



Neutral Citation Number: [2022] EWHC 3331 (Admin)

Case No: CO/1211/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT IN WALES**

Cardiff Civil Justice Centre  
2 Park Street, Cardiff, CF10 1ET

Date: 22/12/2022

**Before :**

**THE HON. MRS JUSTICE STEYN DBE**

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**Between :**

**THE KING on the application of**  
**(1) KIMBERLY ISHERWOOD**  
**(2) AXD**  
**(3) GRACE PATTON**  
**(4) MARK THOMAS**  
**(5) KATE BROOM**

**Claimants**

**- and -**

**THE WELSH MINISTERS**

**Defendant**

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**Paul Diamond and Bruno Quintavalle** (instructed on a **Direct Access** Basis) for the  
**Claimants**  
**Jonathan Moffett KC and Emma Sutton** (instructed by **Welsh Government Legal Services**)  
for the **Defendant**

Hearing dates: 15 and 16 November 2022

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**Approved Judgment**

This judgment was handed down remotely at 2.00pm on 22 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**THE HON. MRS JUSTICE STEYN DBE**

**Mrs Justice Steyn :**

**A. Introduction**

1. This claim for judicial review concerns the introduction of Relationships and Sexuality Education ('RSE') as a mandatory element of the new curricula for maintained schools in Wales, under the Curriculum and Assessment (Wales) Act 2021 ('the 2021 Act'). There is no challenge to the lawfulness of any provision of the 2021 Act. The claimants' challenge focuses on two documents issued by the Welsh Government pursuant to the 2021 Act, namely, *The Curriculum for Wales – Relationships and Sexuality Education Code* ('the Code') and *The Relationships and Sexuality Education (RSE): Statutory Guidance* ('the Guidance').
2. The claimants are parents of children attending maintained schools in Wales who object on religious and/or philosophical grounds to the introduction of RSE without a 'right of excusal', that is, without a parental right to withdraw their child from lessons in which RSE is taught. The strength of feeling underlying their challenge is evident. In this context, it is important to note the constitutional role of the court in judicial review litigation. That role entails the court carrying out an exercise of *review* of the impugned acts or decisions – here, the promulgation of the Code and the Guidance – to determine whether they are compatible with the applicable legal rules and principles.
3. The claimants were granted permission by Turner J to seek judicial review on four grounds. These grounds give rise to the following issues (which are agreed save for the additional issues raised by the claimants in (2A) and (3A)):
  - (1) **Grounds 1, 2 and 3(b)**: In respect of the grounds of challenge relating to a claimed parental right of excusal from RSE:
    - a) does the *common law* provide for the constitutional parental right of excusal for which the claimants contend?
    - b) If so, what is the nature of that right?
    - c) If any such right exists, has it been abrogated by the 2021 Act (and/or any other legislation)?
    - d) If, in the alternative, any such common law right does not exist, has the *statutory* right of excusal provided for by s.405 of the Education Act 1996 been abrogated by the 2021 Act (and/or any other legislation)?
    - e) Do the Code and/or the Guidance misstate the law in relation to any right of excusal?
    - f) In relation to the argument advanced under the *first sentence of Article 2 of the First Protocol* to the European Convention on Human Rights ('A2P1' and 'the Convention'):
      - i) is it open to the claimants to contend that the absence of a parental right of excusal breaches the first sentence of A2P1, or would such a challenge have to be targeted at the 2021 Act itself?

- ii) If it is open to the Claimants so to contend, does the absence of a parental right of excusal breach the first sentence of A2P1?

(2) **Grounds 3(a), (c) and (d):** In relation to the grounds of challenge relating to the right, conferred on parents by the second sentence of A2P1, to ensure education and teaching in conformity with their own religious and philosophical convictions:

- a) do any of the passages in the Code or the Guidance to which the Claimants object purport to authorise or positively approve teaching that will be in breach of the second sentence of A2P1?
- b) Insofar as the Code and/or the Guidance impact on parental rights under the second sentence of A2P1, are such impacts required to be “prescribed by law” and, if so, are they “prescribed by law”?

(2A) **Ground 3 (additional issues):**

- a) does (as the defendant contends) *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 (*‘(A) v SSHD’*) set out the relevant test for the Code and Guidance, i.e. are the Code and Guidance the same sort of “*policy documents or statement of practice issued by a public authority*” as were considered by the Court in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112?
- b) Does the Code and/or Guidance breach the duty on the State to treat all ethical views on an equal footing in a non-partisan manner?
- c) Does the Code and/or Guidance violate A2P1 by imposing ‘the whole school approach’, without providing for any right of excusal, with or without any guarantees as to the content of that education?

(3) **Ground 4:** In relation to the ground of challenge relating to the right to freedom of thought, conscience and religion conferred by article 9 of the Convention (‘article 9’),

- a) do any of the passages in the Code or the Guidance to which the claimants object purport to authorise or positively approve teaching that will be in breach of article 9?

(3A) **Ground 4 (additional issue):**

- b) does the Code and/or Guidance breach article 9 in any other way?

- 4. The claim focuses on the teaching of RSE in maintained mainstream schools in Wales. Accordingly, although the 2021 Act also makes provision in relation to other learning environments, including maintained nursery schools, non-maintained nursery schools that are funded by local authorities, special schools and pupil referral units, this judgment only addresses the position in maintained mainstream schools in Wales.

## **B. The legal framework**

### ***Education Act 1996***

5. Section 7 of the Education Act 1996 ('the 1996 Act') provides so far as relevant:

“The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable –

(a) to his age, ability and aptitude, and

(b) to any ...additional learning needs (in the case of a child who is in the area of a local authority in Wales) he may have,

either by regular attendance at school or otherwise.” (Emphasis added.)

(Compulsory school age is defined in s.8 of the 1996 Act.)

6. Section 9 of the 1996 Act provides:

“In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.”

(A local authority in Wales means a county council in Wales or a county borough council: s. 579 of the 1996 Act.)

7. A parent of a child who is a registered pupil at a school commits a criminal offence if the child does not attend the school in accordance with the rules prescribed by the school, unless a specified exception applies: s.444 of the 1996 Act and *Isle of Wight Council v Plant* [2017] UKSC 28, [2017] 1 WLR 1441, Baroness Hale DSPC at [48].

### ***Curriculum and Assessment (Wales) Act 2021***

8. The 2021 Act is an Act of the Senedd which, as described in its long title, establishes “*a new framework for a curriculum for pupils of compulsory school age at maintained schools ...*” Part 1 of the 2021 Act sets out “*basic concepts that have effect in relation to a curriculum*” for, among others, “*registered pupils at maintained schools (except those over compulsory school age)*” (s.1(1)) and “*includes provision about key documents that support a curriculum of that kind*” (s.1(2)).

9. Section 2 of the 2021 Act provides that the “*four purposes*” of a curriculum are:

“To enable pupils and children to develop as ambitious, capable learners, ready to learn throughout their lives;

To enable pupils and children to develop as enterprising, creative contributors, ready to play a full part in life and work;

To enable pupils and children to develop as ethical, informed citizens of Wales and the world;

To enable pupils and children to develop as healthy, confident individuals, ready to live fulfilling lives as valued members of society.”

10. Section 3(1) of the 2021 Act provides that there are six “*areas of learning and experience for a curriculum*” (‘areas of learning’), namely:

“Expressive Arts  
Health and Well-being  
Humanities  
Languages, Literacy and Communication  
Mathematics and Numeracy  
Science and Technology.” (Emphasis added.)

11. Section 3(2) provides that within those six areas of learning:

“...the following are mandatory elements –

English  
Relationships and Sexuality Education  
Religion, Values and Ethics  
Welsh.” (Emphasis added.)

12. Section 8 of the 2021 Act provides:

“(1) The Welsh Ministers must issue a code (the “RSE Code”) setting out themes and matters to be encompassed by the mandatory element of Relationships and Sexuality Education.

(2) A curriculum does not encompass the mandatory element of Relationships and Sexuality Education unless it accords with the provision in the RSE Code.

(3) Teaching and learning does not encompass the mandatory element of Relationships and Sexuality Education unless it accords with the provision in the RSE Code.

(4) For further provision about the RSE Code, see section 77.” (Emphasis added.)

13. Section 77 lays down the *procedure* for issuing or revising the RSE Code. In particular, the Welsh Ministers must consult the persons they think appropriate (if any), lay a draft of the proposed Code before the Senedd, and if the Senedd resolves to approve a draft the Welsh Ministers must issue the RSE Code in the form of the approved draft.

14. Whereas there is a duty to issue the RSE code, s.71 provides a power to issue other guidance. Section 71 states:

“(1) The Welsh Ministers may issue guidance in relation to the exercise of functions conferred by or under this Act.

(2) Before issuing guidance under this section, the Welsh Ministers must consult the persons they think appropriate (if any).

(3) In exercising their functions, the following persons must have regard to any guidance issued by the Welsh Ministers under this section –

(a) the head teacher of a maintained school ...

(b) the governing body of a maintained school ...

(g) a local authority in Wales.”

15. Chapter 1 of Part 2 of the 2021 Act “*makes provision about the design and adoption of a curriculum*” for, among others, registered pupils at a maintained school, except those over compulsory school age: s.9. Section 10 provides:

“(1) The head teacher of a school must design a curriculum for the school’s pupils.

(2) That curriculum must comply with the requirements in sections 20 to 24, and any requirements imposed under section 25.” (Emphasis added.)

16. Section 11 of the 2021 Act provides:

“The head teacher and governing body of a school must –

(a) adopt the curriculum designed under section 10 as the curriculum for the school’s pupils; and

(b) publish a summary of the adopted curriculum.

(2) But a curriculum may not be adopted under this section unless it complies with the requirements in sections 20 to 24, and any requirement imposed under section 25.”

17. Chapter 2 of Part 2 of the 2021 Act sets out “*curriculum requirements*”. Sections 20-24, with which the curriculum designed by a school’s head teacher, and adopted by the head teacher and governing body, must comply, provide (so far as relevant):

“20. The curriculum must enable pupils, or children to develop in the ways described in the four purposes.

21. The curriculum must provide for appropriate progression.

22. The curriculum must be suitable for pupils, or children, of differing ages, abilities and aptitudes.

23. The curriculum must be broad and balanced.

24. (1) The curriculum must make provision for teaching and learning that –

(a) encompasses each of the areas of learning and experience, including the mandatory elements within the areas of learning and experience, and

(b) develops the mandatory cross-curricular skills.

(2) The provision for teaching and learning encompassing the mandatory element of Relationships and Sexuality Education must be developmentally appropriate for pupils, or children.

...” (Emphasis added.)

18. Section 25 provides a power to impose by regulations further requirements in respect of a curriculum for pupils (broadly) in years 10 and 11.

19. Chapter 3 of Part 2 of the 2021 Act makes provision regarding the implementation of a curriculum that has been adopted pursuant to section 11. Section 27 provides:

“(1) The head teacher of a school must ensure that the adopted curriculum is implemented for the school’s pupils in accordance with sections 28, 29 and 30.

(2) The governing body of a school must exercise its functions with a view to ensuring that the adopted curriculum is implemented for the school’s pupils in accordance with sections 28, 29 and 30.”

20. Section 28 of the 2021 Act provides:

“The adopted curriculum must be implemented in a way that –

(a) enables each pupil to develop in the ways described in the four purposes,

(b) secures teaching and learning that offers appropriate progression for each pupil,

(c) is suitable for each pupil’s age, ability and aptitude,

(d) takes account of each pupil’s additional learning needs (if any), and

(e) secures broad and balanced teaching and learning for each pupil.” (Emphasis added.)

I note that the focus of this provision is on “*each pupil*” rather than a class or cohort.

21. Section 29 provides (so far as material):

“(1) The adopted curriculum must be implemented in accordance with subsection (2) for pupils who have not yet completed the school year in which the majority of the pupils in their class attain the age of 14.

(2) The adopted curriculum must be implemented in a way that secures teaching and learning for each pupil that –

(a) encompasses the areas of learning and experience (including the mandatory elements within those areas), ...

(3) The teaching and learning secured under subsection (2) -

(a) in respect of the mandatory element of Relationships and Sexuality Education, must be suitable for the pupil’s stage of development, ...” (Emphasis added.)

22. Section 30 addresses implementation of the curriculum for pupils who are (broadly) in years 10 and 11. So far as relevant, it provides:

“(2) The adopted curriculum must be implemented in a way that –

(a) secures teaching and learning for each pupil that encompasses the mandatory elements within the areas of learning and experience, ...

(6) The teaching and learning secured under subsection (2) –

(a) in respect of the mandatory element of Relationships and Sexuality Education, must be suitable for the pupil’s stage of development, ...” (emphasis added).

23. Sections 38-40 permit the Welsh Ministers to enable “*development work or experiments*” to be conducted in certain circumstances, and subject to specified conditions, and for that purpose sections 27-30 may be disapplied in relation to a school. Section 41 allows for a pupil’s individual development plan or education, health and care plan to include provision that disapplies those sections.

24. Sections 42-46 address temporary exceptions for individual pupils and children. Section 42 provides so far as material:

“(1) Regulations may enable the head teacher of a maintained school or maintained nursery school to determine, in cases or circumstances specified in the regulations –

(a) that sections 27, 28, 29 and 30, or any of those sections, are to be disapplied in relation to a registered pupil at the school during the period specified in the determination, or

(b) that sections 27, 28, 29 and 30, or any of those sections, are to be applied in relation to a registered pupil at the



school, during the period specified in the determination, with the modifications specified in the determination.

...

(3) If regulations are made under this section, they must provide that a person may make a determination under the regulations only if satisfied that the curriculum that will be implemented for the pupil or child as a result of the determination will –

(a) enable the pupil or child to develop in the ways described in the four purposes,

(b) secure teaching and learning that offers appropriate progression for each pupil or child,

(c) be suitable for the pupil or child’s age, ability and aptitude,

(d) take account of the pupil’s or child’s additional learning needs (if any), and

(e) secure broad and balanced teaching and learning for the pupil or child.

(4) Regulations under this section may specify further conditions that must be met before a determination may be made under the regulations.” (Emphasis added.)

25. Section 43 makes further provision about regulations made under s.42 of the 2021 Act. Among other matters, subsection (3) provides:

“The regulations must specify that the operative period of a determination made under the regulations is either –

(a) a fixed period in the determination that does not exceed 6 months, or

(b) a period that must be brought to an end (in accordance with the regulations) no later than 6 months from its beginning.” (Emphasis added.)

26. Section 45 provides for, among other matters, an appeal by a pupil or a pupil’s parents to the governing body against a decision of a head teacher not to make a determination under s.42 in circumstances where the pupil or the pupil’s parent has asked the head teacher to do so.

27. Section 73 of the 2021 Act provides that “*Schedule 2 contains minor and consequential amendments and repeals.*”

28. Paragraph 45 of Schedule 2 provides for the complete omission of “*Part 7 (the curriculum in Wales)*” from the Education Act 2002. That includes s.101 of the Education Act 2002 which provided:

“(1) The curriculum for every maintained school in Wales shall comprise a basic curriculum which includes –

...

(b) a curriculum for all registered pupils at the school who have attained the age of three but are not over compulsory school age (known as “the National Curriculum for Wales”),

...

(c) in the case of a secondary school, provision for sex education for all registered pupils at the school, ...”

29. Paragraphs 1 to 26 of Schedule 2 specify various amendments to the 1996 Act. Paragraphs 17 to 20 amend sections 403, 404 and 405 of the 1996 Act.
30. Section 403 of the 1996 Act (with amendments made by the 2021 Act shown underlined) provides:

**“Sex education in England: manner of provision**

(1) The governing body and head teacher of a school in England shall take such steps as are reasonably practicable to secure that where sex education is given to any registered pupils at a maintained school (whether or not as part of statutory relationships and sex education), it is given in such a manner as to encourage those pupils to have due regard to moral considerations and the value of family life.

(1A) The Secretary of State must issue guidance designed to secure that when sex education is given to registered pupils at maintained schools in England –

(a) they learn the nature of marriage and its importance for family life and the bringing up of children, and

(b) they are protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned.

(1ZB) In subsection (1A) the reference to sex education does not include sex education given as part of statutory relationships and sex education.

...”

31. Section 405 of the 1996 Act (with amendments made by the 2021 Act shown underlined) provides:

**“Exemption from sex education in England”**

(1) If the parent of any pupil in attendance at a maintained school in England requests that he may be wholly or partly excused from receiving sex education at the school, the pupil shall, except so far as such education is comprised in the National Curriculum, be so excused accordingly until the request is withdrawn.

(2) In subsection (1) the reference to sex education does not include sex education provided at a maintained school in England as part of statutory relationships and sex education.

(3) If the parent of any pupil in attendance at a maintained school in England requests that the pupil may be wholly or partly excused from sex education provided as part of statutory relationships and sex education, the pupil must be so excused until the request is withdrawn, unless or to the extent that the head teacher considers that the pupil should not be so excused.

(4) In this section “statutory relationships and sex education” means education required to be provided at a school in England under section 80(1)(d) of the Education Act 2002.”

***The transitional provisions***

32. The 2021 Act was passed by the Senedd on 9 March 2021 and it received Royal Assent on 29 April 2021. It establishes a new comprehensive framework for curricula at maintained schools in Wales. By virtue of the Curriculum and Assessment (Wales) Act 2021 (Commencement No. 3 and Transitional Provision) Order 2022/652, the new framework is taking effect on a rolling basis:

(1) Since September 2022, the new framework has applied to all year groups in primary school (i.e. from Reception to Year 6), and to Year 7 in 104 secondary schools that expressed a wish to roll out the new framework in September 2022;

(2) From September 2023, the new framework will apply to all year groups from Reception to Year 8;

(3) From September 2024, the new framework will apply to all year groups from Reception to Year 9, and so on until the roll-out is complete in September 2026.

33. The effect of the transitional provisions is that the substantive provisions of the 2021 Act do not apply to pupils who are currently in Year 8 or above, and will not apply to them as they progress to Year 9 next year and up through their schools in subsequent years. The provisions that were previously in force will continue to apply to those pupils, including the statutory right of excusal contained in s.405(1) of the 1996 Act from “*sex education*” as provided in accordance with s.101(1)(c) of the Education Act 2002.

***The Human Rights Act 1998 and the Government of Wales Act 2006***

34. The “*Convention Rights*” referred to in s.1(1) of the Human Rights Act 1998 (‘the HRA’) include A2P1 which is contained in Schedule 1 to the HRA and provides:

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

35. A2P1 has effect subject to the United Kingdom’s reservation (see ss.1(2) and 15) which is set out in Schedule 3 to the HRA and provides:

“At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.”

36. Article 9 (which is also a Convention Right for the purposes of the HRA) provides:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

37. Section 81 of the Government of Wales Act 2006 provides (so far as material):

“(1) The Welsh Ministers have no power –

(a) to make, confirm or approve any subordinate legislation,  
or

(b) to do any other act,

so far as the subordinate legislation or act is incompatible with any of the Convention rights.

(2) Subsection (1) does not enable a person –

(a) to bring any proceedings in a court or tribunal, or

(b) to rely on any of the Convention rights in any such proceedings,

in respect of an act unless that person would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

...”

38. Section 108A provides that a provision of an Act of the Senedd is outside the Senedd’s legislative competence if it is incompatible with the Convention rights. However, as I have indicated, it is not contended that any provision of the 2021 Act was outside the Senedd’s legislative competence.

### ***United Nations Convention on the Rights of the Child***

39. The Welsh Ministers have a statutory duty to have due regard to the requirements of Part I of the UN Convention on the Rights of the Child (‘the UNCRC’) (among other provisions), when exercising any of their functions: see the Rights of Children and Young Persons (Wales) Measure 2011, s.1(1)(a) (‘the 2011 Measure’).
40. Article 14 of the UNCRC, as set out in paragraph 1 of Schedule 1 to the 2011 Measure, provides:

“1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

### ***Other international instruments and measures***

41. The claimants also rely upon the following international instruments, comments, recommendations and resolutions:

- (1) Article 5(1)(b) of the UN Convention against Discrimination in Education (1960) provides:

“It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with

the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction”.

- (2) Article 13.3 of the International Covenant on Economic, Social and Cultural Rights (1966) provides:

“The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.”

- (3) Article 18(4) of the International Covenant on Civil and Political Rights (1966) (‘the ICCPR’) provides:

“The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

- (4) In General Comment No.22: Article 18 (Freedom of Thought, Conscience and Religion) (1993), the Human Rights Committee expressed the view that:

“...public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.”

- (5) Article 5(2) of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) provides:

“Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.”

- (6) Recommendation 1396 (1999) of the Parliamentary Assembly of the Council of Europe on religion and democracy recommends that the Committee of Ministers invite the governments of the member states to “*guarantee freedom of conscience and religious expression within the conditions set out in the European Convention on Human Rights for all citizens*”, to “*promote education about religions*” and, in particular, to:

“e. avoid – in the case of children – any conflict between the state-promoted education about religion and the religious faith of the families, in order to respect the free decision of the families in this very sensitive matter.”

(7) In Resolution 1928 (2013) on *safeguarding human rights in relation to religion and belief, and protecting religious communities from violence*, the Parliamentary Assembly of the Council of Europe called on member States to:

“9.11 while guaranteeing the fundamental right of children to education in an objective, critical and pluralistic manner, respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions;

...

9.13. ensure the full respect of Article 9 of the European Convention on Human Rights and relevant jurisprudence of the European Court of Human Rights and that the freedom of communities and individuals defined by religion or belief is respected and exercised within the limits of the law”.

(8) In Resolution 1928 (2013) on *the protection of the rights of parents and children belonging to religious minorities*, the Parliamentary Assembly of the Council of Europe called on member States “*to protect the rights of parents and children belonging to religious minorities by taking practical steps*”, including to:

“5.4. ensure easy-to-implement procedures for children or parents to obtain exemptions from compulsory State religious education programmes that are in conflict with their deeply held moral or religious beliefs; the options may include non-confessional teaching of religion, providing information on a plurality of religions and ethics programmes.”

## **C. The facts**

### ***The background to the 2021 Act***

42. In March 2014, the Welsh Government commissioned Professor Graham Donaldson, an honorary professor at Glasgow University’s School of Education and the former chief professional advisor on education to the Scottish Government, to undertake an independent review of the curriculum and arrangements for assessment in Wales. Professor Donaldson’s report was published in 2015 and the Welsh Government accepted all his recommendations. One of his recommendations was that the curriculum in Wales should be organised into six “*areas of learning and experience*”, including “*health and well-being*”, which would include education on sex and relationships.
43. In March 2017, the Welsh Government asked Estyn (the body with responsibility for inspecting the quality and standards of education and training in Wales) to evaluate

the quality of healthy relationships education being taught in schools and Estyn did so, publishing a report in June 2017. In the report, entitled *A Review of Healthy Relationships Education*, Estyn advised:

“Healthy relationships education is the term used to describe the range of learning experiences and support that schools provide for pupils to develop safe, respectful personal relationships. This includes taking responsibility for their behaviour in their personal relationships and how to recognise inappropriate behaviour.

...

### **Main findings**

1. The content and delivery of healthy relationships education vary too widely in schools across Wales. Overall, schools do not allocate enough time or importance to this aspect of personal and social education.

2. Schools that are most effective in delivering healthy relationships education create an ethos where pupils understand the importance of equality and respect the rights of others. In these schools, pupils build resilience and grow in self-esteem and confidence.

3. All of the schools surveyed as part of this report teach pupils about healthy digital relationships through e-safety education. As a result, pupils develop age appropriate awareness and understanding of important issues such as cyber-bullying, grooming and protecting personal information on-line.

4. Nearly all schools teach pupils about gender equality. ... Too many schools, particularly in areas where communities are not diverse, do not recognise issues of violence against women as high priority. They do not prepare pupils well enough to live in a diverse society.

5. Evidence from Estyn inspections shows that nearly all Year 6 pupils in primary schools receive sex and relationships education (SRE). Increasingly primary schools are extending this provision into Year 5 to reflect the fact some children reach puberty at a younger age. ...

7. Many schools make effective use of specialist agencies to deliver important aspects of healthy relationships education. Specialist agencies provide schools with a wide range of support including training for staff, age-appropriate lessons for pupils and signposting victims to sources of appropriate support. Where schools liaise effectively with specialist agencies, together they provide comprehensive coverage of



healthy relationships education including age appropriate work on domestic abuse, violence against women and sexual violence.

8. In schools with the best practice, teachers supplement the input of health professionals and specialist agencies well to plan activities for pupils to explore important aspects of healthy relationships in lessons across the curriculum.

...

12. There is support from all schools and agencies visited as part of the survey to include healthy relationships education as part of the health and wellbeing area of learning in the curriculum reform being planned following ‘Successful Futures’ (Donaldson, 2015).”

44. Also in March 2017, the Welsh Government established an expert panel (‘the SRE Panel’) to provide advice on the sex and relationships element of the “*health and well-being*” area of learning. The SRE Panel was chaired by Professor Emma Renold, Professor of Childhood Studies at Cardiff University, and its members were drawn from a wide range of backgrounds, including representatives of Public Health Wales, Estyn, the Office of the Children’s Commissioner for Wales, Learning Disability Wales, the National Safeguarding Board, the NSPCC, schools and charities. The SRE Panel had meetings with, among others, representatives of the Church in Wales and the Roman Catholic Church.
45. In December 2017, the SRE Panel published its report, entitled *The Future of the Sex and Relationships Education Curriculum in Wales*. The report recommended that what was then known as “*sex and relationships education*” should be re-named “*sexuality and relationships education*” (‘SRE’), later to become RSE. This was to reflect a new holistic approach to the subject, with an emphasis on rights, health, equality and equity. The SRE Panel advised:

“Children learn about sexuality and relationships long before they start school. As soon as they enter the social world they will be interacting with complex and often contradictory messages about gender, sexuality and relationships from, for example, advertising, books, music, social media and television and from family members, peers and communities. Even very young children will be negotiating a range of social and cultural norms on these issues that will shape their day to day lives and imagined futures. This knowledge, often termed as the ‘hidden curriculum’ can include misconceptions and misinformation. It can also challenge and exceed adult expectations of what children and young people are learning and experiencing.

Evidence based SRE programmes play a vital role in working with children, young people, parents/carers and communities; exploring the information and values about sexuality and

relationships that children are already exposed to and often struggling to navigate for themselves. ...”

46. The SRE Panel summarised its main findings as follows (quoting only the headline points and omitting the supporting text):

“SRE is often too biological, too negative, and not enough focus is placed on rights, equity, emotions and relationships.

There is a gap between children and young people’s lived experiences and the content of SRE

There are not enough opportunities for children and young people to influence what they learn in SRE

SRE is rarely inclusive and too heteronormative

SRE is inadequate for children and young people with disabilities

High quality SRE: starts early; is adaptable and needs-led; offers a spiral curriculum; collaborates with external providers; is of sufficient duration; is engaging and participatory; and creates a safe, respectful and confidential learning environment

A whole school approach is the single most important element for high quality and effective SRE

SRE as a curriculum is often poorly resourced, given low priority in schools, leading to uneven and unequal provision

There is a lack of awareness and education on violence against women, domestic abuse and sexual violence (VAWDASV)

Effective delivery of high quality SRE depends upon having a well-trained and confident workforce

Successful take up of national SRE specialist training programmes will depend upon the programme being publicly funded and the subject having equal status to other curriculum areas.” (Emphasis added.)

47. The SRE Panel advised:

**“High quality, holistic and inclusive SRE is associated with a range of positive and protective outcomes for children, young people and their communities and can:**

- help reduce homophobic, biphobic and transphobic (HBT) bullying and increase safety and wellbeing for LGBTQ+ children and young people;

- help young people make informed decisions about sexual intimacy and reproductive health;
- help challenge gender and sexual stereotypes, and advance awareness of sex, gender and sexual equality and equity; and VAWDASV
- help increase children and young people’s understanding of safe, consensual, equitable and positive relationships”.

48. The SRE Panel recommended that SRE should be “*statutory within the new curriculum for all schools, from Foundation Phase to compulsory school leaving age (3-16)*”, underpinned by the guiding principles that SRE should be “*rights and gender equity based*”, “*creative and curious*”, “*empowering and transformative*”, “*experience near and co-produced*”, “*holistic*”, “*inclusive*” and “*protective and preventative*”. The SRE Panel stressed the importance of a “*whole school approach to SRE*” as “*the single most important element for high quality health and well-being education*”, advising:

“A whole school approach to SRE means that the core principles of informing the learning and experience from planned SRE sessions (in or outside the classroom) will be reinforced (and importantly, not undermined) across different areas of the school and community. In relation to prevention, protection and transformation, whole school approaches are not just more likely to result in sustained cultural changes at the level of the individual learner, but across school staff and governing bodies and the wider school community.”

49. On 28 January 2019, the Welsh Government published a white paper entitled *Our National Mission: A Transformational Curriculum – Proposals for a new legislative framework* (‘the White Paper’). With the publication of the White Paper, the Welsh Government began a consultation, inviting responses by 25 March 2019, on its proposals for a new legislative framework for the school curriculum in Wales. In line with Professor Donaldson’s recommendations, the White Paper proposed that the new curriculum should comprise six areas of learning (subsequently enacted in s.3(1): paragraph above), in order to achieve the four purposes (subsequently enacted in s.2: paragraph above).

50. The White Paper described the proposals for RSE in paragraphs 3.46 to 3.59. At paragraph 3.59 it drew attention to the existing “*right for parents to withdraw their children from sex education, though not the areas included in the national curriculum programmes of study*”, set out in s.405 of the 1996 Act, and stated that there is “*a need to determine the appropriate arrangements for this and the similar right to withdraw from RE*”. The White Paper stated:

“The Right to Withdraw from Religious Education and Relationships and Sexuality Education

3.75 The current legislation provides that:

- A parent of a pupil at a school has the right to withdraw their child from RE (either wholly or partly);
- A parent of a pupil at a school has the right to withdraw their child from sex education (either wholly or partly), unless it forms part of the National Curriculum programme of study; and
- In both RE and RSE only a parent can request that a child be withdrawn. Therefore, a pupil of any age, including those in the sixth form, cannot withdraw them self at any point and must rely on the parent to do that for them.

3.76 These arrangements have been in place and unchanged for decades. Central to the new curriculum is the right of children and young people to have access to a curriculum which fulfils the four purposes.

3.77 We are therefore keen to explore approaches to modernise these arrangements. In considering a potential new approach we are keen to ensure the rights of children and young people are central to considerations but also that full consideration of the impact on all protected characteristics is given. We also want to ensure that any changes do not increase the burden on schools and teachers.

3.88 At this stage, we would welcome views on the case for change and any specific ideas of how to modernise this area.

Questions:

11. Should the right to withdraw from RE and RSE be retained?
12. If the right to withdraw is to be retained, should it remain with the parent (parent includes those with parental responsibility or those who have care of the child)?
13. If the right to withdraw is removed, what alternative, if any, should be in its place?"

51. The Welsh Government's summary of the responses to the White Paper published in July 2019 showed that of 1,632 respondents, 10.2% agreed with the proposal to make "*age and developmentally appropriate RSE compulsory for pupils aged 3-16 years*", whereas 87.5% disagreed. Of the 1,602 respondents who answered the question whether the right to withdraw from RE and RSE should be retained, 88.7% agreed it should be retained and 9.2% expressed the view it should not be retained.

52. On 3 October 2019, the Welsh Government launched a consultation on a specific proposal not to include a right of excusal in relation to RSE. The consultation ran until 28 November 2019. In the consultation document, entitled *Consultation on proposals to ensure access to the full curriculum for all learners*, the Welsh Government recognised that “*these are issues on which there are strong views*”. As Mr Owain Lloyd, the Director of Education and Welsh Language who has given a statement on behalf of the Welsh Ministers, has said, “*the Welsh Government recognised that many parents who responded to the White Paper had expressed strong and genuinely-held opposition to RSE being compulsory*”. The consultation document stated:

“15. Parents are currently able to prevent their children from receiving aspects of sex education in school (i.e. aspects not contained in the national curriculum). As with RE, parents are not required to give a reason for withdrawal and this remains with the parent throughout schooling (including the sixth form). This consultation proposes there will be no parental right to withdraw from RSE (and RE).

...

29. ... Part of the rationale for including RE and RSE as mandatory elements in the new curriculum is the importance of their contribution to the four purposes; it is unlikely that some of the key characteristics could be secured by learners without access to these subjects.

30 ... in terms of RSE pupils have available to them a vast amount of information through the internet. That information can be accessed easily and in a number of different ways. We believe that the state has a moral obligation to ensure that children in schools receive neutral and accurate information in these issues which pervade throughout society.

31. Not including the right to withdraw would also support the interdisciplinary approach being adopted in the new curriculum. There is already anecdotal evidence that schools and parents find it difficult to identify those lessons from which their child should be withdrawn. This situation is likely to be exacerbated by the interdisciplinary nature of the new curriculum, and it would be difficult to ensure that any right to withdraw was capable of being meaningfully exercised.” (Emphasis added.)

53. In the consultation document, the Welsh Government expressed the view that the absence of a right of excusal would be compatible with Convention rights, stating:

“The parental rights in the second sentence of Article 2 of Protocol 1 will be appropriately respected if the RE and RSE provided does not involve indoctrination and is provided in an objective, critical and pluralistic manner. The rights of the learner in Article 9 will be appropriately respected by ensuring

they do not miss out on vital curriculum content – content which is important not just in terms of making progress in relation to the four purposes but also in safeguarding them. Their parents and wider community are free to provide education on RE (or Religions and Worldviews as we are proposing it is renamed) and RSE as they see fit outside of school.”

54. As part of the consultation exercise, there was specific engagement with representatives of faith groups, including the Church in Wales, the Roman Catholic Church, Black African churches, the Evangelical Alliance, the Muslim Council, the Cardiff United Orthodox Synagogue and the Hindu Council of Wales, and representatives of Black and minority ethnic communities. A summary of the “*findings from the Faith/BAME engagement events*” published in January 2020 noted that “[m]ost Christian groups strongly opposed the ending of the parental right to withdraw, seeing it as State Overreach and/or an enforced encroachment of values/ethics between state and family. The family (their perspective) is the foundation unit of society and therefore should be what forms the values of society, not government.” The Jewish faith communities were also opposed to the removal of the parental right of excusal from RSE, whereas the Muslim faith community’s position on the proposals was found to be “*diverse*”, ranging from “*firm opposition to total support with others somewhere along that continuum*”.
55. On 21 January 2020, the Minister for Education, Kirsty Williams AM, made a written statement announcing that the Welsh Government had decided that there should not be a right of excusal in relation to RSE as part of the new curriculum. On 12 March 2020, the Minister announced the establishment of an RSE Working Group, to help develop guidance on RSE. She stated that the RSE Working Group would work alongside the newly established Faith/BAME Involvement Group, to ensure that the views of faith groups and communities were taken into account.
56. The Curriculum and Assessment (Wales) Bill was introduced in the Senedd on 6 July 2020. An Explanatory Memorandum was published alongside the Bill. Chapter 3 of the Explanatory Memorandum (entitled “Purpose and intended effect of the legislation”) included the following at paragraph 3.34:
- “Following consultation there is no intention to retain existing provisions to allow parents or those with parental responsibility to remove learners from religious education (to be renamed Religion Values and Ethics) and sex education (to be renamed Relationships and Sexuality Education). The intention of the Bill is to enable all learners equal opportunity to receive a broad and balanced education that will support them in developing in the way described by the four purposes.”
57. A summary of the Bill produced by the Senedd’s research staff was published in August 2020. Section 5.2 of that summary, which addresses RSE, included a statement that:
- “At present, parents have the right to withdraw their children from sex education that is not part of a national curriculum

subject. There is no equivalent **parental right of withdrawal** in the Bill. The Welsh Government **consulted in autumn 2019** on the implications of not including a parental right of withdrawal under an approach to ‘ensure full access to the curriculum’.” (Original emphasis.)

58. The Bill followed the normal four-stage legislative process for a public Bill. During the first stage, the Senedd’s Children, Young People and Education Committee reported:

“420. As a Committee we are unanimous in our support for the inclusion of RSE as a mandatory element of the Bill.

...

423. We are satisfied that not including a right to withdraw does not necessarily lead to a breach of parents’ rights under the ECHR, however it is essential that the design and delivery of RSE is objective, critical and pluralistic to ensure that parents’ rights are – and continue to be – respected. We recognise the vital role of parents in educating and providing guidance to their children and consider that RSE should complement this.

424. We believe that the mandatory nature of RSE is essential to creating the necessary conditions to enable our children and young people to access the high quality, comprehensive relationships and sexuality education befitting of a modern, tolerant and inclusive country. It is also an important mechanism to help children and young people to understand and respect both their own rights and those of others under the UNCRC and, more widely, the ECHR.

425. On this basis, we support the fact that the Bill does not include a right to withdraw as we believe all children should have full access to learning about relationships and sexuality. In our view, including even a limited right to withdraw risks undermining this approach. Nevertheless, we emphasise strongly that our support is predicated on the RSE designed and provided being:

- developmentally appropriate;
- objective, critical and pluralistic;
- delivered in accordance with detailed and clear statutory guidance, constructed by experts, practitioners and children and young people themselves; and
- underpinned by the necessary professional learning, resources and expert support.” (Emphasis added.)

59. The Children, Young People and Education Committee expressed deep concern about the extent to which misinformation about the Bill’s RSE provisions was in circulation, observing that this illustrated “*how essential a fact-based, objective, pluralistic and critical approach to this aspect of education (and others) is*” “*to equip our children and young people with the necessary tools to navigate information, particularly online, and to seek reputable sources of information, the reliability and accuracy of which they are able to examine carefully*”.
60. During the third stage of the legislative process (detailed consideration by the Senedd), a Member of the Senedd moved an amendment to the Bill which would have provided for parents to have a right of excusal of their children from RSE. That amendment was rejected by 40 votes to 14.

### ***Drafting and publication of the Code and the Guidance***

61. Once the 2021 Act had been passed and received Royal Assent (see paragraph above), on 21 May 2021 the Welsh Government published a consultation document setting out a draft code and statutory guidance on RSE. The consultation period ran to 16 July 2021. Revised versions of both documents were drafted in light of the consultation responses.
62. On 23 November 2021, a draft Code was laid before the Senedd for its approval pursuant to s.71 of the 2021 Act. The Senedd voted to approve the draft Code on 14 December 2021. A draft of the Guidance was also provided to Senedd members, although there is no requirement under the 2021 Act for the Senedd to approve a draft of the Guidance.
63. On 10 January 2022, the Guidance and the Code were first published as a composite webpage on the Welsh Government’s “*Hwb*” website (which is a website dedicated to learning, teaching and school curricula). On 25 January 2022, the Code was published on the Welsh Government’s main website as a separate document. When the Guidance is accessed on the Hwb website, there are embedded definitions of certain words and phrases. These definitions were part of the Guidance that was approved by the Minister for Education pursuant to s.71 of the 2021 Act. The version of the Code originally published on the Hwb website also included embedded definitions of three words and phrases. However, as those definitions did not form part of the version of the Code approved by the Senedd they have since been removed.

### ***“Whole-school approach” and RSE as a “cross-cutting element”***

64. As Mr Lloyd explains, and as is evident from the Guidance, there is a distinction between the “*whole-school approach*” and the concept of RSE as a “*cross-cutting element*” of the curriculum:

“110. ... the whole-school approach is concerned with ensuring that the teaching that pupils receive is reflected across the whole school community, and that the culture of the school allows pupils to seek non-judgemental support where necessary. This is likely to include, for example, ensuring that the school’s policies reflect the values that are taught in RSE



and preclude discrimination on grounds of a person's sex, sexuality or gender identity.

111. The whole-school approach is to be distinguished from the provision in the Guidance for RSE to be treated as a cross-cutting element of the curriculum. As the Guidance explains, RSE is 'a broad, interdisciplinary and complex area that includes biological, social, psychological, spiritual, ethical and cultural dimensions', and this means that RSE teaching can pick up on themes that emerge in other subject areas, and *vice versa*, in order to place them in context. ...

112. For example, the guidance on designing a languages, literacy and communication curriculum points out that considering RSE themes in literature can help learners to start to think critically about how relationships, gender, sexual identity and body norms play out in different cultures and communities. Similarly, the guidance on humanities emphasises that this area of learning provides an important opportunity for learners to understand how societal understandings and perceptions of relationships, sex, gender and sexuality have changed over time across different cultures and contexts around the world, and how they continue to evolve."

### ***The claimants***

65. The claim was filed on 6 April 2022. The first claimant, Ms Isherwood, is a single parent of two boys. She is "*ethically opposed*" to the introduction of mandatory RSE. She expresses a belief that "*the school should have no role to play in the emotional and complex field of the forming and the maintaining of sexual relationships*"; "*there should be no teaching on sexuality in any form for children and young adults*". Her view is that RSE will involve the "*promotion by the state of an ideology*", "*indoctrination on sexual lifestyles absent a coherent concept of ethics or even of right and wrong*", "*the promotion of the LGBTQI+ agenda*", and it will result in the "*sexualization of children based on the principle of pleasure promotion ... and sexual libertarianism*".
66. The first claimant has recently completed an MA in Applied Criminology and Criminal Justice and, among other matters, she has focused on child sex abuse and exploitation perpetrated by adults in educational settings. She set up an incorporated public interest group, Public Child Protection Wales ('PCPW'), to campaign on these issues, and all the claimants are affiliated to PCPW. During the passage of the Curriculum and Assessment (Wales) Bill, the first claimant submitted a petition to the Senedd. The petition was supported by 5,307 signatures, and stated:

"Relationships and Sexuality Education (RSE) is part of a Global Roll out of Sexuality Education which is not appropriate for this country. It sexualises children, fails to safeguard, read's [sic] like models of offending, has barriers to disclosure, and the local authority departments involved lack adequate training

to spot the signs of Child Sexual Abuse, Exploitation, Harmful Sexual Behaviour, And much, more! In addition to that we have evidence those involved in the Welsh Curriculum lack knowledge of this global roll out.”

The petition was considered by the Senedd’s Petitions Committee on 26 January 2021 and 16 March 2021, but that committee decided not to refer it for a debate.

67. When the first claimant gave her first statement on 14 March 2022 her sons were aged 17 and 13. Although her evidence does not specify their year groups, it is highly likely in light of their ages that they are currently in year groups above Year 7 and so the new framework does not, and will not, apply to either of them; with the effect that they will not be taught RSE.
68. The second claimant, ‘AXD’, has a daughter who is currently in Year 5 in a mainstream primary school. Her daughter was home schooled during the academic year 2020/2021, but the second claimant found that home schooling was not practical or in her daughter’s best interests. She is particularly concerned to protect her daughter from premature sexualisation as her daughter was the victim of sexual abuse as a very young child. The second claimant expresses a “*philosophical objection to free choice or an ideology of sexual libertarianism*”. The second claimant states:

“The ‘TQ+’ elements of LGBTQ+ are of particular concern and are controversial political subjects. Transgenderism is a subject without ‘reason’ and I do not believe that a man can become a woman and vice versa. A school teaches a subject without any evidential basis. I believe it is an ideology contrary to the interests of woman and undermines important societal gains. Nor do I accept the notion of fluidity of gender identities. The meaning of queer/questioning is directed to questioning if you are queer and exploring such matters. This has no business in a school and is contrary to my belief that these are private family matters and that children are too young to be exposed to such ‘teachings’. The concept of ‘+’ is clearly purely ideological and is entirely divorced from any scientific criteria, it is being promoted by certain groups to further their own unscientific agenda to promote the existence of new sexualities.

I am fighting against the sexualization of children which is opposed to my ethical and philosophical beliefs regarding the correct way to bring up children. ...

Issues of sex and sexuality are complex issues which engage many viewpoints and raise matters of deep ethical concern. Adults find this subject conflicting and it is not for the Government to promote one side of this complex debate: namely its view of what constitutes a morally good choice with which other people, such as myself, don’t agree.”

69. The third claimant, Ms Patton, is a single mother with two daughters who were, in March and November 2022 when she made her statements, aged 9 and 13. The third

claimant has been home schooling both her daughters since January 2021, at the same time as herself studying for a degree with the Open University. The third claimant states that she and her daughters are “*open to them returning to new schools in the future*” when her concerns about RSE are addressed. The third claimant’s evidence does not identify the older daughter’s year group, but given her age it is highly likely that if she were to attend a mainstream school she would, currently, be in a year group above Year 7 (specifically, Year 8, 9 or 10, depending on her date of birth), and so would not be taught RSE. However, the second claimant’s younger daughter is of primary school age and so the new framework would apply to her.

70. The third claimant expresses a strong belief that “*this curriculum, if not stopped, then at least needs to have the parental opt out restored*”. She believes “*children should most definitely receive information on how their bodies work to understand them and what changes they are going through to better equip them for their adult lives*”, but she believes “*such teaching should be factual; and has no need to address ethical issues*”. She believes that it is “*vital to ensure that older teenagers understand what the law is, and clearly states on matters of sexual consent*”, but she strongly disagrees with RSE being taught “*from such a young age*”, expressing a belief that 13-14 years old would be a more suitable age. With respect to learning about “*different types of relationships such as lesbian and gay relationships*” the third claimant agrees that young people should learn about these matters, but does not agree to “*such teaching at young ages*”. She considers that the “*whole school approach*” to RSE is “*alarming*” and shows an “*ideological agenda*”.

71. The fourth claimant, Mr Thomas, is a single father of four children and a local town councillor. In the academic year 2021/22, when Mr Thomas made his statement, his youngest child was 13 years of age and attending a maintained secondary school. As his youngest child will currently be in Year 8 or above (depending on his date of birth), the new framework will not apply to any of the fourth claimant’s children, and none of them will be taught RSE. The fourth claimant has expressed what he describes as serious ethical objections to RSE. He states:

“I do not regard this teaching as teaching as it does not prepare pupils for the working world but seeks to indoctrinate/influence my son with views that I do not approve of. I have a moral objection to such teaching on such subjects: these intimate matters are for the parents to teach about or guide their children on. I regard RSE as sexually expressive, promoting values that I do not want taught to my children.

...

The Welsh Government has cleverly refused to detail the content or activist groups that they will use, but it is clear that there is an agenda. I would not want my son to go to school without a right of excusal from certain classes, nor be subject to this promotion in a whole school approach.”

72. The fifth claimant, Ms Broom, is a single mother of three children. In April 2022 when she made her statement her two sons were aged 14 and 12, and her daughter was aged ten. All three children attend local maintained schools. The new framework

will apply to the fifth claimant's daughter, and it may apply to her younger son, depending on his year group, but it is likely that her older son will be in Year 9 or higher (depending on his date of birth) and so it will not apply to him. The fifth claimant describes herself as "*a committed Christian*". She believes that mandatory RSE is "*against family life*" and is "*totalitarian*". She states:

"This curriculum teaches adult concepts when a children's neuro development is such that they are not able to understand ... and neither should they have the need to know such things.

I believe it destroys their identity and confuses them, their gender, creating unresolved guilt and self-hatred. As a Christian I believe that our gender is decided before birth. Should God create a male that feels like he should be female it infers that God made a mistake. I believe that God is perfect even though sometimes we don't understand everything that happens to us.

...

I do not believe that children should have adult themes of sexuality imposed on them; including the LGBTQ+ agenda in school. *Normalisation* of relationships occurs naturally throughout society; but this is the imposition of a morality (I disagree with) being imposed on my children."

### ***The interveners***

73. I have also received a joint witness statement from Imam Ridhwan Rahman and others who describe themselves as "*a group of religious leaders of mosques in Wales*". They express deep concern about the compulsory nature of RSE for children from the age of 3. Insofar as the points they make go to the grounds pursued by the claimants, the interveners state:

"Muslim parents are worried that the RSE curriculum imposes and promotes a single perspective on issues of gender identity and sexuality and is not inclusive nor reflective of the faith communities' beliefs. Children between the ages of three through to eleven are thus exposed to content that is age inappropriate, within the confines of Islam and it's culture [*sic*].

...

A significant number of parents are seriously considering home-educating their children due to the provided RSE curriculum not meeting their religious and cultural needs. ...

...

The following Hadith highlights one area amongst many that conflict between parents who hold on to the Islamic Faith and wish to have their children educated in mainstream schools and the new RSE code.

*‘Inb ‘Umar (May Allah be pleased with them) reported: The Prophet (Peace be upon Him) said, ‘All of you are guardians and are responsible for your subjects... The main is responsible for his family, the woman is responsible for her husband’s house and his offspring. (Sahih Al-Bulhari: 5200)*

This passage highlights the responsibility is with the parents for their children. This responsibility covers many facets including sexual education, gender identification and sexual orientation to name a few.

Parents of an Islamic background are left deeply conflicted in sending their children to school since the RSE code does not conform to this religious and faith-based conviction of theirs and deprives them of their primary legislative right as already highlighted.”

#### **D. The Code and the Guidance**

74. The 2021 Act provides that RSE is a mandatory element within the prescribed areas of learning, but the 2021 Act, the Code and the Guidance do not prescribe a single curriculum for RSE (or, indeed, a single curriculum more broadly for maintained schools in Wales). The RSE that a pupil receives will depend on the curriculum that is designed by the headteacher of their school, and adopted by the headteacher and governing body, and on the implementation of that curriculum.

#### ***The Code***

75. The Code was issued pursuant to the statutory duty on the Welsh Ministers imposed by s.8(1) of the 2021 Act (see paragraph above). The Code is addressed, so far as relevant, to head teachers and governing bodies of maintained schools and local authorities in Wales. The curriculum designed, adopted and taught by a maintained school in Wales *must accord* with the Code.
76. The Code is a 14 page document. Save to the extent necessary to provide context, I set out here only those parts to which the claimants take objection. In both the Code and the Guidance, I have included the paragraph numbers added by the parties, for ease of navigation.

“[C1] This Code contains mandatory requirements, the legal basis for which is set out in the **legislation summary** of this Curriculum for Wales framework guidance. It sets out the themes and matters that must be encompassed in RSE. A curriculum and teaching and learning must encompass the mandatory element of RSE outlined within the following RSE Code.

#### **Designing your curriculum**

[C2] This mandatory RSE Code supports schools to design their RSE. The content is set within the context of broad and interlinked learning strands, namely:

- relationships and identity
- sexual health and well-being
- empowerment, safety and respect.

[C3] These strands allow practitioners to design and develop a curriculum tailored to their learners, making connections and developing authentic contexts for learning across the curriculum.

[C4] The Welsh Government committed to covering the following themes in RSE: relationships; rights and equity; sex, gender and sexuality; bodies and body image; sexual health and well-being; and violence, safety and support. To assist schools and settings in their planning of RSE, these themes are interwoven into the learning strands.

[C5] Across the learning strands, curriculum content in RSE must be inclusive and reflect diversity. It must include learning that develops learners' awareness and understanding of different identities, views and values and a diversity of relationships, gender and sexuality, including LGBTQ+ lives.

...

### **Content appropriate to learner development**

[C7] The Act requires that the RSE schools provide must be developmentally appropriate for learners. This means schools and settings must take account of a range of factors including the learner's age; knowledge and maturity; any additional learning needs and anticipating their physiological and emotional development. RSE must be developmentally appropriate for each learning, meaning that learners' needs of similar ages may differ.

[C8] The phases have been designed to give practitioners an understanding of what is likely to be developmentally appropriate. For example, in phase 1 and 2, learners will be taught about the principles of general consent as pre-requisites for learning about sexual consent at the developmentally appropriate time in phase 3. In practice, this means learners in phase one and two developing an awareness of asking for permission to share materials, for example toys; or learning about respecting personal boundaries.

[C9] ... The ages set out below indicate broadly when practitioners should start to consider whether learning in a phase is developmentally appropriate for their learners. ...

[C11] The learning for RSE refers to both what is taught expressly and what is embedded throughout the curriculum and in the school environment through the whole school approach.

**Relationships and identity**

...

[C13] Learners need to develop the understanding and behaviours that will support them to develop and maintain healthy, safe and fulfilling relationships throughout their lives. Learners need to be supported to recognise and value different types of relationships, including families and friendships, as well as the diversity within different types of relationships, including LGBTQ+ diversity, and that these can change over time. Developing empathy, compassion and communication skills are critical to learners’ relationships now and the relationships they will form in the future. This will also support respect, understanding and equitable treatment for others, whatever their sex, gender, sexuality, faith or belief.

[C14] Learners also need to develop both their sense of self and their sense of everyone being unique. Over time, learners can explore how relationships, sex, gender, romantic and sexual attraction and personal experiences may shape and inform a person’s identity and individuality. This supports learners to understand how identity, relationships and sexuality are informed by biology, technology and social, cultural and religious norms and that these can change over time. By engaging with these aspects, learners can recognise both positive and harmful behaviours and norms and have the confidence to speak up for themselves and to speak out and advocate for the rights and respect of others.

...

<b>Phase 1</b>	<b>Phase 2</b>	<b>Phase 3</b>
Practitioners should consider learners’ developmental appropriateness for learning in each phase:		
<b>From age 3</b>	<b>From age 7</b>	<b>From age 11</b>
...		
[C21] <u>Experiencing inclusive behaviours, language and role</u>	Valuing and recognising the contributions of	An ability to <u>advocate for and advance the rights of</u>

<p><u>modelling that show respect for others, whatever their gender.</u></p> <p>Recognising learners’ rights to be treated fairly, kindly and with respect.</p>	<p>everyone; and <u>the importance of sex and gender equality.</u></p> <p>Recognise and know how to safely respond to and <u>challenge gender and sexual stereotypes and unfair behaviour.</u></p> <p><u>An awareness of how positive and negative social and cultural norms regarding sex, gender and sexuality influence relationships and behaviours.</u></p>	<p>all and understand and respect all people <u>in relation to sex, gender and sexuality.</u></p> <p>Understanding how the law and human rights secure freedoms around sex, gender and sexuality and how these can differ in other countries and over time.</p> <p>Ability to critically <u>explore</u> and understand how a range of social, cultural and religious norms and influences about relationships, sex, gender and sexuality can shape perceptions and our well-being and can be both positive and harmful.</p>
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**Sexual health and well-being**

...

<p>[C26] <u>The use of accurate terminology for all body parts.</u> ...</p>	<p>...</p>	<p>...</p>
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**Empowerment, safety and respect**

...

[C36] Learners need to develop an understanding of the social, emotional, physical and legal nature and impact of harmful behaviours, including all bullying, and LGBTQ+ bullying, sexual violence and gender-based violence in a range of contexts, including online.

<p>...</p>		
<p>[C38] Recognising harmful behaviour including</p>	<p>Understanding of the importance of fair treatment for</p>	<p><u>Understanding the importance of inclusivity,</u></p>



<p>behaviours which are discriminatory and the right to be free from discrimination.</p> <p>Ability to interact with others in a way that is fair.</p>	<p>all and of respect in all interpersonal interactions offline and online.</p> <p>Recognising the value of non-discriminatory behaviours and when and how to take safe action to respond to and challenge discriminatory behaviours.</p>	<p><u>including for LGBTQ+ people, non-discrimination and the value of diversity in our interpersonal behaviours and relationships.</u></p> <p>Developing a sense of individual and social responsibility to others, including consideration of how we respond to behaviours that are discriminatory, disrespectful and harmful, offline and online.</p>
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...” (Emphasis added, save in [C1] the words “*legislation summary*” are hyperlinked to that document: see paragraph below.)

### **The Guidance**

77. The Guidance was issued pursuant to the *power* given to the Welsh Ministers by s.71(1) of the 2021 Act (see paragraph above). Head teachers and governing bodies of maintained schools, and local authorities in Wales, are required to have regard to the Guidance in exercising their functions. This means that they must proceed on a proper understanding of it, take it into account and act in accordance with it unless they have clear reasons for departing from it.
78. The Guidance is an 11 page document. Again, save to the extent necessary to provide context, I set out here only those parts to which the claimants take objection.

#### **“Introduction**

##### **[G2] Mandatory**

*Relationships and sexuality education (RSE)* is a statutory requirement in the Curriculum for Wales framework and is mandatory for all learners from ages 3 to 16.

[G3] RSE has a positive and empowering role in learners’ education and plays a vital role in supporting them to realise the **four purposes** as part of a *whole-school approach*. Helping learners to form and maintain a range of relationships, all based

on mutual trust and respect, is the foundation of RSE. These relationships are critical to the development of emotional well-being, resilience and empathy. An understanding of sexuality with an emphasis on rights, health, equality and *equity* empowers learners to understand themselves, take responsibility for their own decisions and behaviours, and form relationships that are fully inclusive, reflecting **diversity** and promoting respect.

[G4] Schools and settings have an important role to play in creating safe and empowering environments that support learners' rights to enjoy fulfilling, healthy and safe relationships throughout their lives. This is critical to building a society which treats others with understanding and empathy, whatever their ethnicity, social economic background, disability, or *sex, gender* or sexuality.

[G5] This section of the Curriculum for Wales framework contains:

- the RSE Code: this sets out the mandatory learning at developmentally appropriate phases
- the statutory supporting guidance: this provides support in developing RSE in a curriculum both as essential learning in its own right and also as a cross-cutting element in all Areas

[G6] The section below makes clear what is part of the mandatory Code and what is statutory guidance. A link to schools' and settings' legal duties on RSE can be found in the **legislative summary** section of this framework guidance.

### **Why is RSE so important?**

[G7] The world around us is evolving rapidly and significantly. As a society we are becoming ever more aware of:

- changing family structures and relationships
- shifting social, cultural and religious norms in relation to sex, gender and sexuality
- advances in technology including the rising influence of social media and increased use of digital communications and devices
- changing laws and rights around relationships, sex, gender and sexuality

[G8] In this context, RSE is an important support in enabling learners to navigate these changes. Understanding how

relationships are formed, developed and maintained enables children and young people to develop skills and attitudes to support them in their own relationships throughout their lives. These may include family relationships, friendships, professional relationships, romantic and sexual relationships. Learning about both relationships and sexuality supports young people to develop the knowledge and skills needed to make sense of their thoughts and feelings and to effectively navigate rapidly changing influences. Learners to be supported to respond to these and, where appropriate, feel equipped to challenge harmful stereotypes and perceptions and seek help and support.

[G9] RSE has the potential to be transformative for learners and communities, it is important in empowering learners and in developing their critical thinking. Children and young people are navigating a range of complex and contradictory messages about relationships and sexuality that will shape their sense of self and their relationships with others. High-quality RSE provision will support learners to critically engage with what they are learning and experiencing. This supports them to understand their values and beliefs and to *advocate* for respect and understanding of others.

The Welsh Government believes all children and young people have the right to receive high-quality, holistic and *inclusive* education about relationships and sexuality. High-quality, holistic and inclusive RSE is associated with a range of positive and protective outcomes for all learners and their communities and can, for example:

- help increase learners' understanding of and participation in healthy, safe, and fulfilling relationships
- help young people recognise abusive or unhealthy relationships and seek support
- help reduce all bullying, including homophobic, biphobic and transphobic bullying, and increase safety and well-being for all learners
- help all learners make informed decisions about sexual intimacy and reproductive health
- help promote equality and equity of sex, gender and sexuality
- increase awareness, knowledge and understanding of gender-based and sexual violence

**What is RSE?**

[G10] RSE encompasses the knowledge, skills, dispositions and values that will empower learners to:

- support their health and well-being
- develop healthy, safe and fulfilling relationships of all kinds, including those with family and friends, and in time, romantic and sexual relationships
- navigate and make sense of how relationships, sex, gender and sexuality shape their own and other people's identities and lives
- understand and support their rights and those of others to enjoy equitable, safe, healthy and fulfilling relationships throughout their lives and advocate for these.

[G11] RSE provision helps to ensure learners develop a positive understanding of relationships and sexuality and to recognise misconceptions. RSE aims to empower learners in line with their needs, experiences and wider development. Through discussion and by responding to learners' questions and needs, it can provide safe and empowering environments that enable learners to reflect on and express their views and feelings on a range of issues.

...

### **Whole-school approach**

[G14] Teaching and learning in RSE should be supported by a whole-school approach to RSE and this is critical in supporting learners' well-being.

[G15] This means effectively linking all aspects of school, including the curriculum, policy, staff, school environment and community to support learners in their relationships and sexuality education. This should support the development of positive relationships, allowing learners and practitioners to thrive, reinforce a consistent, positive ethos and provide holistic high-quality support for practitioners and learners.

[G16] A whole-school approach should include consideration of leadership and policy around RSE. This should include the participation of the senior leadership team in developing the school's vision for RSE as well as the designation of a RSE lead within the school. This should also consider how curriculum and pedagogy supports and informs the development of the wider approach. Professional learning is also key. The senior leadership should ensure that all staff

participate in professional learning. Schools should also consider how their culture and environment can support RSE.

### **Enabling human rights**

[G17] Schools and setting should discuss RSE in the context of children's rights as protected by the United Nations Convention on the Rights of the Child (UNCRC). A rights-based approach supported by equity should be embedded in the learning.

...

[G20] Schools and settings should expressly consider children's rights. Learning in RSE should highlight the right to:

- non-discrimination (Article 2)
- to be heard and involved in decision-making (Article 12)
- freedom of expression (Article 13)
- follow your own religion (Article 14)
- have privacy (Article 16)
- access information to make informed decisions (Article 7)
- not be harmed and should be looked after and kept safe (Article 19)
- experience the highest attainable health, access to health facilities, and preventative health care (Article 24)
- education that prepares children to understand others (Article 29)
- protection from sexual abuse and exploitation (Article 34)
- get special help if they have been abused (Article 39)

...

[G21] Schools and settings can also link to the United Nations Convention on the Rights of Person with Disabilities (UNCRPD). ...

### **Inclusivity, including LGBTQ+ inclusivity**

[G22] In line with the mandatory requirements of the RSE Code, RSE will be realised in a way that is inclusive in accordance with the principles of equality. This helps ensure that all learners can see themselves, their families, their communities and each other reflected across the curriculum and can learn to value difference and diversity as a source of strength. This contributes to a cohesive, fair and equitable society that equips learners with skills for life. This of course includes gender equity and LGBTQ+ inclusivity.

[G23] Learners are growing up in a world where gender and sexual identity, cultures, rights and legislation are changing or evolving around the world. In order to be effective, inclusive RSE must start early. From a young age learners can learn about their own uniqueness, how to appreciate diversity and respect the rights of others. This is the foundation for exploring diversity in relationships, gender and sexual identity and for developing the skills and values needed to think critically about gender and sexual forms, rights and inequities. This should include consideration of a range of influences that shape our values and identity. It should help learners to develop understanding of different values, religious beliefs and non-religious convictions that can inform our values and identity around relationships and sexuality.

### **RSE as a cross-cutting element**

[G24] RSE is a broad, interdisciplinary and complex area that includes biological, social, psychological, spiritual, ethical and cultural dimensions.

[G25] This means that each Area of the curriculum and the range of subject disciplines within them each have a unique contribution to learning in RSE. RSE should draw on all Areas to allow learners to make connections between their learning in RSE and the wider curriculum, understanding historical, cultural, geographic, physical, political, social and technological perspectives and influences on RSE issues. ... Schools should consider what each Area can authentically bring to an understanding of RSE. This should be meaningful and should avoid superficial or tenuous links.

...

G30 Schools should have regard to the mandatory strands of developmentally appropriate content within the RSE Code to develop their approach, and should recognise learners' social, emotional and cognitive development and needs during their planning.

...

### **Engaging with learners, parents, carers and wider communities**

[G36] ... Communicating effectively with parents and carers on an ongoing basis is an important way to foster positive relationships in order to engage them in powerful and meaningful dialogue. ...” (Italicised words are given an embedded definition; underlined words are hyperlinked: see paragraph below.)

79. The embedded definitions in the Guidance include:

Gender: “(Rhywedd) often used to refer to whether someone identifies as female, male or non-binary. Gender can also refer to the social and cultural norms and differences that different societies have about how people behave, look or dress. People often find an important sense of identity in these but they can also perpetuate discrimination, inequalities and harms.

LGBTQ+: “(LHDTC+) lesbian, gay, bisexual / bi, transgender / trans, queer or questioning. The + refers to other letters that can be added to represent other identities, including non-binary.

Relationships: “(Cydberthnasau) can be interpersonal and intrapersonal. Interpersonal relationships refer to the connections and interactions between two or more people. Intrapersonal relationships refers to the relationship that one has with oneself. Both types are inextricably linked, shifting and changing over time. They can be familial, spiritual, romantic, platonic and sexual.”

Sex: “(Rhyw) attributed to a person on the basis of primary sex characteristics (genitalia) and reproductive functions.”

Sexuality: “(Rhywioldeb) a central aspect of being human and encompasses sexual orientation, gender identities and roles, sex, reproduction and intimacy. Sexuality is experienced and expressed through thoughts, beliefs, behaviours and relationships.”

### ***Legislation summary***

80. The “*legislation summary*” which is referred to and hyperlinked in both the Code and the Guidance includes under the heading “*Relationships and sexuality education*”:

#### **“Pluralistic requirement**

In all schools and settings, RSE must be objective, critical and pluralistic as to its content and manner of teaching (see the case of ‘Dojan and Others v Germany 2011 application no. 319/08’). By pluralistic we mean that where questions of values are concerned, schools and settings must provide a range of views on a given subject, commonly held within society. This also means providing a range of factual information on RSE issues. In all schools, where they explore specific beliefs or views, this must include a range of other faith and

non-religious views on the issue.

For example, schools may include learning about current tensions, disagreements or debates within society, or they may explore different perspectives within faiths on issues. Developing this pluralism is important in ensuring learners develop as informed citizens who are aware of and sensitive to a range of different opinions, values and beliefs. This supports them to engage with and navigate potential tensions.

A good understanding of learners' views, emerging values and backgrounds is central to developing this pluralism. Positive relationships with wider communities can help to create a constructive context for exploring aspects and tensions in a sensitive way."

## **E. Grounds 1 and 2: the right of excusal and the principle of legality**

### ***The claimants' submissions***

81. The claimants contend that the common law provides a fundamental, constitutional parental right of excusal which has not been removed by the 2021 Act. The effect of the principle of legality is that such a common law right could not be removed without clear statutory authority. The claimants submit the 2021 Act fails to provide the necessary authority because the Senedd did not squarely confront the removal of the common law right of excusal in the primary body of that Act. Alternatively, the claimants rely on the principle of legality in support of the proposition that the statutory right of excusal in s.405 of the 1996 Act has not been removed in Wales by the 2021 Act. If they succeed in establishing the existence of a right of excusal (whether common law or statutory), then they contend that statements in the Code and the Guidance which suggest that the right of excusal has been removed are wrong in law.
82. In their written submissions, the claimants defined the constitutional right which they claim as a right of parents "*to ensure that their children are not educated contrary to their philosophical or religious beliefs*"; "*to determine the content of what their children are taught*"; and as encompassing: (a) "*a right to be informed as to the content of any education provided and access to the materials used*", as otherwise any exercise of the right of excusal would be rendered nugatory; (b) "*a right to object without prejudice to them or their child*"; (c) "*a right to have their objections addressed reasonably, either by withdrawal of material offensive to them or explanation of how its use has had due regard for their own opinions and properly balanced their rights and is not presented as the single 'truth'*"; and (d) "*an ultimate right to excusal if their objections are not reasonably addressed*".
83. In his oral submissions, while maintaining his reliance on the descriptions of the claimed right identified above, leading Counsel for the claimants, Mr Diamond, described it as a parent's duty to educate their child, and a parent's right to determine the content of their child's education within the boundaries of reasonableness, with parents having control over their child's religious, philosophical, ethical and political education.



84. The common law right contended for has, the claimants submit, existed since before the enactment of the first education Act, the Elementary Education Act 1870 ('the 1870 Act'), and the introduction of compulsory education up to the age of 11 in 1880. In support of its existence they rely on: *Blackstone's Commentaries*, 17<sup>th</sup> ed. (1830), vol.1, chapters 16 and 17; *Lyons v Blenkin* (1821) Jacob 245, 38 ER 842; *Agar-Ellis v Lascelles* (1878) 10 Ch D 49; *Re Scanlan* (1888) 40 Ch D 200; *Barnardo v McHugh* [1891] AC 388; *R v Gyngall* [1893] 2 QB 232; *Hewer v Bryant* [1969] 3 All ER 578; *Gillick v West Norfolk and Wisbech Health Authority* [1986] 1 AC 112; and *Christian Institute v The Lord Advocate* [2016] UKSC 51, (2017) SC (UKSC) 29. I address these authorities below.
85. The claimants also draw upon A2P1 and article 9 of the Convention, and article 14(2) of the UNCRC, as well as a number of unincorporated international instruments (see paragraphs 34.-above), as informing the content of the common law, albeit they submit that the common law may provide more extensive protection. The claimants contend that the logic of the "*margin of appreciation*" is that states may opt for a higher level of protection for rights than the "*floor*" provided by the Convention, and that it is important that national judges should be robust in maintaining our tradition of limited state intrusion into family life. Many of the international texts they rely upon are concerned with religion or belief, but the claimants submit that non-biological sex education, touching as it does profound ethical, philosophical and moral views relating to the world and humanity's action within it, is a species of religious education.
86. The claimants refute the contention that through the Education Acts passed since 1870, and in particular by the introduction of measures for the provision of religious education and sex education, subject to statutory rights of excusal, Parliament has abrogated the common law right of excusal or "*occupied the field*". They contend that Parliament did not create a new right of excusal but merely gave express recognition to an existing common law right.
87. The claimants submit that the significance of the fundamental common law right on which they rely is that general words in a statute will not be taken to authorise an interference with the right (*R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539 and *R v Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115); and a statutory provision protecting the common law right will be immune from implied repeal (*Thorburn v Sunderland City Council* [2003] QB 151). When a common law right is impacted by legislation, particularly in an area as sensitive as this, there can be no scope for ambiguity.
88. They contend that the Welsh Ministers have sought (ineffectively) to remove the right of excusal "*by sleight of hand*". In support of this submission they rely, first, on the amendment of s.405 of the 1996 Act appearing only in a Schedule to the 2021 Act bearing the title "*minor and consequential amendments and repeals*"; and, secondly, the lack of any detail of the content of the RSE curriculum in the 2021 Act itself. In relation to the latter point, the claimants submit that if parental views on matters falling within RSE are to be contradicted by teaching in maintained schools, it was necessary for the statute to make crystal clear in what respect and to what extent parental views are to be overridden. A blanket removal of the right of excusal without specifying what children will be taught in RSE is inconsistent with the principle of legality.

89. The claimants contend that the Code and the Guidance, by claiming that RSE is mandatory (see C1, G2 and G30: paragraphs 76. and above), present “*a positive statement of the law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way*”: *A v SSHD*, Lord Sales JSC and Lord Burnett of Maldon CJ, [46].

### ***The defendant’s submissions***

90. The defendant submits that the claim fails at each stage. First, Mr Moffett KC, leading Counsel for the Welsh Ministers, submits that the courts have never previously recognised the constitutional right claimed, and this court should not do so now, for the first time. There is no support, whether in the case law or in any academic commentary, for such a constitutional right of excusal.
91. The defendant submits the lack of clarity as to the exact nature of the claimed constitutional right is an unpromising basis for establishing any such right, but however it is characterised it does not have the fundamental character that is required to be recognised as a constitutional right: *R v Lord Chancellor, ex p. Lightfoot* [2000] QB 597, 609B-D. The various formulations entail four essential features. First, the claimed right goes further than a parental power to make choices for and on behalf of a child. It is a constitutional right that a parent can assert as against the state, and it exists independently of any rights or powers that might otherwise inhere in the child. Secondly, it extends beyond the parental power to choose whether to enter a child into the state (or any other) system of education, to a positive right to determine what the child is taught after the parent has made the election to enter their child into a particular system of education. Thirdly, the defendant submits the claimed constitutional right would be far-reaching, potentially extending into every aspect of the curriculum. For example, such a right would potentially entitle a parent to withdraw their child from English or Welsh literature lessons based on a philosophical objection to certain books, or to withdraw them from geography or history lessons by reason of the parent’s belief in the Biblical account of creation. Fourthly, the defendant contends that the claimants have sought to make the claimed constitutional right more palatable by hedging it with caveats, and introducing a condition of reasonableness, but in doing so they have formulated a text that is more akin to legislation than a fundamental constitutional right arising out of the common law.
92. The defendant contends the court should be very slow to develop the common law in a field that has been comprehensively regulated by statute for so many years, and in which Parliament has incorporated A2P1: *In re McKerr* [2004] 1 WLR 807, Lord Nicholls, [30]-[32], Lord Steyn, [51], Lord Hoffmann, [71] and Lord Brown, [91]. The effect of developing the common law to recognise “*more marginal claims of right*” as enjoying the protection of the principle of legality would be to “*impermissibly confine the powers of the elected legislature*”: *Lightfoot*, Laws J, 509C-D. Mr Moffett submits this is an area in which the legislature has not merely occupied the field; it has created it. Conceptually, a right of excusal can only be formulated as a result of the establishment by Parliament of a system of compulsory education.
93. Secondly, if the court were to accept the existence of the claimed right of excusal, the defendant submits it has been abrogated by the 2021 Act. The Senedd (like Parliament) has the power to legislate in a way that abrogates common law

constitutional rights, but it must clearly indicate that it has done so: *Pierson and Simms*. Contrary to the claimants' contention, and the view expressed by Laws J in *R v Lord Chancellor ex p. Witham* [1998] QB 575 and in *Lightfoot*, the defendant submits that common law constitutional rights can be abrogated not only expressly but also by necessary implication, that is, one which necessarily follows from the express provisions of the legislation construed in their context.

94. The defendant refutes the suggestion that the Senedd did not squarely confront the question whether parents should continue to have a statutory right of excusal, or that there was any sleight of hand. The Senedd adopted a new legislative scheme. It did so in a legislative context in which a parent of a child who is a registered pupil at a school commits a criminal offence if the child does not attend the school in accordance with the school rules, unless a specified exception applies: s.444 of the 1996 Act and *Platt*, [48]. The 2021 Act expressly provides that RSE is a “mandatory” element of the curriculum and expressly requires that each pupil is to be taught RSE. Where the Senedd considered it appropriate to allow for exceptions to be made to the requirement that each pupil should be taught RSE, it did so expressly. And the 2021 Act expressly amends the statutory right of excusal from sex education (s.405 of the 1996 Act) so that it no longer applies in Wales. The continued existence of any constitutional right of excusal would be inconsistent with these deliberate legislative choices.
95. If the defendant is right on either of these first two issues, it follows that the Code and the Guidance do not misstate the law. But, in any event, the Code and the Guidance do not themselves refer to a right of excusal and none of the passages relied on misstates the law.

## **ANALYSIS AND DECISION ON GROUNDS 1 AND 2**

### ***The legislative history of compulsory education***

96. As Baroness Hale recounted in *Platt*,

“8. ... During the early 19<sup>th</sup> century, the Church of England, the Methodist Church and other Churches set up many elementary schools, but attendance was not compulsory and the state had no obligation to provide universal elementary education. The Elementary Education Act 1870 (33 & 34 Vict c 75) by section 5 required there to be provided in every school district ‘sufficient amount of accommodation in public elementary schools’ for all the children resident in the district ‘for whose elementary education efficient and suitable provision is not otherwise made’.

9. However, the 1870 Act did not insist that attendance be made compulsory everywhere. This was politically controversial. ... Instead, therefore, section 74 of the 1870 Act empowered each school board, with the approval of the Secretary of State, to make byelaws (1) requiring parents of children of specified ages (between five and 12 inclusive) to cause them to attend school, unless there was some reasonable

excuse, (2) fixing the times when children were required to attend school, with two exceptions, one of which was for “any day exclusively set apart for religious observance by the religious body to which his parent belongs”, and (4) [sic] imposing penalties for breach. ...

97. Section 7 of the 1870 Act allowed parents the unconditional right to withdraw their child from attending “*any religious observance or any instruction in religious subjects in the school or elsewhere*”, and such observance or instruction was required to be either at the beginning or the end of the school day, to make the exercise of such rights of withdrawal effective. This statutory right of excusal from religious instruction was preserved in, among others, the Education Acts of 1918 and 1921.

98. Baroness Hale continued:

10. Only a minority of school boards made such byelaws. However, the climate of opinion soon changed. The Elementary Education Act 1876 (39 & 40 Vict c 79) prohibited the employment of children under ten, and of children between ten and 13 who had not attained an appropriate standard of education (section 5), and for the first time imposed upon parents a duty to cause their children ‘to receive efficient elementary instruction in reading, writing and arithmetic’: section 4. Thus such a parent might not only be prosecuted for a breach of the byelaws but also have the education of his child taken out of his hands. This was followed up by section 2 of the Elementary Education Act 1880 (43 & 44 Vict c 23), which required all school boards to introduce byelaws to compel attendance, although they could still set times at which attendance was required.

...

12 The school leaving age was raised to 14 by the Education Act 1918. The Education Act 1921 consolidated the earlier legislation, with its three basic features: the parental duty to cause their children to be efficiently educated in reading, writing and arithmetic; the duty of the local education authority (as school boards had become) to apply for a school attendance order where a parent habitually and without reasonable excuse neglected to do this; and the duty to make byelaws requiring parents to cause their children to attend school at the times required by the byelaws unless there was a reasonable excuse.

...

14. The principle that the parent had to cause the child to attend school at all times when required to do so by the byelaws was affirmed in *Osborne v Martin* (1927) 91 JP 197, where the Divisional Court held that a parent who withdrew his child

from school every week for piano lessons should have been convicted. Lord Hewart CJ observed, at p 197:

‘It was never intended that a child attending the school might be withdrawn for this or that hour to attend a lesson thought by the parent to be more useful or possibly in the long run more remunerative. The time-table and discipline of a school could be reduced to chaos if that were permissible.’

Salter J pointed out, at p 198, that parents were not obliged to take advantage of the free education provided by the state, but if they did, they had to take it as a whole.” (Emphasis added.)

99. As Baroness Hale explained, the modern law of school attendance dates back to the Education Act 1944 which provided for compulsory primary *and secondary* education. Section 36 of the 1944 Act introduced the duty on the parent of a child “*to cause him to receive efficient full-time education suitable to his age, ability and aptitude, either by regular attendance at school or otherwise*” (cf. s.7 of the 1996 Act, paragraph above).
100. The school attendance requirement is now contained in s.444 of the 1996 Act. Section 444(1) provides that a parent of a child of compulsory school age who is a registered pupil at a school is guilty of an offence if the child “*fails to attend regularly at the school*”, unless the child’s absence is “*with leave*” or “*on any day exclusively set apart for religious observance by the religious body to which his parent belongs*”. The Supreme Court held in *Platt* that “*regularly*” means “*in accordance with the rules prescribed by the school*”: Baroness Hale, [48]. The Supreme Court considered that this interpretation reflects an important legislative policy, having regard to the disruptive effect of unauthorised absences on the education of the individual child and the work of other pupils, and the extra work required by the child’s teacher ([40]).
101. “*Sex education*” was first introduced as a required element of the curriculum for secondary school pupils by s.241 of the Education Act 1993, which amended the Education Reform Act 1988 (‘the 1988 Act’). At the same time, Parliament created a statutory right of excusal from receiving sex education at school, save to the extent that such education was comprised in the National Curriculum. Section 17A of the 1988 Act was in essentially the same terms as s.405(1) of the 1996 Act prior to its amendment by the 2021 Act (see paragraph above). The statutory right of excusal from sex education could be exercised by a parent without giving any reasons, and it could not be overridden.
102. The statutory right of excusal from sex education or religious instruction is distinct from a parent’s right to opt to secure suitable education for their child otherwise than at a school (which is sometimes referred to as the ‘right of withdrawal’): s. 7 of the 1996 Act (paragraph above). Parents can choose to secure suitable education for their children by educating them at home or by sending them to private schools, albeit, as the claimants emphasise, for many parents home schooling may not be a realistic and practically viable option, and most parents would not be able to afford private school fees.

### ***Common law right of excusal***

103. The first key question is whether the authorities demonstrate that the courts have recognised the existence of the claimed common law right of excusal. For the reasons given by the defendant, as summarised in paragraphs 91.-above, with which I agree, if the authorities do not show that such a right exists, this court should not now *develop* such a right in a field that has been comprehensively regulated by the legislature for many years.
104. *Lyons v Blenkin* pre-dated the 1870 Act. Lord Eldon LC considered the jurisdiction of the Court of Chancery to control the authority of a father over his minor children. The father of three daughters had placed them in the care of their grandmother who, in her will, made provision for their education and for them to be under the guardianship of their aunt. Although the grandmother had not had the power to establish such a guardianship, the father was found to have enabled it by his consent. Following the aunt's marriage the father sought to have his three daughters returned to his care. The court rejected the father's application. While recognising that it is "*always a delicate thing for the Court to interfere against the parental authority*", Lord Eldon held that in circumstances where the father's situation left him "*without the means of so educating them as they ought to be educated, regard being had to their fortune and estate*", having consented to their course of education, the father was precluded from being "*permitted to break in and introduce a new system of education, which cannot be consistent with the system to which they have been habituated*". This case provides no support for the claimed right, in particular the parental right to determine the content of their child's education.
105. In *Agar-Ellis* a Protestant man married a Roman Catholic woman, having promised prior to the marriage that any children of the marriage would be brought up as Roman Catholics. At the time of the proceedings, the couple had three minor daughters. Although their father had, soon after the birth of the first child, reneged on his promise and determined that the children should be brought up as Protestants, the mother had brought them up as Catholics. When the daughters refused to go with their father to a Protestant place of worship, he applied for them to be made wards of court and sought directions as to where, and the persons by whom, his daughters should be educated. The mother brought a counter-petition. Malins V-C found for the father.
106. On appeal to the Court of Appeal, James LJ observed that there could be no question of any conflict of rights *between the husband and wife* as to the education of the children. That reflected the husband's position as "*master of his own house, as king and ruler in his own family*" (p.75), in accordance with which it was the wife's duty to obey her husband. Consequently, the main argument was as between the father and the children themselves (p.71). James LJ held:

"It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at

all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach of intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with." (Emphasis added.)

107. James LJ's observations regarding the rights as between the husband and wife obviously do not reflect the law today, and the claimants place no reliance on that outdated aspect of the case. But they submit that substituting "parent" for "father", the principle to be derived from *Agar-Ellis* is that a parent has a right (or power), on a par with the right to life, liberty and property, to educate his or her children.
108. As Lord Denning MR observed in *Hewer v Bryant*, 369, addressing the holding in *In re Agar-Ellis* (1883) 24 Ch D 317 (*Agar-Ellis* (2)), 326, that "*the law of England ... is, that the father has the control over the person, education and conduct of his children until they are 21 years of age*", that both *Agar-Ellis* cases reflect "*the attitude of a Victorian parent towards his children*", expecting "*unquestioning obedience to his commands*". In *Gillick*, at 183E-F, Lord Scarman said "*there is much in the earlier case law which the House must discard – almost everything I would say but its principle*". He gave as an example of that which must be discarded, "*the horrendous Agar-Ellis decisions, 10 Ch D 49; 24 Ch D 317 of the late 19<sup>th</sup> century asserting the power of the father over his child*", which he described as having been "*rightly remaindered to the history books by the Court of Appeal in Hewer v Bryant [1970] 1 QB 357*". At 187B-C he reiterated that the *Agar-Ellis* cases "*cannot live with the modern statute law*". Also in *Gillick*, at 173B-C, Lord Fraser observed that the *Agar-Ellis* cases "*seemed to have been regarded as somewhat extreme even in their own day*". Lord Bridge agreed with both Lords Fraser and Scarman.
109. I do not read Lord Scarman's speech in *Gillick* as suggesting that the court should continue to derive any core principle from *Agar-Ellis*. On the contrary, it is a case that has been confined to legal history. But even if the claimants were right in their submission that *Agar-Ellis* has not been disapproved, it does not provide any support for a common law right of excusal. The "*sacred right*" to which James LJ referred was the father's right of control over his children, including a power to take decisions for his children regarding their education, even against their wishes. Such a right or power *vis-à-vis* his children is distinct from the claimed parental right which is asserted against a third party. *Agar-Ellis* says nothing about whether a parent who chooses to secure their child's education by placing the child in a school has a right to determine the content of what they are taught at that school, and to excuse their child's attendance (without the school's permission) from any teaching to which the parent takes a religious or philosophical objection.
110. The issue in *Scanlan* was whether, in circumstances where a father had determined the faith in which his children should be brought up, the mother was bound by that determination even after the father's death. Stirling J held that she was bound by the father's determination, at least in part based on his interpretation of the Guardianship of Infants Act 1886. Stirling J cited *Agar-Ellis* in support of "*the absolute right of a*

*father in his lifetime to decide what religious education his children shall receive*” (207), subject to circumstances in which the law may take away that right (208-209). The claimant’s reliance on the “*absolute right*” identified in *Agar-Ellis* does not support the claimed right of excusal for the reasons I have given in discussing that case.

111. *Barnardo v McHugh* [1891] AC 388 concerned the custody of a child. The mother had entrusted her son to be brought up in one of the Homes for Destitute Children of which Dr Barnardo was the founder and director. About 18 months later, the mother sought to have her son delivered into the care of a guardian chosen by her, with a view to being brought up as a Catholic. Dr Barnardo refused as he wished the child to be brought up a Protestant. The House of Lords found for the mother. In doing so, the House of Lords drew a distinction between the legal (common law) right not to be improperly detained and the equitable jurisdiction to interfere for the protection of the child, acting as *parens patriae*, in accordance with which the mother’s wishes were required to be taken into consideration. Lord Halsbury LC considered it unnecessary to determine whether the mother had a legal right as the same answer was reached as a matter of equity in any event (394-395). Lord Herschell was not satisfied that the mother had a legal right, but he too considered that it was no longer important to determine her rights at common law as all courts were now “*governed by equitable rules, and empowered to exercise equitable jurisdiction*” (398-400). Lord Hannen agreed with both judgments.
112. In *Gyngall* the mother of a 15 year old girl who was living under “*actual assumed guardianship*” made an application for *habeas corpus*, seeking custody of her daughter. Lord Esher MR distinguished the courts’ common law and equitable jurisdictions (238-239). He observed that “*at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct*” (239). The mother was not guilty of any such misconduct, nevertheless the court refused the application for *habeas corpus*, exercising its equitable jurisdiction to act in the interests of the welfare of the child. The court attached particular weight to the child’s view as to the religion she wished to practise (245).
113. Both *Barnardo* and *Gyngall* were concerned, insofar as they addressed common law rights, with custody and the right not to be unlawfully detained. No support for the claimed right of excusal can be derived from the common law rights in issue in those cases. Both cases were heard after the Judicature Act 1873 came into force, and primarily turned on the application of the court’s equitable jurisdiction, involving the weighing and balancing of considerations to determine what was in the interests of the child’s welfare. Plainly, no common law right of excusal can be found in the court’s application of such equitable principles.
114. In *Hewer v Bryant* the issue was whether a 15 year old boy who was seriously injured when living and working as an agricultural trainee on a farm, was “*in the custody of a parent*” at the time of the accident, for the purposes of the Limitation Act 1939. The Court of Appeal held that the claim was not statute-barred as he was not in the custody of a parent within the meaning of the Act when the right of action accrued. Sachs LJ observed that in its wider meaning the word “*custody*” is used as if it were almost the equivalent of “*guardianship*” in the fullest sense. He said at 373B-C:



“such guardianship embraces a ‘bundle of rights,’ or to be more exact, a ‘bundle of powers,’ ... These include power to control education, the choice of religion, and the administration of the infant’s property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right ... to apply to the courts to exercise the powers of the Crown as *parens patriae*.” (Emphasis added.)

115. Lord Denning MR described the legal right of a parent to the custody of a child, which “*starts with a right of control*”, as being a “*dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is*”, which right ends on the child’s 18<sup>th</sup> birthday, by which point it is little more than a right to give advice (369).

116. In *Gillick*, the issue was whether, and if so in what circumstances, a doctor could prescribe contraception to a girl under the age of 16 years without the consent of one of her parents. Lord Fraser held at 170D that:

“parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family. If necessary, this proposition can be supported by reference to *Blackstone Commentaries*, 17<sup>th</sup> ed. (1830), vol.1, p.452, where he wrote ‘The power of parents over their children is derived from ... their duty.’”

He agreed with Lord Denning’s description of the parental right as a “*dwindling*” one (172H).

117. Lord Scarman held at 183H-184B that, approaching the earlier authorities stripped of inappropriate detail,

“one finds plenty of indications as to the principles governing the law’s approach to parental right and the child’s right to make his or her own decision. Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child – custody, care, and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.” (Emphasis added.)

118. Lord Scarman continued at 184F-185F:

“We are not concerned in this appeal to catalogue all that is contained in what Sachs LJ has felicitously described as the ‘bundle of rights’ ... which together constitute the rights of custody, care, and control. ... A most illuminating discussion of parental right is to be found in *Blackstone’s Commentaries*, 17<sup>th</sup> ed. (1830), vol. 1, chs. 16 and 17. He analyses the duty of the parent as the ‘maintenance ... protection, and ... education’ of the child: p.446. ...

The two chapters provide a valuable insight into the principle and flexibility of the common law. The principle is that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection and education until he reaches such an age as to be able to look after himself and make his own decisions.” (Emphasis added.)

119. I accept the claimants’ contention that *Hewer v Briant* and *Gillick* show that parental rights, duties or powers exist, including a duty to secure the child’s education. The introduction of the concept of “*parental responsibility*” by the Children Act 1989, which “*means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*” (s.3(1) of the Children Act 1989), reflects the emphasis in *Gillick* on parental power to control a child existing not for the benefit of the parent but for the benefit of the child. Put into the statutory language of parental responsibility, the observations of their lordships in *Gillick* remain pertinent.
120. However, there is nothing in these authorities that would justify the leap which acceptance of the claimants’ argument would require, from a duty on a parent to secure their child’s education to a fundamental common law right of excusal. *Gillick* was concerned with the parental power of control of a child in the context of medical treatment of the child. The duty to educate – a duty owed by the parent to the child - was mentioned, but the court was not concerned to address it.
121. *Christian Institute* was a challenge to the information-sharing provisions in the Children and Young People (Scotland) Act 2014, in which the Supreme Court held that those provisions were outside the legislative competence of the Scottish Parliament because they were incompatible with the rights of children, young people and their parents under article 8 of the Convention. Baroness Hale, Lord Reed and Lord Hodge observed at [71]-[73]:

“71. In the context of this legislation, the interests protected by Art 8 of the ECHR include both family life and privacy. The relationship between parent and child is an integral part of family life. ... Family life also encompasses a broad range of parental rights and responsibilities with regard to the care and upbringing of minor children, enabling parents to take important decisions on their behalf, and Art 8 protects the rights of parents to exercise such parental authority (*Nielsen v Denmark*, para 61).

72. As is well known, it is proper to look to international instruments, such as the United Nations Convention on the Rights of the Child (1989) ('UNCRC'), as aids to the interpretation of the ECHR. The preamble to the UNCRC states:

'[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.'

Many articles in the UNCRC acknowledge that it is the right and responsibility of parents to bring up their children. Thus Art 3(2) requires States Parties, in their actions to protect a child's wellbeing, to take into account the rights and duties of his or her parents or other individuals legally responsible for him or her; Art 5 requires States Parties to respect the responsibilities, rights and duties of parents or, where applicable, other family or community members or others legally responsible for the child to provide appropriate direction and guidance to the child in the exercise of his or her rights under the Convention; Art 14(2) makes similar provision in relation to the child's right to freedom of thought, conscience and religion; ... Articles 27(3) and 18(2) make it clear that the state's role is to assist the parents in carrying out their responsibilities...

73 This represents the detailed working out, for children, of the principle established in Art 16(3) of the United Nations Universal Declaration of Human Rights (1948) and Art 23(1) of the United Nations International Covenant on Civil and Political Rights (1966) that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies. The noble concept in Art 1 of the Universal Declaration, that '[a]ll human beings are born free and equal in dignity and rights' is premised on difference. If we were all the same, we would not need to guarantee that individual differences should be respected. Justice Barak of the Supreme Court of Israel has put it like this (in *El-Al Israel Airlines Ltd v Danielowitz*, para 14):

'The factual premise is that people are different from one another, "no person is completely identical to another" ... Every person is a world in himself. Society is based on people who are different from one another. Only the worst dictatorships try to eradicate these differences.'

Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people. The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way. As Justice McReynolds, delivering the opinion of the Supreme Court of the United States famously put it in *Pierce v Society of Sisters* (pp 534, 535):

‘The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.’” (Emphasis added.)

122. The claimants place considerable reliance on this authority, particularly the passages that I have underlined. But in *Christian Institute* the Supreme Court was not addressing the content of the common law at all. Moreover, the description in [71] of the protection of parental rights provided by article 8 is consistent with *Gillick*; insofar as the Supreme Court cited international instruments in [72], none of them support the existence of the claimed right of excusal; and there is no conflict between the quotation from *Pierce* in [73] and the legal framework applicable in Wales. *Pierce* concerned the Oregon Compulsory Education Act, adopted in 1922, which required parents of children in Oregon to send their children to public (i.e. state) schools. It is common ground that in Wales a parent has a right to choose to secure suitable education for their child otherwise than at a state school, whether by means of home schooling or by sending the child to a private school.
123. The final authority referred to in the context of the arguments in relation to a common law right of excusal is *Birmingham City Council v D* [2019] 1 WLR 5403. The case concerned the accommodation by a local authority of a child aged 15, who lacked capacity, in circumstances amounting objectively to confinement. The child's parents consented to his accommodation in that setting, and the question was whether their consent had the effect that the child's confinement was not to be imputed to the State. The Supreme Court held that it was not within the scope of parental responsibility for the parents to authorise what would otherwise be a fundamental violation of the child's rights under article 5 of the Convention. The case provides no support for the claimed common law right of excusal.
124. In my judgment, the claimants' reliance on unincorporated international treaties and other texts does not assist their argument. First, those materials can only be relied on, if at all, to show how the common law should develop, rather than what it is; and, as I have said, it would not be appropriate for this court to create the common law right for which the claimants contend. Secondly, I bear in mind that “*it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part*

of the law of the United Kingdom”: *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, Lord Reed PSC, [77], [84] and [91].

125. I address the effect of A2P1 and article 9 below, in the context of grounds 3 and 4. I accept that, in principle, common law rights *may* be more extensive than analogous Convention rights. However, the claimants are wrong to suggest that proposition flows from the concept of the “*margin of appreciation*”. As Lord Reed PSC explained in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133 at [85]:

“the margin of appreciation is itself a principle of interpretation. When the European court finds that the contracting states should be permitted a margin of appreciation, it does not cede the function of interpreting the Convention to the contracting states, or enable their domestic courts to divide that function between their institutions. Contracting states can of course create rights going beyond those protected by the Convention, but that power exists independently of the Convention and the Human Rights Act, is not dependent on the margin of appreciation doctrine, and is exercisable in accordance with long-established constitutional principles, under which law-making is generally the function of the legislature.” (Emphasis added.)

126. In my judgment, for the reasons I have given, the case law and texts relied upon by the claimants do not support the existence of a fundamental common law right of excusal. I reject the contention that such a right exists. This conclusion is unsurprising, given the nature of the claimed right, which is conceptually dependent on a pre-existing obligation of school attendance, and which, as defined by the claimants, has the appearance of legislation rather than a common law right.

### ***The principle of legality***

127. It is a basic constitutional principle that fundamental rights cannot be taken away by a generally or ambiguously expressed provision in a statute. The principle of legality means that the legislature “*must squarely confront what it is doing and accept the political cost*”. As Lord Hoffmann explained in *Simms*, 131F-G:

“This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”

128. In *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, considering the powers of the Scottish Parliament, Lord Reed observed at [152]:

“The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on

another body, by general or ambiguous words, the power to do so.”

129. The authorities make clear that common law constitutional rights can be abrogated not only expressly but also by necessary implication. On either basis, for the court to interpret legislation as overriding fundamental rights, it must be “*crystal clear*” that the legislature intended to do so. A reasonable implication will not suffice to override such rights. The implication that the legislature must have abrogated the relevant constitutional right must be one that truly necessarily follows from the express provisions of the legislation construed in their context. See *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38, [2014] AC 700, Lord Neuberger PSC, [55]; *R (Jackson) v Attorney General* [2006] 1 AC 262, Baroness Hale, [159]; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, Lord Hobhouse, [45]; and *R (Juncal) v Secretary of State for the Home Department* [2007] EWHC 3024 (Admin), [2008] 1 MHLR 79, Wyn Williams J, [43].
130. Applying this principle of statutory construction to the 2021 Act, I reject the claimants’ contention that the Senedd failed squarely to confront the fact that it was removing the right of excusal or that there was any sleight of hand in doing so. I accept that the 2021 Act does not *expressly* state that the parental right of excusal has been abrogated. In addition, if paragraph 20 of Schedule 2 to the 2021 Act is viewed in isolation as the means by which the right was overridden, its terms may be said to provide some, albeit superficial, support for the claimants’ argument that the Senedd did not squarely confront what it was doing.
131. But paragraph 20 of Schedule 2 should not be viewed in isolation; it must be considered in context. By the 2021 Act the Senedd adopted a comprehensive new legislative framework for curricula in maintained schools in place of the pre-existing scheme. The 2021 Act expressly provides that RSE is a “*mandatory*” element of the curriculum (s.3(2)), and repeatedly describes it as “*mandatory*” (s.8(1), 24(2) and 29(3)). The 2021 Act expressly provides that the curriculum which is required to be designed, adopted and implemented in each school must encompass the mandatory element of RSE (ss.10, 11, 24 and 27).
132. Importantly, the 2021 Act expressly requires the teaching and learning to be secured for “*each pupil*” to encompass RSE (s.29(2)); and expressly permits limited exceptions to be made (Chapter 4 of Part 2). The most pertinent provision in Chapter 4 is s.42 which (a) enables, but does not require, the Welsh Ministers to provide an exception for individual pupils; (b) requires that determination of whether to grant such an exception lies with the head teacher; and (c) limits the period for which such an individual exception may initially be given to six months. These provisions must be considered in the legislative context in which a parent of a child who is a registered pupil at a school commits a criminal offence if the child does not attend the school in accordance with the school rules (including, for example, being withdrawn for an hour a week to attend a piano lesson without permission: see paragraph above), unless a specified exception applies: s.444 of the 1996 Act and *Platt*, [48].
133. These express provisions of the 2021 Act are wholly inconsistent with an unlimited and unconditional parental right to exempt a child who is a registered pupil at a maintained school from attendance during periods of the school day when RSE is taught. It is in that context that the consequential amendment was made by paragraph

20 of Schedule 2 to make clear that s.405 of the 1996 Act no longer applies in Wales. The claimants' contention that such a significant amendment had to be placed in the body of the Act to be effective is contrary to authority. As Brett LJ observed in *Attorney General v Lamplough* (1878) 3 Ex D 214, 229, “[t]he schedule is as much a part of the statute, and is as much an enactment as any other part”; and see *Bennion, Bailey and Norbury on Statutory Interpretation* (8<sup>th</sup> ed., 2020), sections 2.7 and 16.9. Further, their submission that the amendments to add “in England” in s.405 say nothing about the application of the provision to Wales has no merit. Section 405, as amended, is clearly a provision that only applies to England (where the “National Curriculum” and “sex education” are taught), and not to Wales where a different framework is in place.

134. I agree with the submission of the Welsh Ministers that the continued existence of any constitutional right of excusal (if, contrary to my view, such a right was created by the common law) would be irreconcilable with the deliberate legislative choices to which I have referred. In addition, subject only to the transitional provisions, it is plain that the statutory right of excusal in s.405 of the 1996 Act no longer applies in Wales.

***Do the Code or the Guidance misstate the law in relation to any right of excusal?***

135. With respect to the issues identified in paragraph above, I have concluded that: the common law does not provide for the constitutional parental right of excusal for which the claimants contend (1(a)); and so the question as to the nature of the right does not arise (1(b)); in any event, if any such right exists, it has been abrogated by the 2021 Act (1(c)); and the statutory right of excusal provided by s.405 of the 1996 Act has been abrogated by the 2021 Act, in respect of Wales (1(d)). It follows that in describing RSE as “mandatory”, neither the Code nor the Guidance misstate the law (1(e)).

**F. Ground 3: Article 2 of Protocol 1**

***The claimants' submissions***

136. First, in the alternative to grounds 1 and 2, the claimants submit that the absence of a parental right of excusal is in breach of the *first sentence* of A2P1 (“No person shall be denied the right to education”). By making the provision of state education conditional upon parents acting contrary to their religious or philosophical convictions, the state has breached its obligations under the first sentence of A2P1. They submit that the cross-cutting and whole-school approaches “imposing LGBTQ+ teaching across the whole curriculum” would render any right of excusal, if it were recognised, “wholly illusory”, so forcing parents who wish to ensure that their child’s education is not contrary to their religious or philosophical beliefs to remove them from maintained schools. In this regard, they contend that paragraphs [C11] of the Code and [G14]-[G16] of the Guidance (paragraphs 76. and above) make the practical exercise of a right of excusal entirely ineffective.
137. The claimants submit that their case is analogous to *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, in which a chamber of the European Court of Human Rights held that the provision of education conditional on the parents accepting that their child would potentially be liable to corporal punishment, contrary to their philosophical convictions, was not reasonable and breached the first sentence of

A2P1. In the absence of any guarantee to parents that RSE will be delivered in a way which respects their moral values, the removal of the right of excusal is not Convention-compliant.

138. Secondly, the claimants contend that various passages of the Code and the Guidance authorise or positively approve teaching that would be in breach of the right, conferred on parents by the *second sentence* of A2P1, to ensure education and teaching in conformity with their own religious and philosophical convictions. They contend that the Code and the Guidance impose controversial socio-sexual ideologies or theories, particularly in relation to the “*TQ+ component*” of “*LGBTQ+ diversity, equality and inclusivity teaching*”, and teaching based on “*a supposed distinction between sex and gender*”, which have no basis in law, and constitute, or risk constituting, indoctrination by the State. The claims in the Guidance that RSE has the power to be “*transformative*” and that to be effective it must “*start early*” are, they contend, strongly suggestive that the programme is designed to be ideological, and that it seeks in some cases to divide children from the values of their parents or the communities they come from on matters of moral and ethical values. At the same time, the claimants contend that the Code and the Guidance have been made “*purposefully obscure*”, lacking any detail of the resources, books or outside speakers to be used. The claimants take particular objection to paragraphs [C4]-[C5], [C13]-[C14], [C21], [C26], [C36] and [C38] of the Code, and paragraphs [G4], [G9]-[G10] and [G22]-[G23] of the Guidance.
139. Further, the claimants submit that the impacts on their A2P1 rights are required to be, but are not, prescribed by law and foreseeable. Mr Diamond submits that *A v SSHD* is not the appropriate test because the Code and the Guidance constitute, in effect, *ultra vires* subordinate legislation. Given the lack of detail of the content of RSE in the 2021 Act, the Code and the Guidance should be subjected to the same intensity of review as the courts would give to the interpretation of powers delegated under a so-called Henry VIII clause.
140. The claimants contend that maintaining a liberal democratic state requires the adoption by the State of a neutral stance with regards to areas of controversy in fields that transgress on privacy rights. A coercive use of the public power that seeks to ensure that the children of the citizenry conform to a version of the good as defined by the State, is illiberal and intolerant, even if done in the name of tolerance and inclusion. The neutral public square needs compromise over differences on matters such as sexual ethics. They contend neutrality and impartiality are impossible to achieve in the field of sexual ethics because of the breakdown in consensus; and the assertion that teaching will be neutral and impartial is implausible.
141. In support of this ground, the claimants rely upon *Kjeldsen and others v Denmark* (1976) 1 EHRR 711, *Campbell and Cosans, Folgerø v Norway* (2008) 46 EHRR 47 (GC), *Zengin v Turkey* (2008) 46 EHRR 44, *Dojan v Germany* (2011) 53 EHRR SE24, *Lautsi v Italy* (2012) 54 EHRR 3 (GC), and *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin), [2016] PTSR 405. I address these authorities below.

### ***The defendant's submissions***



142. The Welsh Ministers submit that it is not open to the claimants to contend that the absence of a right of excusal breaches the first sentence of A2P1. Such an argument is not a challenge to the Code or the Guidance which are the only texts challenged in these proceedings. Rather, it necessarily amounts to an allegation that the material provisions of the 2021 Act were outside the Senedd's legislative competence: s.108A of the Government of Wales Act 2006.
143. In any event, the defendant submits that the claimants' argument in relation to the first sentence of A2P1 cannot be made out unless they succeed in their argument on the second sentence. The question is whether the 2021 Act would inevitably operate incompatibly with the second sentence of A2P1. The defendant accepts that the removal of a child from school may give rise to a breach of the child's rights under the first sentence of A2P1 if the removal is necessary to avoid a breach of the parent's rights under the second sentence. But the question whether it is necessary inevitably shifts the focus onto whether there would be breach of parental rights.
144. In relation to the argument advanced by the claimants under the second sentence of A2P1, the defendant contends that to succeed the claimants have to show that the Code and/or the Guidance purport to authorise or positively approve unlawful conduct: *A v SSHD*. The question is whether the Code and/or the Guidance will inevitably result in unlawful conduct in a "*material and identifiable number of cases*" or whether it can be operated in a lawful way: *A v SSHD*, [63]. However, in response to the claimants' contention that the *A v SSHD* test is inapplicable, Mr Moffett submits that it is unnecessary for the court to determine whether the approach to assessing the lawfulness of subordinate legislation or a policy applies. The approach is either the same, involving consideration of whether the subordinate legislation will inevitably operate incompatibly with Convention rights in a "*legally significant number of cases*" (*In re Northern Ireland Human Rights Commission's Application for Judicial Review* [2019] 1 All ER 173 ('*In re NIHRC*'), Lord Mance, [74], [82]; *A v SSHD*, [78]), or the claimants would have to show it would be incompatible in "*all or almost all cases*" (*Christian Institute*, [88], citing *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, per Baroness Hale, [2], [60], Lord Hodge, [69]). While reserving the right to argue for the higher threshold, for the purposes of the argument before this court, the defendant accepts the test as described by Lord Mance.
145. The defendant relies on the "*major principles*" that emerge from A2P1 as enumerated by the Grand Chamber in *Folgerø*, [84]. Much of the jurisprudence on the second sentence of A2P1 relates to religious education, in which context the European Court of Human Rights has emphasised the state's duty of neutrality as between different religious and philosophical beliefs. But the court has taken a different approach in the context of teaching of sex education, morals and ethics. A position of strict neutrality on the part of the state is not required. The fundamental requirements are of pluralism and the avoidance of indoctrination.
146. The state is entitled to provide teaching that (i) addresses considerations of a moral nature, provided it does not constitute an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour; (ii) aims to equip pupils to protect themselves and to show consideration for others; (iii) seeks to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality in order to enable them to develop their own moral views and an independent approach to their

own sexuality, and that encourages tolerance towards human beings irrespective of their sexual orientation and identity; and (iv) aims to enable pupils to be tolerant and open to dialogue and to people whose beliefs differ from their own.

147. The defendant submits that it is important to look at the Code and the Guidance as a whole and in context, including the requirement in the 2021 Act that teaching must be developmentally appropriate. There is much in the Code and the Guidance that, even on the claimants' case, is unobjectionable. And the defendant submits that whether taken in isolation, or together and in context, none of the statements in the Code or the Guidance to which the claimants object purports to authorise or positively approve teaching that would breach A2P1. On the contrary, they reflect the general spirit of the Convention as an instrument designed to maintain and promote the ideals and values of a democratic society, including those of tolerance, respect and equality; and are plainly capable of being implemented in a way that is compatible with the second sentence of A2P1.
148. In broad terms, the defendant summarises the purposes of RSE, as set out in the Guidance, as being: (i) to help pupils to form and maintain a range of relationships that are fulfilling, healthy and safe, and that are based on mutual trust and respect [G3, G4, G8]; (ii) to help pupils to understand themselves and make informed decisions, including about sexual relationships and sexual health, and to take responsibility for their own decisions and behaviours [G3]; (iii) to enable pupils to navigate changes in society and to think critically about the range of complex and potentially contradictory messages about relationships and sexuality to which they are exposed [G7, G8, G9]; (iv) to enable pupils to protect themselves and others from abusive relationships and bullying [G9]; (v) to contribute to a society in which people treat others with understanding and empathy, whatever their personal characteristics, and promote equality and equity [G4, G9]. These are, the defendant submits, entirely consistent with the pluralism requirement.
149. The defendant submits that there is nothing in the Code or the Guidance that authorises or positively approves teaching that advocates or promotes any particular identity or sexual lifestyle over another, or that encourages children to self-identify in a particular way. The claimants' argument that it is a breach of A2P1 to teach children that there are persons who self-identify in a gender that is different to their biological sex at birth, and that there are persons who self-identify with the T, Q or + elements of the term LGBTQ+ (i.e. who self-identify as transgender or trans, queer or questioning, or in other identities), is misconceived. It is an incontrovertible fact - which is not denied by the claimants and is recognised by a substantial body of reputable organisations (as identified in Mr Lloyd's statement) - that there are persons who self-identify in a gender that is different to their biological sex at birth and there are persons who self-identify as T, Q or +; and for many such persons this constitutes an important and often fundamental part of their identity. It cannot be incompatible with A2P1 to teach children that such persons exist, and that they should be treated equally and with respect. Such teaching is entirely aligned with the pluralism requirement.
150. In response to the claimants' contention that the impact of the Code and the Guidance is not "*prescribed by law*", the defendant submits, first, the European Court of Human Rights' approach is to consider whether, as a matter of substance, teaching is in breach of A2P1. A2P1 is not structured in the same way as qualified Convention

rights (such as articles 8 and 9) which confer a right which can only be interfered with if prescribed conditions, including that any interference is prescribed by law, are met. Secondly, in any event, both the Code and the Guidance have the quality of law for the purposes of the Convention.

### **ANALYSIS AND DECISION ON GROUND 3**

#### ***Standing***

151. The defendant has not raised the question whether each of the claimants have standing to pursue this ground, but the question of standing is a jurisdictional issue which must be considered by the court at the substantive stage, if necessary: *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin), Singh LJ and Swift J, [17]. It falls to be answered by reference to the question whether the claimants (or any of them) would be a “victim”, for the purposes of article 34 of the Convention, of the alleged breach of A2P1 if proceedings were brought in the Strasbourg court: s.7(3) of the HRA and s.81(2) of the Government of Wales Act 2006.
152. The second, third and fifth claimants each have one or more children who are of such an age as to be affected by the introduction of RSE, and so their rights under A2P1 are affected, and they have standing. However, it does not seem to me that the first or fourth claimants have standing as the former legislative provisions (including the statutory right of excusal from “sex education”, save to the extent that it forms part of the National Curriculum) continue to apply in respect of each of their children who are of school age. According to the established jurisprudence of the European Court of Human Rights the requirement that a person must be a victim of an alleged violation of Convention rights requires that he or she is directly and personally affected by it. It is clear that an *actio popularis* is not permitted under the Convention.
153. Nonetheless, given that some of the claimants have standing to pursue this ground, this finding does not have any impact on the substance of the argument.

#### ***Policy or subordinate legislation: the applicable test***

154. In *Gillick* the Department of Health and Social Security had issued to area health authorities a memorandum of guidance on family planning services which contained a section dealing with contraceptive advice and treatment for young people. The lawfulness of the guidance was challenged. At 181F-G Lord Scarman observed:

“It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way.”

155. In answering that question, the court first had to determine, “*what is the true meaning of the text?*” (Lord Scarman, 180E). That question fell to be determined by asking: “*what would a doctor understand to be the guidance offered to him, if he should be faced with a girl under 16 seeking contraceptive treatment without the knowledge or consent of her parents?*” (Lord Scarman, 180F-G). It was clear that the guidance “*would convey to any doctor or other person who read it that the decision whether or not to prescribe contraception for a girl under 16 was in the last resort a matter for*

*the clinical judgment of a doctor, even if the girl's parents had not been informed that she had consulted the doctor, and even if they had expressed disapproval of contraception being prescribed to her*" (Lord Fraser, 165F-G; Lord Scarman 180E-F). It was in those circumstances that the issue arose as to whether a doctor could lawfully prescribe contraception to a girl under the age of 16 years without the consent of one of her parents.

156. In *A v SSHD* the Supreme Court identified three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others ([46]). The only one the claimants rely on (albeit they contend that the Code and the Guidance are akin to subordinate legislation rather than a policy) is the first: "*where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in Gillick [1986] AC 112)*" ([46]).
157. In *A v SSHD* the Supreme Court held:
- "63. ... where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way.
- ...
65. ... In principle, the test for the lawfulness of a policy is not a statistical test but should depend, as the *Gillick* test does, on a comparison of the law and of what is stated to be the behaviour required if the policy is followed."
158. In my judgment, while I accept that arguably the Code may be akin to subordinate legislation, the Guidance is a paradigm example of the type of policy document to which the test in *A v SSHD* applies. In any event, I agree with the defendant that if the test of lawfulness of subordinate legislation applies, the most beneficial outcome for the claimants results in the application of a test that is "*in substance ... the same*", namely, whether the Code or the Guidance will inevitably operate incompatibly with Convention rights in a legally significant number of cases (*A v SSHD*, [78]; In re NIHRC, [82]).
159. Accordingly, in assessing the lawfulness of the Code and the Guidance I shall consider whether it can be operated lawfully, or whether it is *bound* to work in a way that is incompatible with Convention rights in a "*legally significant*" or "*material and identifiable*" number of cases. In undertaking this assessment it is necessary to ascertain (a) what the Convention rights require, (b) the meaning of the Code and the Guidance, having regard to how those documents would be understood by those to whom they are addressed, in particular head teachers and governing bodies of maintained schools, and then to compare them.

***Does the absence of a parental right of excusal breach the first sentence of A2P1?***

160. In my judgment, a challenge alleging that the absence of a parental right of excusal breaches the first sentence of A2P1 would have to be targeted at the 2021 Act. The removal of the statutory right of excusal was effected by the 2021 Act, not by the Code or the Guidance. Moreover, the Welsh Ministers could not lawfully have granted a parental right of excusal in the Code or the Guidance.
161. The claimants have not brought any ground alleging the 2021 Act is outwith the legislative competence of the Senedd, by reason of being incompatible with A2P1 or otherwise. It follows that it is not open to the claimants to contend that the absence of a parental right of excusal breaches the first sentence of A2P1.
162. In any event, I agree with the defendant's submission that, in this case, if the claimants' argument based on the second sentence of A2P1 fails, the argument based on the first sentence must inevitably fall with it. It can only be shown that a child, who has been removed from school by a parent, has thereby been denied the right to education by the state if the removal was necessary to avoid a breach of the parent's rights under the second sentence of A2P1. As I have found, for the reasons that I give below, that neither the Code nor the Guidance breach the second sentence of A2P1, and no other breach of that provision is alleged, it follows that if the argument were open to the claimants, I would find that the absence of a parental right of excusal does not breach the first sentence of A2P1.

***Prescribed by law***

163. I can dispose briefly of the claimants' contention that any limitations on parental rights in the second sentence of A2P1 flowing from the Code or the Guidance do not satisfy the requirement to be prescribed by law as such limitations are not formulated with sufficient clarity in the 2021 Act.
164. First, unlike the qualified rights in articles 8 to 11 of the Convention which expressly require restrictions to be "*in accordance with the law*" (article 8(2)) or "*prescribed by law*" (articles 9, 10 and 11), A2P1 contains no such words and the European Court of Human Rights has never found any such requirement to be implicit in A2P1. On the contrary, the Strasbourg court's approach is to consider whether, as a matter of substance, there has been a breach of A2P1. In *Perovy v Russia* (app. no. 47429/09, 20 October 2020), the court held that the performance of a religious ceremony in a school did not breach A2P1, even though it was contrary to domestic law (see [17]). In *Lautsi*, the Grand Chamber held, when rejecting the applicants' complaints of a breach of A2P1, that it did not need to determine whether the display of the crucifix in state schools in Italy was incompatible with "*the principle of secularism as enshrined in Italian law*" ([57]). As Lord Bingham observed in *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, when addressing the interpretation of A2P1:

"There is no Convention guarantee of compliance with domestic law."

To similar effect, Lord Hoffmann observed that A2P1 "*is concerned only with results*" ([57]; and see [58]-[60]).

165. This is sufficient to dispose of this element of the argument. But in any event the contention that the “*prescribed by law*” requirement, if it applies, can only be met by prescribing any interference with the claimants’ rights under A2P1 in an Act is contrary to the highest authority. In *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, Lord Bingham observed at [34]:

“Mr Gordon, on behalf of Mind, submits that the interference is not ‘in accordance with law’ because not prescribed by a binding general law. I cannot for my part accept this. The requirement that any interference with the right guaranteed by article 8(1) be in accordance with the law is important and salutary, but it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied. This could of course have been achieved by binding statutory provisions or binding ministerial regulations. But that was not the model Parliament adopted. It preferred to require the Secretary of State to give guidance and (in relation to seclusion) to call on hospitals to have clear written guidelines. ... The rules are accessible, foreseeable and predictable. It cannot be said, in my opinion, that they are not in accordance with or prescribed by law.”

166. Lord Hope of Craighead’s speech at [91] to [94], citing *Silver v United Kingdom* (1983) 5 EHRR 347 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245, was to the same effect. In particular, at [94] Lord Hope observed:

“The requirement which the law lays down that those to whom the Code is addressed are expected to follow it unless they can give a good reason for not doing so provides a sufficient assurance of certainty and predictability to satisfy the requirements of article 8(2).”

167. Insofar as the claimants’ complaint is directed at the absence of a right of excusal, as I have explained, that is the clear effect of the 2021 Act itself. Insofar as the claimants’ complaint is directed at matters which flow from the Code and the Guidance (such as the whole-school approach, the requirement that RSE should be cross-cutting, or the content of the curricula to be designed by head teachers), both the Code and the Guidance plainly have the quality of law for the purposes of the Convention.
168. In relation to the claimants’ submission that the Code and the Guidance do not provide sufficient information to enable them to know what their children will be taught in RSE lessons I note, first, that the role of such policy guidance is not to eliminate all uncertainty regarding its application and all risk of legal errors by head teachers or governing bodies (*A v SSHD*, [34]); and secondly, s.11 of the 2021 Act has the effect that these texts will be supplemented by a published summary of the curriculum adopted by the head teacher and governing body of each school.

***A2P1: the authorities and applicable principles***

169. A2P1 has been addressed by the Grand Chamber of the European Court of Human Rights in two cases: *Folgerø* and *Lautsi*. Neither case concerned sex education (or RSE).
170. In *Folgerø*, Christianity, religion and philosophy were taught as a single subject, “KRL”, following a change to the school curriculum. The applicants, who were Humanists, had previously been able to exempt their children from Christian faith lessons but following the change they were only able to obtain exemptions excusing their children’s attendance during certain parts of KRL. They complained that the refusal of a full exemption from KRL constituted a breach of their A2P1 and article 9 rights. By nine votes to eight, the Grand Chamber found a violation of A2P1.
171. In *Folgerø*, at [84], the Grand Chamber drew together the “*major principles*” which emerge from the court’s caselaw on the interpretation of A2P1 (omitting the footnotes):

“(a) The two sentences of Art.2 of Protocol No.1 must be interpreted not only in the light of each other but also, in particular, of Arts 8, 9 and 10 of the Convention.

(b) It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between state and private teaching. The second sentence of Art.2 of Protocol No.1 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.

(c) Article 2 of Protocol No.1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire state education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the “functions” assumed by the State. The verb “respect” means more than “acknowledge” or “take into account”. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term “conviction”, taken on its own, is not synonymous with the words “opinions” and “ideas”. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.

(d) Article 2 of Protocol No.1 constitutes a whole that is dominated by its first sentence. By binding themselves not to “deny the right to education”, the contracting states guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the

possibility of drawing, by official recognition of the studies which he has completed, profit from the education received.

(e) It is in the discharge of a natural duty towards their children—parents being primarily responsible for the “education and teaching” of their children—that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.

(f) Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

(g) However, the setting and planning of the curriculum fall in principle within the competence of the contracting states. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era. In particular, the second sentence of Art.2 of Protocol No.1 does not prevent states from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.

(h) The second sentence of Art.2 of Protocol No.1 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded (ibid.).

(i) In order to examine the disputed legislation under Art.2 of Protocol No.1, interpreted as above, one must, while avoiding any evaluation of the legislation’s expediency, have regard to the material situation that it sought and still seeks to meet. Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents’ religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism.”



172. Applying those principles, the Grand Chamber held that the question was whether the state “*had taken care that information or knowledge included in the Curriculum for the KRL subject be conveyed in an objective, critical and pluralistic manner or whether it had pursued an aim of indoctrination*” ([85]). The court held that the answer to that question was that the state had not taken sufficient care, in circumstances where the object was “*to help give pupils a Christian and moral upbringing*” ([90]), and this object was compounded by the “*clear preponderance of Christianity in the composition of the subject*” ([91]), as well as “*qualitative differences applied to the teaching of Christianity as compared to that of other religions or philosophies*” ([95]). The system of partial exemption, in practice, was a theoretical or illusory rather than practical and effective means of the guaranteeing the applicants’ rights. The possibility of seeking alternative education in private schools which were heavily subsidised by the state did not dispense with the obligation to safeguard pluralism in state schools ([101]).
173. In *Lautsi* the Grand Chamber held by 15 votes to two that there was no violation of A2P1 as a result of the display of the crucifix in Italian state school classrooms. The court held at [60]-[61] that A2P1:
- “should be read in the light not only of the first sentence of the same article, but also in particular, of art.9 of the Convention, which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on contracting states a ‘duty of neutrality and impartiality’.”
- In that connection, it should be pointed out that states have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs.” (Emphasis added.)
174. The Grand Chamber observed that there was no evidence that the display of a religious symbol on classroom walls influenced young persons whose convictions were still in the process of being formed ([66]). In determining that the principle of neutrality was not breached it was significant that the presence of the crucifix was no more than a passive symbol ([72]). Provided that states’ decisions did not lead to a form of indoctrination, the court had a duty to respect their decisions regarding the organisation of the school environment, and the setting and planning of the curriculum, including the place they accord to religion ([69]). The presence of a Christian symbol, conferring preponderant visibility on the country’s majority religion, was not sufficient to denote a process of indoctrination ([71]).
175. The claimants place reliance on one further A2P1 case outside the context of sex education or RSE: *Zengin*. *Zengin* concerned a course in religious culture and ethics which was taught in primary and secondary schools in Turkey. The second applicant, who was a pupil in a state school, was required to attend the course, despite her father’s request for an exemption. The course was mandatory for Muslims, whereas

Christian and Jewish children could seek an exemption. The applicants were adherents of Alevism, a belief system generally considered to be one of the branches of Islam, but which rejects the sharia and sunna. The court noted that the Alevi faith has deep roots in Turkish society and the proportion of the Turkish society belonging to it was said to be “*very large*” ([67]).

176. The court observed in *Zengin* at [49]:

“Article 2 of Protocol No.1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire state education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the ‘functions’ assumed by the State. The verb ‘respect’ means more than ‘acknowledge’ or ‘take into account’. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The word ‘convictions’, taken on its own, is not synonymous with the words ‘opinions’ and ‘ideas’. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.”

177. The course taught the Sunni understanding of Islam. Pupils were given instruction in the precepts, rites and prayers of the Muslim faith, in its Sunni form, whereas there was no teaching on the confessional or ritual specificities of the Alevi faith. The court held, having regard to the content of the subject, that the course did not meet the criteria of objectivity and pluralism and failed to respect the religious and philosophical convictions of the second applicant’s father, a follower of the Alevi faith, “*on the subject of which the syllabus is clearly lacking*”. The exemption procedure did not provide sufficient protection for the father’s religious or philosophical convictions. Consequently, the court held that the applicants’ rights under the second sentence of A2P1 had been breached.

178. The European Court of Human Rights has considered A2P1 in the context of four cases concerned with sex education, namely, *Kjeldsen, Jiménez v Spain* (app. no. 5118/99, 25 May 2000), *Konrad v Germany* (2007) 44 EHRR SE8 and *Dojan*. A2P1 was also considered by the court in *Appel-Irrgang v Germany* (app. no. 45216/07, 6 October 2019), a case which concerned compulsory ethics lessons, rather than sex education, but in which there is some overlap between the content of ethics and the relationships aspect of RSE. None of these judgments found a breach of A2P1. Apart from *Kjeldsen*, the complaints in all these cases were found to be manifestly ill-founded, and therefore inadmissible.

179. *Kjeldsen* was determined more than thirty years before *Folgerø*. It was cited extensively by the Grand Chamber in that case, as well as in *Lautsi* and many of the individual Section decisions. The facts of *Kjeldsen* are close to those of the present case. In *Kjeldsen* three couples with school age children objected to “*integrated and hence compulsory, sex education as introduced into State primary schools in Denmark*” ([14]). The legislature had “*directed schools to include in their curricula, often in conjunction with traditional subjects, certain new topics such as road safety,*

*civics, hygiene and sex education*” ([16]). As in Wales, children had a right to free education in state schools, but parents were not obliged to enrol them in state schools; they could home educate their children or send them to private schools ([15]). However, unlike in Wales, the Danish state subsidised 85% of the running costs of private schools with at least 20 pupils, and no fewer than 10 pupils per class ([18]).

180. The legislation was introduced, following a report by a committee set up by the Danish Government, to implement the recommendation that “*it was essential for sexual instruction to be adapted to the children’s different degrees of maturity and to be taught in the natural context of other subjects, for instance when questions by the children presented the appropriate opportunity*” ([21]). The list of matters to be taught is identified as including, the concept of the family, the difference between the sexes, conception, birth and development of the child, family planning, relations with adults whom the children do not know, puberty, sexual organs, hormones, heredity, sexual activities (masturbation, intercourse, orgasm), methods of contraception, venereal disease, homosexuality, pornography, and ethical, social and family aspects of sexual life ([28]).
181. In *Kjeldsen*, the court identified, at [50]-[54], the principles that were later endorsed by the Grand Chamber in *Folgerø* in subparagraphs (a), (b), the first sentence of (c), (d), (e), the third and fourth sentences of (g), (h) and (i) of [84] (see paragraph above). At [53], having held that A2P1 does not permit parents to object to the integration of teaching of a directly or indirectly religious or philosophical kind in the curriculum, provided that it is “*conveyed in an objective, critical and pluralistic manner*” and does not pursue an aim of “*indoctrination*”, the court observed,

“In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications.”

182. In determining that the applicants’ complaints should be rejected, the court had regard to the objectives that the Danish legislature sought to pursue ([54]). The court recognised that the teaching entailed considerations “*of a moral order*”, and that it was capable of “*encroaching on the religious or philosophical sphere*”. But there was no breach of A2P1 given that:

“Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour. It does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible. Further, it does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line the parents’ own religious or philosophical convictions.”

183. *Jiménez* concerned a 13-14 year old girl whose father withdrew her from sex education classes which were given in the context of Natural Sciences. He considered that a booklet distributed to his daughter went well beyond the scope of Natural

Sciences and contained guidelines on sexuality which were contrary to his moral and religious convictions. The booklet comprised chapters entitled, “*Concept of sexuality*”; “*We are sexual beings*”; “*Body awareness and sexual development*”; “*Fertilisation, pregnancy and childbirth*”; “*Contraception and abortion*”; and “*Sexually transmitted diseases and Aids*”. The daughter sat an examination in which she did not answer any of the questions on sex education. Consequently she failed the examination and was required to re-sit the year.

184. At p.6 the court observed:

“In the instant case the Court notes that the sex education class in question was designed to provide pupils with objective and scientific information on the sex life of human beings, venereal diseases and Aids. The booklet tried to alert them to unwanted pregnancies, the risk of pregnancy at an increasingly young age, methods of contraception and sexually transmitted diseases. That was information of a general character which could be construed as of general interest and which did not in any way amount to an attempt at indoctrination aimed at advocating particular sexual behaviour.”

185. In rejecting the complaint, the court also took into account, as it had done in *Kjeldsen*, that the parents’ ability to educate their child in line with the parents’ own religious and philosophical convictions was unaffected; and that the parents had opted for a state school in circumstances where (state-subsidised) private schools were available.

186. In *Konrad*, the applicants’ complained that Germany had refused their application to be authorised to educate their children at home, and exempted from compulsory primary school attendance, on grounds of (among other reasons) their religious objection to sex education. Notably, the court’s assessment that the allegation of a breach of A2P1 was manifestly ill-founded was in the context of the more far-reaching absence of a right of withdrawal from education in school, rather than the lack of a right of excusal from sex education after opting for a state school.

187. The court stated at p.143-144:

“In the present case, the Court notes that the German authorities and courts have carefully reasoned their decisions and mainly stressed the fact that not only the acquisition of knowledge, but also the integration into and first experience with society are important goals in primary school education. The German courts found that those objectives cannot be equally met by home education even if it allowed children to acquire the same standard of knowledge as provided for by primary school education. The Court considers this presumption as not being erroneous and as falling within the Contracting States’ margin of appreciation which they enjoy in setting up and interpreting rules for their education systems. The Federal Constitutional Court stressed the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of

integrating minorities into society. The Court regards this as being in accordance with its own case law on the importance of pluralism for democracy (see, *mutatis mutandis*, *Refah Partisi (The Welfare Party) v Turkey* (2002) 35 E.H.R.R. 3 at [89]).

Moreover, the German courts have pointed to the fact that the applicant parents were free to educate their children after school and at weekends. Therefore, the parent's right to education in conformity with their religious convictions is not restricted in a disproportionate manner. The compulsory primary school attendance does not deprive the applicant parents of their right to "exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions" (see, *mutatis mutandis*, *Kjeldsen, v Denmark*, cited above, at [54]; *Efstathiou v Greece* (2006) 43 E.H.R.R. 24 at [32])." (Emphasis added.)

188. *Dojan* also concerned the German education system in which compulsory elementary school attendance was imposed and home education was, in general, not a permissible option (*Dojan*, [62]). Mandatory sex education classes formed part of the school curriculum in the fourth year of primary schooling. In addition, a two day school theatre workshop addressing sex education was organised at regular intervals as a mandatory event for children in the third and fourth years (comprising children between seven and nine). The aim of "sexual education" in school, according to the relevant German legislation, was "to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity" ([44]).
189. The applicants were five couples who were members of the Christian Evangelical Baptist Church and who had several children who attended state primary schools in Germany. They complained that compulsory attendance at sex education lessons, the theatre workshop and another event infringed their rights under A2P1. In similar terms to the objections raised in this case, in *Dojan* the parents objected to the content of a book that was used in sex education lessons, "which in their opinion was partly pornographic and contrary to Christian sexual ethics requiring that sex should be limited to matrimony. In their view, it set forth a liberal, emancipatory image of sexuality which was not consistent with their religious and other moral beliefs and would lead to premature 'sexualisation' of the children" ([12]). The applicants were fined, and ultimately sentenced to terms of imprisonment of up to 43 days, for failing to secure their children's attendance at school when sex education lessons or events were taking place.
190. The court in *Dojan* reiterated the principles governing the general interpretation of A2P1 as set out in *Kjeldsen, Folgerø and Zengin*. Having referred to the conclusion the court reached in *Konrad*, the court stated:

"63 The Court finds that similar considerations apply in the case at hand, where the applicants do not seek a general

exemption from compulsory schooling with a view to educating their children at home but rather request exemption from specific sex education classes or school events which they deem to conflict with their religious convictions.

64 The Court observes that the sex education classes at issue aimed at, as stated by the Paderborn District Court, the neutral transmission of knowledge regarding procreation, contraception, pregnancy and childbirth in accordance with the underlying legal provisions and the ensuing guidelines and the curriculum, which were based on current scientific and educational standards. The goal of the theatre workshop ‘My body is mine’ was to raise awareness of sexual violence and abuse of children with a view to its prevention.

65 The Court refers in this context to s.33 of the North Rhine-Westphalia Schools Act stipulating that the aim of sexual education is to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity. This objective is also reflected in the decisions of the German courts in the case at hand, which have found in their carefully reasoned decisions that sex education for the concerned age group was necessary with a view to enabling children to deal critically with influences from society instead of avoiding them and was aimed at educating responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society—in particular, with a view to integrating minorities and avoiding the formation of religiously or ideologically motivated ‘parallel societies’.

66 The Court finds that these objectives are consonant with the principles of pluralism and objectivity embodied in art.2 of Protocol No.1.

...

68 The Court finds that the presumptions underlying the decisions of the domestic authorities and courts are not erroneous and fall within the contracting states’ margin of appreciation in setting up and interpreting rules for their education systems. It further notes that there is nothing to establish that the information or knowledge included in the curriculum and imparted within the scope of the said events was not conveyed in an objective, critical and pluralistic manner. In this respect the Court shares the view of the domestic courts, which concluded that there was no indication that the education provided had put into question the parents’

sexual education of their children based on their religious convictions or that the children had been influenced to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions. Neither did the school authorities manifest a preference for a particular religion or belief (*Zengin* at [59]) within the scope of the school activities at issue. The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions (see *Appel-Irrgang v Germany* (45216/07) October 6, 2009).

69 Moreover, as also pointed out by the German courts, the applicant parents were free to educate their children after school and at weekends and thus their right to educate their children in conformity with their religious convictions was not restricted in a disproportionate manner." (Emphasis added.)

191. *Appel-Irrgang* concerned the introduction, by means of primary legislation, of ethics as a compulsory subject for all pupils in grades 7 to 10 in state schools. The objective of ethics lessons was:

"to promote the propensity and ability of pupils, regardless of their cultural, ethnic, religious or ideological background, to address, in a constructive manner, the fundamental cultural and ethical problems of individual life and social coexistence and different value systems and explanations of life. Pupils shall thus acquire the foundations for leading an autonomous and responsible life, and develop an ability to interact socially and an aptitude for intercultural dialogue and ethical discernment. To this end, knowledge shall be imparted of philosophy, religious and philosophical ethics, different cultures and ways of life, the main world religions and questions of lifestyle."

192. The course outline specified that the teaching would be neutral from a religious and ideological perspective, and indoctrination was prohibited, but the "*course shall not be value-neutral [wertneutral], however. Young people must be educated in a spirit of humanity, democracy and freedom. Tolerance and respect for the convictions of others are part of this education ...*" The course outline listed six subject areas to be addressed: "*Identity, friendship and happiness*", "*Freedom, responsibility and solidarity*", "*Discrimination, violence and tolerance*", "*Equality, law and justice*", "*Guilt, duty and conscience*" and "*Knowledge, hope and belief*".
193. The first applicant was a state school pupil and the other applicants were her parents. They were Protestants who sought, but failed to obtain through the German courts, an exemption from the obligation to attend the ethics class. In their complaint to the Strasbourg court they contended that the ethics class imposed views which conflicted with their religious convictions, and had been introduced in breach of the state's duty of neutrality. At p.10 the court stated:

"The Court particularly emphasises that the setting and planning of the curriculum fall in principle within the

competence of the Contracting States, which must nonetheless ensure that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind with regard to religion in a calm atmosphere which is free of any misplaced proselytism. They are also forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions, as the parents are primarily responsible for the education and teaching of their children. That is the limit that must not be exceeded."

194. The court concluded that the aims of the ethics classes were in keeping with the principles of pluralism embodied in A2P1. Unlike in *Zengin*, the ethics classes that the first applicant was required to attend were "*neutral and do not give particular weight to any one religion or faith; rather they seek to transmit a common base of values to pupils and to teach them to be open to people whose belief differs from theirs*". The court noted that there was no evidence that the "*ethics tuition given in practice*" had sought to unduly influence or indoctrinate the pupils. (*Appel-Irrgang*, p.11.)

195. At p.12 the court observed:

"As regards the applicants' claims that the ethics classes were contrary to their religious beliefs, the Court observes that neither the School Act nor the course outline indicated that the classes were designed to give one belief priority over another, or omit or challenge other beliefs, in particular the Christian faith. ... As to the applicants' submission that the ethics classes contained ideas or conceptions critical of or opposed to Christian beliefs, the Court considers that it is not possible to deduce from the Convention a right not to be exposed to convictions contrary to one's own (see, *mutatis mutandis*, *Konrad*, cited above). The Court observes above all that the first applicant can continue to attend the Protestant religion classes provided on the school premises and that there is nothing to prevent her parents from enlightening and advising their daughter, playing their natural role as educators or guiding her in a direction compatible with their own religious convictions ...

In the light of the foregoing, the Court considers that by introducing compulsory ethics classes the national authorities did not exceed the margin of appreciation conferred by Article 2 of Protocol No. 1."

196. Finally, I note that Warby J addressed A2P1 in *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin), [2016] PTSR 405. The claimants sought judicial review of a decision of the Secretary of State to issue new GCSE Religious Studies subject content for the 2016 academic year and, at the same time, to assert that the subject content was consistent with the statutory requirements for the provision of religious education. That assertion was materially misleading because it



encouraged readers to conclude that a GCSE formulated in accordance with the new content would be enough on its own to satisfy the state's obligation to provide religious education, whereas the subject content allowed for the complete exclusion of any study of non-religious belief for the whole of Key Stage 4. Warby J observed that the Strasbourg jurisprudence shows that “*the duty of impartiality and neutrality owed by the state do not require equal airtime to be given to all shades of belief or conviction*”, but the complete exclusion for two years of schooling of any study of non-religious beliefs was incompatible with A2P1 ([74]).

197. In addressing the interpretation of A2P1, Warby J observed that the requirement to safeguard the possibility of pluralism is separate and distinct from the prohibition on indoctrination; “*the requirements of A2P1 will be infringed by the state if it fails in its duty to take care that the educational provision it makes is conveyed in an objective, critical and ... pluralistic manner, even if it does not go so far as – in the ordinary sense of the phrase – to ‘pursue the aim of indoctrination’*” ([29]-[31]). In *Fox* the allegation, upheld by the court, was that the pluralism requirement was not met.
198. Drawing the threads together, in my judgment the key points for the purposes of this case are these:
  - (1) Pluralism is essential for the preservation of a modern liberal democracy, and this aim must be realised above all through state teaching. (*Folgerø*, [84(b)]).
  - (2) The state may not pursue an aim of indoctrination (*Folgerø*, [84(h)]).
  - (3) When considering whether there is a breach of the second sentence of A2P1, it is necessary to have regard to the material situation and the objectives that the relevant education seeks to meet (*Folgerø*, [84(i)]). However, the instruction provided may breach A2P1, even if the state’s aims are consonant with that article (e.g. *Zengin*, [59], [70]).
  - (4) A2P1 must be read as a whole (while recognising that the first sentence is dominant), and in light of, in particular, states’ responsibility under article 9 for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. It is not necessarily incompatible with the duty of neutrality or A2P1 for a state to give greater priority to the majority religion, but A2P1 does not permit a state to treat the religious or philosophical convictions of minorities in a way that is significantly different at the qualitative level (*Folgerø*, [84(a), (d), (f)], *Lautsi* [60], *Zengin*, [63], *Fox*, [31]-[39]).
  - (5) Teaching should be neutral from a religious perspective, but it is not required to be value neutral. In particular, sex and ethics education which aims to encourage tolerance between human beings irrespective of their sexual orientation and identity, and to enable children to deal critically with influences from society, so that they develop into responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society, is consonant in its objectives with the principles of pluralism and objectivity embodied in A2P1 (*Appel-Irrgang*, pp.7, 9-11).
  - (6) In determining the content of education and the manner of its provision the state has a duty to respect parents’ convictions, be they religious or philosophical.

Respect entails more than merely acknowledging or taking into account parents' convictions; it implies a positive obligation. For the purposes of A2P1, convictions are views that attain a certain level of cogency, seriousness, cohesion and importance; are worthy of respect in a democratic society; and are not incompatible with human dignity, or the child's right to education under A2P1 (*Folgerø*, [84(c), (e)]).

- (7) However, the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions (*Dojan*, [68]).
- (8) The setting and planning of a curriculum is, in principle, a matter for the state, and this mainly involves questions of expediency within the state's competence and margin of appreciation (*Folgerø*, [84(g)], [89]).
- (9) Teaching of information or knowledge of a directly or indirectly religious or philosophical kind will be compatible with A2P1 if the state takes care to ensure that such information or knowledge is conveyed in an objective, critical and pluralistic manner, and does not breach the prohibition on indoctrination (*Folgerø*, [84(g), (h)]).
- (10) If those criteria are not breached, A2P1 does not permit parents to object to the inclusion of such teaching in the curriculum, even where compulsory school attendance with no possibility of home schooling is required (*Folgerø*, [84(g)], *Konrad*, *Dojan*). In this regard, it is relevant that compulsory schooling does not deprive parents of the ability to educate their children outside school in line with their own religious and philosophical convictions (*Kjeldsen*, [54], *Dojan*, [69]).

### ***Application of the A2P1 principles to the facts***

199. I have set out the background to the introduction of RSE in paragraphs 42. to above. It is evident that its introduction as a mandatory element of curricula in Wales has been the product of a process of careful consideration which has involved input from expert professionals (including teachers), children's charities and faith groups; extensive consultation with the public; and detailed consideration by the Senedd. The expert advice provided to the Welsh Government was to the effect that high quality RSE is of great benefit to pupils, a key element of successful RSE is to teach pupils about the importance of equality and to respect the rights of others, RSE should be made a mandatory part of the curricula taught in schools, and RSE works best when it is supported by a "*whole school*" approach.
200. The Welsh Government's objectives, and the purposes of mandatory RSE, are also evident in the background documents to which I have referred, and in the Guidance itself, particularly paragraph G3-4 and G7-9. I agree with, and the claimants have not disputed, the defendant's summary of the broad purposes of RSE (paragraph above). In relation to the third purpose, I note that a key element of the material situation is the Welsh Government's view that it has a "*moral obligation to ensure that children in schools receive neutral and accurate information*" on these issues, in circumstances where they have access to a vast amount of information (and misinformation) through the internet and social media (see paragraph above). I would also add to the defendant's summary that mandatory RSE has the overarching aim of supporting the realisation of the "*four purposes*" (paragraph above), including by enabling pupils to

develop as healthy, confident individuals, and as ethical, informed citizens of Wales and the world.

201. These objectives and purposes are entirely consonant with the principles of pluralism and objectivity embodied in A2P1 (see paragraph above). Indeed, there is a close resemblance between the Welsh Government's objectives and the purposes of teaching that the Strasbourg court considered compatible with A2P1 in *Kjeldsen and Dojan*.
202. In my judgment, the content of the Code and the Guidance is consistent with the requirement to take care to ensure that RSE teaching is conveyed in an objective critical and pluralistic manner, and does not breach the prohibition on indoctrination. There is nothing in the Code or the Guidance that authorises or positively approves teaching that advocates or promotes any particular identity or sexual lifestyle over another, or that encourages children to self-identify in a particular way. I agree with Mr Moffett's submission that there is a disjunct between the contents of the Code and the Guidance, and what is alleged by the claimants. For example, some of the claimants have expressed concerns about the RSE curriculum based on their belief that it "*reflects a body of educational advocacy known as Comprehensive Sexuality Education ('CSE') which originated in the United States*". It is clear that neither the Code nor the Guidance seek to encourage teaching which reflects the claimants' understanding of CSE. Nor do those texts promote libertarianism or the sexualisation of children.
203. I reject the contention that any of the statements in the Code or the Guidance to which the claimants object will inevitably result in teaching that is contrary to A2P1 in an identifiable, material or legally significant number of cases. Both the Code (at [C1]) and the Guidance (at G6]) expressly refer head teachers and governing bodies to the "*legislation summary*" (paragraph above), in which they are advised in clear terms that the content and manner of teaching RSE "*must be objective, critical and pluralistic*", meaning that schools must, where questions of values are concerned, "*provide a range of views on a given subject, commonly held within society*", including "*a range of other faith and non-religious views*".
204. The first paragraphs of the Code to which the claimants take particular objection are [C4] and [C5] (paragraph above). Paragraph [C4] merely summarises the themes to be covered in RSE. Paragraph [C5] requires RSE to be "*inclusive*" and to "*reflect diversity*", including by developing learners' awareness of different identities, views and values. On its face, this paragraph is consistent with the pluralism requirement. Head teachers would understand that this paragraph means that RSE should develop pupils' awareness of different identities, and a diversity of relationships, gender and sexuality, including LGBTQ+ lives, as well as developing their awareness of differing views and values.
205. This is consistent with the legislation summary which makes clear to head teachers and governing bodies that in designing, adopting and implementing an RSE curriculum for their school, when addressing sensitive issues on which there are "*current, tensions, disagreements or debates within society*" (such as the topic of gender identity) they must provide a range of views and perspectives. Openness to a plurality of ideas and the ability to engage sensitively, critically and respectfully with such debates, which RSE seeks to encourage and develop, fully accords with the aim

of pluralism in a liberal and democratic state. The fact that such teaching is likely to include the expression of some views with which the claimants profoundly disagree (and, no doubt, other views with which others would disagree equally strongly) does not violate A2P1 (see paragraph above).

206. With respect to the claimants' contention that it is a breach of A2P1 to teach their children that some people self-identify in a gender that is different to their biological sex at birth, or self-identify as transgender/trans, queer or questioning, or in other identities, I agree with the defendant's submissions as summarised in paragraph above. I also note that in *Elan-Cane* the Supreme Court recognised, in light of the Strasbourg Court's case law concerning transgender individuals, that the appellant's identification as non-gendered was an aspect of private life within the meaning of article 8 (Lord Reed PSC, [23], [26] and [30]). The appellant's article 8 right was outweighed in the circumstances of the case, nonetheless it shows that the law has recognised that in accordance with the principle of autonomy a person's identity as non-gendered, and other identities such as trans and non-binary, are aspects of private life protected by article 8.
207. [C13] and [C14] explain that learners should develop the understanding and behaviours that will enable them to develop and maintain healthy, safe and fulfilling relationships and should be able to recognise and value diverse types of relationships; they should develop their sense of self and of everyone being unique, and should explore the various factors that inform a person's identity, including cultural and religious norms. In the second and third columns of [C21], to which objection is taken, the Code states, in essence, that learners should be taught to show respect for and value others, to recognise the importance of equality and to challenge stereotypes and unfair behaviour, to be aware of and able critically to explore how positive and negative social, cultural and religious norms can shape perceptions and influence relationships and behaviours, to be able to advocate for rights of all, and to understand the law and human rights in relation to sex, sexuality and gender. The Code explains in [C36] that learners need to develop an understanding of the nature and impact of harmful behaviours and state; and in the third column of [C38] that learners should be taught the importance of inclusivity and the value of diversity.
208. Pluralism is an ethic of respect that values human diversity, and the promotion of a spirit of tolerance. In my judgment, the curricula and teaching envisaged in the Code is clearly in line with the pluralism requirement.
209. I also reject the contention that the term "*explore*" in [C14] and [C21] gives any reasonable cause for concern. Those to whom the Code is directed would understand that "*explore*" is used here, as it often is by teachers, to mean "*learn about*" or "*study*".
210. Finally, I note that the claimants also take strong objection to the first column of [C21] in which the Code indicates that from the age of three learning should support the "*use of accurate terminology for all body parts*". The 2021 Act provides, and the Code reinforces the point, that RSE must be developmentally appropriate for each pupil. The first column of [C21] indicates that "*practitioners should start to consider*" ([C9]) from the age of three whether such use of accurate terminology is developmentally appropriate for learners. For the youngest age group, this may mean, for example, starting with learning body parts such as arms and legs, and terms such

as stomach (rather than ‘tummy’). The claimants express concern that there are no tools or means to determine the age and developmental appropriateness of topics or resources, but it is inherent in the 2021 Act that the Senedd trusts teachers and head teachers to be able to apply the concept of developmental appropriateness. The aim of this paragraph is to help protect children from abuse by enabling more effective reporting, avoiding the use of euphemistic labels that are prone to misunderstanding. In any event, it is impossible to see how a requirement to use accurate terminology could breach A2P1. Such teaching is obviously scientific, factual and neutral.

211. With respect to the Guidance, the claimants focus on paragraphs [G4], [G9]-[G10] and [G22]-[G23] (paragraph above) which state, in essence, that schools have an important role to play in creating safe and empowering environments that support learners’ rights to enjoy fulfilling, healthy and safe relationships; that all children have the right to receive high quality and inclusive RSE that achieves a range of positive outcomes; that RSE should empower learners to support their health and well-being, develop healthy relationships, navigate and make sense of how relationships, sex, gender and sexuality shape identities and lives, and understand and support their rights and those of others to enjoy healthy relationships throughout their lives; that RSE should be taught in a way that is inclusive and accords with principles of equality, and which reflects the diversity among learners, their families and their communities; and that learners should be equipped to think critically about gender and sexual norms in a changing world, and to understand the difference values, including religious values, that inform values and identities.
212. The claimants express concern that RSE is said to have the potential to be “transformative” ([G9]). However, a head teacher or member of a governing body reading the Guidance would not understand that term as authorising or approving teaching that advocates or promotes any particular identity or sexual lifestyle over another, or that encourages children to self-identify in a particular way. The sense of the word “transformative”, as it is used in the Guidance, is in line with the language used in s.2(1) where the Senedd described the four purposes of enabling the *development* of pupils in various identified ways. Education may, in that sense, generally be said to have the potential to be transformative.
213. In my judgment, both the Code and the Guidance reflect the general spirit of the Convention as an instrument designed to maintain and promote the ideals and values of a modern liberal democracy, including the values of tolerance, respect and equality. These documents are clearly capable of being implemented in a way that is fully compatible with the second sentence of A2P1. The contention that they fall foul of the prohibition against indoctrination is misconceived.

### ***Conclusion on ground 3***

214. With respect to the issues identified in paragraph above I have concluded that:
- (1) it is not open to the claimants to contend that the absence of a parental right of excusal breaches the first sentence of A2P1 (1(f)(i));
  - (2) in any event, the absence of such a right does not breach the first sentence of A2P1 (1(f)(ii));

- (3) none of the passages in the Code or the Guidance to which the Claimants object purport to authorise or positively approve teaching that will be in breach of the second sentence of A2P1 (2(a));
- (4) there is no requirement in A2P1 that any impacts on parental rights under the second sentence are prescribed by law, but in any event the Code and the Guidance have the status of law for the purpose of the Convention (2(b));
- (5) *A v SSHD* sets out the relevant test for determining the lawfulness of the Code and the Guidance, but in any event the test in respect of subordinate legislation (as stated by Lord Mance in *In re NIHRC*) is in substance the same (2A(c)); and
- (6) neither the Code nor the Guidance breach A2P1, whether by reference to the duty of neutrality, or as result of the whole-school approach (or cross-cutting elements), or otherwise (2A(d) and (e)).

#### **G. Ground 4: Article 9**

##### ***The parties' submissions***

215. The claimants submit that the same passages of the Code and the Guidance also give rise to a separate and distinct breach of the rights of their children under article 9 of the Convention. In particular, they contend that the Code and the Guidance, in seeking to introduce “transformative” RSE teaching, and by adopting an approach which they contend amounts to state indoctrination, breaches the right to freedom of thought, conscience and religion. The protection for the *forum internum* (that is, the sphere of private personal beliefs) is not subject to the restrictions contained in article 9(2) which apply to the *manifestations* of religion or belief. The claimants submit that any attempt by teachers, who stand in a position of authority, to re-orient the beliefs of pupils will breach article 9: *Larissis and others v Greece* (1998) 27 EHRR 329.
216. The Welsh Ministers submit, first, the correct approach to the challenge to the Code and the Guidance is the same as in relation to the second sentence of A2P1: applying *A v SSHD*, the claimants have to show that the Code and/or the Guidance will inevitably result in teaching that would breach article 9. Secondly, the European Court of Human Rights has repeatedly emphasised that A2P1 is the *lex specialis* in the education sphere, that it falls to be interpreted consistently with article 9, and so article 9 gives rise to no separate issue: *Kjeldsen*, [57]; *Folgerø*, [54] and [84(a)]; *Appel-Irrgang*, p.13; *Dojan*, [55] and [75]; *Perovy*, [47]-[48]; *Lautsi*, [77] and *Fox*, [24]. For both reasons, the defendant submits that this ground adds nothing to ground 3. In any event, they submit that nothing in the Code or the Guidance will inevitably result in teaching that constitutes religious indoctrination.

#### **ANALYSIS AND DECISION ON GROUND 4**

##### ***Standing***

217. The reasons that I have given in paragraph above for finding that the first and fourth claimants do not have standing to pursue a claim for breach of A2P1 apply equally to the alleged breach of article 9. But additional questions arise as to whether each of the second, third and fifth claimants have standing to pursue this ground. The defendants

do not contest the claimants' standing insofar as they are bringing an *ab ante* 'in principle' challenge based on article 9. Although the rights relied on under this head are the rights of the children, I note that in *R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359, Tuckey LJ, [14], the Court of Appeal took the view (albeit without full argument) that the parent of a minor whose human rights have been breached has standing to complain under s.7 of the HRA. So I accept that the second, third and fifth claimants have standing to bring an *ab ante* challenge.

218. However, a claim that relies on article 9 directly would have to be targeted at the RSE teaching that the child receives. The second and fifth claimants each have one or more children who attend a maintained school and are of an age such that they will be taught RSE. Although there is no evidence as to what they are being taught, I consider that is relevant to the question of breach rather than standing. I accept that the second and fifth claimants have standing to pursue this ground of claim. In circumstances where the third claimant's younger child is currently home schooled, it cannot be said she has been the victim of any teaching in breach of article 9, and so I do not consider the third claimant has standing in respect of this ground. As some of the claimants have standing, these findings do not affect the substance of the ground.

### ***Lex specialis***

219. The case law of the European Court of Human Rights makes clear, first, that A2P1 has to be interpreted in light of, among other Convention rights, article 9. Secondly, the authorities to which the defendant has referred (see paragraph above) show that the Strasbourg court has consistently held that in the area of education and teaching A2P1 is, in principle, the *lex specialis* in relation to article 9; and as a consequence no separate issue arises under article 9.
220. In any event, I agree with the defendant that the applicable test would be the same (see paragraphs 154. to above); and that this ground of claim falls to be dismissed in light of my rejection of the A2P1 ground of claim.

### **H. Conclusion**

221. For the reasons I have given, the claim is dismissed on all grounds.