes tolerance and harmony between different cultural traditions.²⁵

An Academy school designated as having a religious character is in the same position as an Independent school with such designation. Provision for Catholic religious education would be made under an agreement between the Department for Education and the diocese or religious order and the school.

5. Admissions

This issue has been debated in the Church recently.²⁶ Due to demographic movements some Catholic Voluntary Aided schools have up to 90% non-Catholic pupils. A spokesperson for the diocese of Lancaster said:²⁷

These schools were bought and paid for a long time ago, and the Church still pays for 10% of the running costs. But it is not just about the money. It is much more about the mission of the Church –these things are only of value if they help the mission.

The Canon law places an obligation on parents to ensure that their children attend Catholic schools, but if they are unable to do so they are obliged to ensure that a Catholic education is provided outside school.²⁸ Further, Catholics have an obligation to assist in the establishment and maintenance of Catholic schools according to their means.²⁹ This support is not limited to financial assistance and extends to voluntary work and any other type of non-monetary assistance. For a child starting at primary school baptism will signify membership of the Church.³⁰ Where necessary³¹ Catholics are admonished to ensure (presumably through

23 See for example Stonyhurst College.

24 Education Act 2002, Pt 10; Education (Inspection School Standards) (England) Regulations 2003, Sch, reg 5(2).

25 Education (Inspection School Standards) (England) Regulations 2003, Sch, para 2.

26 The Catholic Herald, 6 January 2012.

27 Ibid.

28 C 798.

29 C 800(2).

30 C 96. For children who have reached the age to receive the sacraments (over the age of 7 years: C 11) and adults, full-communion with the Church will require profession of a common faith, sharing in sacramental celebrations, and acceptance of the Church's governance: C 205.

31 Presumably where Catholic schools are not provided by the state.

political engagement) that Catholic schools receive a fair allocation of public subsidies so that parents are not penalised when exercising their Canonical right to select Catholic schools.³²

The Canon law does not prohibit non-Catholics attending Catholic schools. Admissions can be a contentious issue with practising and active Catholics arguing that they should be given priority to non-practising and inactive Catholics. There is also pressure from the state³³ to admit more non-Catholics. It is also an emotive issue in the case of Independent schools because the admissions criteria are based on selection by academic ability and the ability to pay fees.

A Catholic Voluntary Aided school which has been designated³⁴ as having religious character may, when over subscribed, allow schools to admit pupils on the basis of their membership or practice of the faith.³⁵ In determining these issues schools must have regard to any guidance from the body or person representing the religion or religious denomination.³⁶ In the case of a Catholic Voluntary Aided school this will be the diocese or a religious institute.

Some Catholic Voluntary Aided schools have sought to set their own criteria for over subscription designed to ascertain whether parents are practising Catholics. Some admissions policies award points³⁷ for involvement in parish activities or require a priest's reference³⁸ but schools adopting such policies run the risk of a legal challenge by either the LEA or the diocese. The fact that a Catholic school is run by a religious order where the diocese is not the trustee does not mean that diocesan guidance carries any less weight than for a diocesan school.³⁹

In terms of selection by ability, unless the Voluntary Aided school is designated as a grammar school, it cannot select pupils on the basis of high ability or aptitude.⁴⁰

32 C 797. See *Gravissimum Educationis*, referred to in Beal, Coriden and Green, *New Commentary on the Code of Canon Law*, Pauline Press, 2000, p 955.

33 In 2006, the Government backed down following pressure from the Catholic Church and did not impose a 25% quota on faith schools to admit non-believers. See www.ce sew.org.uk 'Briefing on the Education and Inspections Act 2006.'

34 School Standards and Framework Act 1998, s.69(3).

35 See School Admissions Code, 1 December 2011, para 1.38. The code is made under School Standards and Framework Act 1998, s 84.

36 School Admissions Code, 1 December 2011, para 1.38.

37 *Diocese of Westminster v The Governors of Cardinal Vaughan Memorial School* ADA/001720.

38 *The London Borough of Newham v The Governors of St Angela's Ursuline School and 8 others* ADA/001682-9.

39 *The Archdiocese of Southwark v The Governing Body of Coloma Convent Girl's School* ADA/002148.

40 Equality Act 2010, Sch 11, part 3, para 8(2)(a)-(c).

There are Catholic grammar schools - typically they were founded by religious orders.⁴¹

Independent schools can be designated as having a religious character in the same way as Voluntary Aided schools.⁴² Once designated, Independent schools can admit pupils on the basis that they are Catholics.⁴³ Although, under the civil law, an Independent school could set out criteria for qualification as a Catholic they will be bound by Canon law to follow diocesan policy on the issue. Quite apart from Canonical obligations it would be unusual for an Independent school to raise the bar for Catholic admissions when most Catholic Independent schools have a high intake of non-Catholics.⁴⁴

Arguably, the charitable purposes of an Independent school should include a purpose to advance the Roman Catholic religion so that the school can more easily argue that it is protected under the Equality Act 2010⁴⁵ and the European Convention of Human Rights against discrimination on the grounds of religion or belief.⁴⁶ In practice, Catholic Independent schools tend to have charitable purposes to advance the Roman Catholic religion which include an object to advance education and which does not restrict admissions to Catholics.⁴⁷ Charities with objects to advance religion are accepted as being for the benefit of the public if they allow for access from members of the Church, whether there is a high attendance or not.⁴⁸

Canon law does not prohibit Catholic schools from charging fees. Independent schools which are constituted as charities charge fees. Following the Charities Act 2006 and the abolition of the common law presumption of public benefit⁴⁹ schools need to demonstrate that the level of fees charged does not exclude the poor entirely but subject to making more than token provision for inclusion and making provision to the community as a whole, fees may be charged at a level that will

41 For example St. Anselm's College, Wirral. Note this college was Voluntary Aided but has become an Academy school.

42 School Standards and Framework Act 1998, s 124(B) and Religious Character of Schools (Designation Procedure) (Independent Schools) (England) Regulations 2003.

43 Equality Act 2010, Sch 11, para 5(b).

44 See for example St. Mary's College, Cambridge www.stmaryscambridge.co.uk.

45 Equality Act 2010, s 10.

46 European Convention on Human Rights, Art 9, which was given further effect in English law by the Human Rights Act 1998.

47 See Stonyhurst College.

48 *Neville Estates v Madden* [1962] Ch 832.

49 S.3(2) Charities Act 2006. See now Charities Act 2011, s 4(2).

limit admissions to those who can afford to pay fees⁵⁰ whether they are Catholic or non-Catholic.

Further, Catholic Independent schools may select on the basis of high ability or aptitude, even if this results in children being excluded as a result of special educational needs.⁵¹ A random sample review of the internet of ten per cent of Catholic Independent schools⁵² reveals that eighty per cent of these schools' selection is on the basis of ability, the other twenty per cent have a comprehensive intake. The sample points towards selection by academic ability being typical.

Academy schools are bound, through their funding agreement, to comply with the Schools Admission Code 2011 in the same way that Voluntary Aided Schools are in terms of admission by faith. In addition, it is government policy⁵³ that new Academy schools (the so called 'Free Schools', which are constituted as Academy Schools) which do not replace existing schools are required to go further and admit 50% of their pupils without reference to faith. Voluntary Aided schools which convert to academy status retain their faith-based admission freedoms.

In terms of selection, unless the Academy school is replacing one that was selective⁵⁴ then it must provide education for pupils of different abilities.⁵⁵

6. Closure

The closure of Catholic schools can be emotive and controversial.⁵⁶ The Canon law has nothing specific to say about the closure of Catholic schools. However, the Canon law on temporal goods of the Church does make it a requirement that donations with conditions attached are to be fulfilled 'most diligently'.⁵⁷ It follows that where legacies and donations have been given for the purpose of a school then the bishop should be 'vigilant' and if necessary 'even through visitation' ensure that the property is used for that purpose.⁵⁸ Balanced against this consideration is the need for dioceses and religious orders to be able to have the freedom to develop their strategic plans. As shown below, the Civil law supports the

⁵⁰ *R (Independent Schools Council) v The Charity Commission for England and Wales; HM Attorney General v The Charity Commission for England and Wales* [2011] UKUT 421 (TCC) para 315.

⁵¹ Equality Act 2010, Sch 11, part 3, para 8(2)(c).

⁵² According to the CES there are 150 Independent schools www.cesew.org.uk.

⁵³ See Faith schools: Faith Academies 7 June 2011 www.education.gov.uk.

⁵⁴ Academies Act 2010. Ss 6(3)(4).

⁵⁵ Academies Act 2010, s.1(6)(c).

⁵⁶ *Gunning v Buckfast Abbey Trustees Registered* Ch Div 27 May 1994, *The Times*, 9 June 1994.

⁵⁷ C 1300.

⁵⁸ C 1301(2).

protection of property, if not for a particular school, then for the purpose of being applied for the advancement of the Catholic faith or for Catholic education. Its weakness is that it does not recognise the right of parents in respect of a particular school. This seems unfair as the Church calls on the faithful to support and maintain Catholic schools.⁵⁹

The Secretary of State has the power to close a Voluntary Aided school due to serious weaknesses⁶⁰ or because it requires special measures.⁶¹ The Secretary of State may give a direction to the LEA to close the school but before doing so he must consult the bishop. There is nothing to stop Catholic parents making representations to the bishop which he can pass on to the Secretary of State. The diocese will own the school land and property which on the closure of the school will be available for other diocesan purposes. If an Independent school wishes to close then this will usually involve the trustees passing a resolution to dissolve the charity and pass its surplus assets to another charity having similar purposes. As most Catholic Independent schools have governing documents with general charitable objects including advancing the Roman Catholic faith this will enable property to be passed to another Catholic charity such as the diocese or a religious order.

As discussed later,⁶² the Secretary of State can terminate the funding of an academy school without consulting the bishop or the trustees, although the Catholic Education Service (CES) is negotiating to make provision for this in a supplementary agreement. Even if funding was cut the diocese would still own the school property and would hold it subject to its general charitable purposes to promote the Roman Catholic faith purposes through another school.

7. Control or Recognition

Canon law 803(1) states that:

A Catholic school is understood as one which a competent ecclesiastical authority or public ecclesiastical juridic person directs or which ecclesiastical authority recognises as such through a written document.

Canon 803(3) states that even if a school is Catholic, no school shall bear the name 'Catholic school' without the consent of competent ecclesiastical authority.

There is no guidance on what constitutes control or the key terms needed in a written document to be recognised by an ecclesiastical authority. In the absence of such guidance, we have to look at how control is secured through the Civil law to see how the Catholic Church complies with Canon 803. This will be through

⁵⁹ C 800(2). See Section 2 of this article.

⁶⁰ School Standards and Framework Act 1998, s 15(4).

⁶¹ Ibid, s 15(6).

⁶² Section 8.

supervision by the bishop, appointment of school governors by a Church authority and/or key Catholic requirements contained in a written document. The requirements of the bishop will vary from diocese to diocese.⁶³

A Voluntary Aided school is a state maintained school.⁶⁴ Voluntary aided status is favoured by the Catholic Church because it is financially advantageous and fits with the Canon law. Typically, a Catholic diocese or religious order will provide the school property under a charitable trust deed and will appoint foundation governors who must always be in the majority.⁶⁵ Their role is to ensure that it is conducted in accordance with the trust deed. The bishop⁶⁶ of the Roman Catholic diocese in which the school is situated has overall responsibility for securing the religious character⁶⁷ of the school although at governor level this will be the duty of the foundation governors.

In a Voluntary Aided school the requirement of control is satisfied through the power of Church authorities⁶⁸ to appoint a majority of the foundation governors. Further, the school will be governed by an instrument of government⁶⁹ which will provide for the religious ethos.⁷⁰ The instrument of government is drafted by the governing body of the school and submitted to the LEA.⁷¹ The LEA needs the approval of the foundation governors, trustees of any foundation and the bishop before making the instrument of government.⁷² In terms of control and recognition of a written document by an ecclesiastical authority, a Voluntary Aided Catholic school would fit within the requirements of Canon 803.

Independent schools are usually governed by a registered charity, typically in the form of a charitable company limited by guarantee. A few are run by dioceses⁷³

63 Note that a bishop has legislative, executive and judicial power within his diocese: C 391(1).

64 School Standards and Framework Act 1998, s 20 and Sch 2.

65 The School Governance (Constitution) (England) Regulations 2007 No 957, reg 18(1)(d)(2)(b). See *R (the application of Parent Governors of the Cardinal Vaughan Memorial School) v Roman Catholic Archbishop of Westminster* [2011] EWCA Civ 433 for the duty on the jurdic person when appointing foundation governors.

66 School Standards and Framework Act 1998, s 69(4).

67 As designated by the Secretary of State under School Standards and Framework Act 1998, s 69(3).

68 The School Governance (Constitution) (England) Regulations 2007 No 957, reg 18(1)(d)(2)(b).

69 School Standards and Framework Act 1998, s 37(1).

70 The School Governance (Constitution) (England) Regulations 2007 No 957, reg 30(1)(i).

71 *Ibid*, reg 31(1).

72 *Ibid*, reg 31(2).

73 For example, Bishop Challoner School in the Archdiocese of Southwark.

but historically many were run by religious orders⁷⁴ many of which have transferred the operation of the school to mainly lay Catholic governors.⁷⁵ By looking at a selection of governing documents of Independent Catholic schools it is clear that actual control by a Church authority, in the sense of appointing a majority of the governors, is unnecessary so long as other key Catholic requirements are contained in the document.⁷⁶

The Carlile Report⁷⁷ which looked into sex abuse at St Benedict's School recommended that the governance of the School should be separate from the religious order and structured in a way that the School is run by a separate charity preferably not controlled by the religious order. Whether this applies to the particular circumstances relating to the particular school in question or whether it has wider implications for the Independent schools in general remains to be seen. However, if governors are independent from the religious order there would appear to be no reason in law why the religious order cannot appoint or remove them as during their tenure they will be independent.⁷⁸

Sometimes control by an ecclesiastical authority such as a bishop or a religious order is retained through membership of the charitable company running the school, with entrenched provisions in the articles protecting the Catholicity of the school. Under the Companies Act 2006, entrenched provisions can only be amended with the unanimous consent of the members so this means that the ecclesiastical authority has a right to veto such amendments.⁷⁹

Academy schools are independent non-fee paying schools which receive funding directly from the Secretary of State.⁸⁰ The Secretary of State may enter into academy arrangements with any person.⁸¹ This includes Independent schools. This status can be achieved by a maintained school applying for an academy order.⁸² In the case of a Catholic Voluntary Aided school, the consent of the school's trustees (diocesan or religious order) and the person or persons by whom the foundation governors are appointed is needed before a school can become an Academy.⁸³

74 For example, Stonyhurst College (Jesuits).

75 For example, St. Mary's College, Cambridge.

76 Stonyhurst and St.Mary's Colleges.

77 Report by Lord Carlile of Berriew QC into matters Relating to Ealing Abbey and St Benedict's School, Ealing, 7 November 2011 www.stbenedicts.org.uk.

78 See *R (the application of Parent Governors of the Cardinal Vaughan Memorial School) v Roman Catholic Archbishop of Westminster* [2011] EWCA Civ 433.

79 Companies Act 2006, s.22(3)(a).

80 Academies Act 2010, s 5.6(8) (designated as an Independent school having a religious character).

81 Academies Act 2010, s 1.

82 Academies Act 2010, s.3(1).

83 Academies Act 2010, s.3(4)(a)(b).

Academy trust schools must be governed by a charitable company limited by guarantee.⁸⁴ Governance arrangements are left to the promoters of an Academy to decide.⁸⁵ An agreed model articles of association prepared by the CES and approved by the Department for Education allows for the diocesan bishop and the trustees to appoint a majority of the foundation members and governors, if they wish.

8. Supervision by the Bishop

Connected with canon 803 (control or recognition by a Church authority) the Canon law confers rights on the diocesan bishop. A religious institute cannot establish a Catholic school without the consent of the bishop.⁸⁶ The diocesan bishop has responsibility for those who are designated as teachers of religious instruction to see that they are outstanding in correct doctrine, the witness of Christian life, and teaching skill.⁸⁷ The bishop has the right, in his own diocese, to appoint or remove or demand that such teachers be removed if a reason of religion or morals requires it.⁸⁸ Finally, the diocesan bishop has the right to watch over Catholic schools in his diocese, including those run by religious institutes.⁸⁹

Schools cannot call themselves Catholic without the consent of a Church authority.⁹⁰ This could be a religious order but the bishop will have an interest too. The role of the bishop is generally well protected in the Civil law but the concurrent jurisdiction of religious orders and the bishop is one which needs to be clarified particularly in the context of closure.⁹¹

The bishop has various statutory rights⁹² of oversight in respect of Catholic Voluntary Aided schools. For example, he has the right to be consulted about an educational development plan.⁹³ Where there is intervention in respect of a failing school the bishop has the right to appoint an equal amount of governors to that

84 Academies Act 2010, s 12(1)(2).

85 The only requirements that the DfE imposes is that there are at least two parent governors and that no more than one-third of the governors are employed by the academy trust.

86 C 801.

87 C 804(2).

88 C 805.

89 C 806.

90 C 803(3).

91 Para 6.

92 Under the School Standards and Framework Act 1998.

93 *Ibid*, s.6(7).

appointed by the LEA.⁹⁴ The Secretary of State cannot modify the trust deed of a Catholic Voluntary Aided school without consulting the bishop.⁹⁵

The bishop, through his diocesan education officer, has advisory rights in respect of the appointment, engagement or dismissal of teachers at a Voluntary Aided school.⁹⁶ The governors can have regard to a person's ability and fitness to preserve and develop the religious character of the school.⁹⁷ When the governors appoint, remunerate or promote teachers they may give preference to those whose religious opinions are in accordance with the tenets of the Catholic faith or who attend church or who give or who are willing to give religious education at the school.⁹⁸

As the bishop has the right to appoint a majority of the foundation governors⁹⁹ of a diocesan Voluntary Aided school he can be said to be exercising supervision. Voluntary aided schools run by religious institutes will also be supervised by the bishop through the diocesan education officer¹⁰⁰ but the religious order will appoint the foundation governors¹⁰¹ and appoint the headteacher.¹⁰²

As the bishop will be consulted when an Independent school is established he will have the opportunity to ensure that its governing document protects his right to supervise the school. This is because a religious institute requires the consent of the bishop before establishing a Catholic school.¹⁰³

Other people wishing to found a Catholic school will need to satisfy the bishop that the school is Catholic and the bishop will seek to ensure that he has supervisory rights in the governance arrangements.¹⁰⁴ For example, St. Anthony's Preparatory School in Hampstead was privately owned by a Catholic family but, when the family transferred ownership to a commercial education provider, the consent of the Archbishop of Westminster was required before it could continue to be called a Catholic school. It was agreed that a pastoral advisory committee be established to

94 Ibid, s.16(10).

95 Ibid, s.82(2)(c).

96 Ibid, Sch 17, para 28(2).

97 Ibid, s.60(4).

98 Ibid, s.60(5).

99 The School Governance (Constitution) (England) Regulations 2007 No 957, reg 18(1).

100 School Standards and Framework Act 1998, Sch 17, para 28(2).

101 Ibid, s .69(4).

102 Ibid, Sch 17, para 29.

103 C 801.

104 C 803.

maintain the Catholic ethos of the school and that the Archbishop would carry out an inspection to ensure, inter alia, that the school remained Catholic.¹⁰⁵

Independent schools can be designated as having a religious character in the same way as Voluntary Aided schools.¹⁰⁶ As a result, just as in the case of Voluntary Aided schools, the governors may give preference, when employing teachers, to those whose religious opinions are in accordance with the tenets of the Catholic faith or who attend church or who give or who are willing to give religious education at the school.

In the case of a Catholic Voluntary Aided school the consent of the school's trustees (diocesan or religious order) and the person or persons by whom the foundation governors are appointed is needed before a school can become an Academy.¹⁰⁷ A religious institute cannot establish a Catholic school without the consent of the bishop¹⁰⁸ and any other persons need the consent of the bishop to establish a new Catholic school under Canon law.¹⁰⁹

An Academy, as an Independent school, will be designated as having a religious character in the same way as Voluntary Aided schools¹¹⁰ and will be able to give preference to a person's religious faith in respect of employment issues.

A number of concerns were expressed by the CES about protecting the Catholicity of Academy schools. Unlike a Voluntary Aided school, if an Academy school fails, the model funding agreement¹¹¹ provides for the occurrence of a 'special measures termination event' which would allow the Secretary of State to terminate the agreement without consulting the bishop. Furthermore, the model articles of association allow the Secretary of State to flood the board of governors with additional governors and take control of the school. This would mean that the bishop or the religious institute under the supervision of the bishop would no longer have control.¹¹²

¹⁰⁵ See Diocese of Westminster Inspection Report under C 806, 11 November 2011. The report is very positive about the Catholicity of the school.

¹⁰⁶ School Standards and Framework Act 1998, s 124A.

¹⁰⁷ Academies Act 2010, s .3(4)(a)(b).

¹⁰⁸ C 801.

¹⁰⁹ C 803.

¹¹⁰ School Standards and Framework Act 1998, s 124A.

¹¹¹ Academies Act 2010, s 2.

¹¹² The CES is looking at a possible solution whereby the Secretary of State agrees not to intervene in this way in respect of a failing school within a multi academy model on the basis that it would be inappropriate to take such action against the multi academy because of one particular school.

The CES has sought to protect the interests of the Catholic Church and its schools in a supplemental agreement¹¹³ which acknowledges the right of the Secretary of State to terminate the agreement and appoint additional governors, but it requires the Secretary of State, before taking such action, to notify the trustees (including the bishop) and diocesan authorities to allow them to make recommendations. In addition, the Secretary of State agrees to consider any improvement plan in good faith along with the resourcing and funding implications. Although these provisions are comforting they do not constitute control by the bishop.

The funding agreement is entered into by the academy trust for seven years or an indefinite period with the requirement for the Secretary of State to give seven years' notice. The Secretary of State may also give notice under the agreement for a breach of its terms and where the Academy is failing. Upon termination the school would cease to be an Academy trust,¹¹⁴ would no longer be funded and would close. The CES has negotiated for the inclusion of a provision within a supplemental agreement for the Secretary of State to have regard to the wishes of the trustees and/or diocesan authority or religious order about the future of the school, including its reclassification as a Voluntary Aided school. The CES acknowledges that this may not be practical if the LEA does not have the resources to support the reclassified school.

9. Conclusion

Two general observations can be made. Sometimes the Canon law lacks detail. For example, on what constitutes control by the Church, admissions and worship. The gaps are expected to be filled by the bishop at a local level but there are problems with this. First, there is inconsistency between dioceses and potential for confusion.¹¹⁵ Connected to this problem is the danger that the state will not understand the Church's position and fully accommodate it when making legislation. The other observation is that the state has generally accommodated the Church's canonical requirements of what is a Catholic school, sometimes going beyond what is expressly stated in Canon law and accommodating the Church, for example in the case of admissions and worship.

A lack of detail in the Canon law creates problems at a time when the Church needs to be making its position clear. For example, what type of control¹¹⁶ is required by a Church authority and what is needed in a written document to gain recognition?¹¹⁷ As the Church increasingly relies on lay governors it is important that these issues are clarified. The scope of a bishop's power in terms of

113 See www.catholicacademies.org.uk.

114 Within the meaning of the Academies Act 2010.

115 The Archdiocese of Westminster gives greater guidance on what is required for control by the Church than other dioceses.

116 Section 7.

117 Ibid.

supervision is unclear beyond ensuring that religious education is orthodox and of a high standard.¹¹⁸ For example, does he have a protectorate role over the school in terms of ensuring its continuation? Further, the interrelationship between the bishop and religious orders is unclear, particularly in the context of school closures¹¹⁹ and admissions.¹²⁰

It is clear that the prime purpose of a Catholic school is to evangelise children¹²¹ but it is unclear whether Catholic schools are for Catholics or for non-Catholics, Christian or non-Christian and if so where the balance lies. Where Catholics are in a minority is the school still Catholic? Or is a Catholic school in an analogous position to Catholic missionaries operating in a non-Christian country? Connected to this question is the crucial issue of Catholic worship. There should be a clear statement in the Canon law that worship is Catholic. This is particularly important where a Catholic school has a large non-Catholic intake.

Further, on the subject of admissions, the Canon law does not prohibit the charging of fees or say anything about academic ability needed to access Catholic schools, but should the Canon law make a statement that Catholic schools do all they can to promote access from a wide cross section of society and from a mixed range of academic abilities? Generally diocesan policy¹²² is to see baptism and practice by the family as signifying membership of the Church should some schools be adding to that criterion through selection? Connected to that question: should bishops and superiors of religious orders be encouraging Independent Catholic schools to apply for academy status (subject to ensuring that the Catholicity of such schools is protected) to widen access through non-selection on financial or academic ability?

Academies offer the opportunity to Catholic Independent schools¹²³ to convert to academy status and increase access through not charging fees and adopting an admissions policy not based on selection by ability, but it has been shown in this article that there were concerns expressed by the CES about the issue of control by the Church where a school is failing or in breach of its agreement with the Department for Education which still needs resolving before this option is risk free.¹²⁴

118 Section 8.

119 Section 6.

120 Section 5.

121 Section 1.

122 See *The Queen on the Application of the Parent Governors of The Cardinal Vaughan Memorial School v His Grace The Archbishop of Westminster and Westminster Roman Catholic Diocese Trustee* [2011] EWCA Civ 433 at para 4.

123 For a review of Independent schools converting to academy status, see Debra Morris 'Building a big Society: will charity's creeping reach generate a new paradigm for state schools?' (2011) *Journal of Social Welfare and Family Law* 33:3, 209-226.

124 Section 8.

Finally, although the Canon law protects the property of donors when given for a specific purpose such as a school, it could be argued that it should set out the rights of parents in respect of school closures and the role of the bishop.¹²⁵ The Church asserts its right to establish schools¹²⁶ and calls for parents to support them.¹²⁷ It should follow that if parents have duties in respect of Catholic schools then it only seems fair that the Canon law should provide them with express rights when it is proposed that schools close.

¹²⁵ Ibid. But note that Canon law does provide the general right of hierarchical recourse: C 1733-1737.

¹²⁶ C 800(1) and C 801.

¹²⁷ C 800(2).