Submission No 66

INQUIRY INTO EDUCATION LEGISLATION AMENDMENT (PARENTAL RIGHTS) BILL 2020

Organisation: Institute for Civil Society

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Education Legislation Amendment (Parental Rights) Bill 2020 (NSW)

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Contents

Part 1 - Policy Submission

The Institute for Civil Society (ICS) makes this submission to the Committee on the *Education Legislation Amendment (Parental Rights) Bill 2020* (NSW) (the Bill). The Institute broadly supports the Bill subject to recommendations about the scope of some provisions below. This submission also seeks to set out the relevant international human rights law and demonstrates how the Bill's provisions give effect to or are compatible with international human rights law.

1A. Overview of Human Rights and Policy Considerations

There are two primary questions that arise in the consideration of appropriate protections around education of children in government schools on moral and religious matters. Moral and religious matters include sex education about what is appropriate sexual activity and expression of sexual orientation, whether gender identity as a personal attribute different from biological sex exists and if so how it is determined and changed including the appropriateness of gender transitioning (including altering the endocrinology and anatomy of a genetic sex male or female person by drugs or surgery to make the person resemble and function more like a person of the opposite genetic sex). The two primary questions are:

1. What may be included in the curriculum, noting that the applicable international human rights law requires that the content of education on moral and religious matters including sex education must be 'neutral and objective'[1] and be free from 'indoctrination';[2] and

[1] *Leirvåg and ors v. Norway* C/82/D/1155/2003. The UNHRC has to date only considered complaints in respect of religious instruction. As noted at Parts 3 and 4, the ECHR has considered that the equivalent European Convention right extends to sex education.
[2] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23 (*Kjeldsen*) [53].

2. Having satisfied the foregoing requirement, what is the scope of any exemption to be permitted to parents who wish to excuse their children from education on moral and religious matters including sex education?

The Bill takes the approach that teaching about sexuality or gender fluidity can amount to 'advocating or promoting dogmatic or polemical ideology'. In this respect the Bill echoes existing language within the *Education Act 1990* (NSW), noting that existing section 30 provides:

> In government schools, the education is to consist of strictly non-sectarian and secular instruction. The words "secular instruction" are to be taken to include general religious education as distinct from dogmatic or polemical theology.

It is not only theology and political ideologies which may be dogmatic or polemical. Some sex and gender ideologies may also be dogmatic or polemical.

In its prohibition of 'dogmatic or polemical ideology' the Bill can be said to give effect to the relevant international law. This is further canvassed in this submission at Parts II and III where it is shown that:

1. International human rights obligations on Australia require Australian governments 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***.[3] This includes a right of parents to protect their children from teaching that detrimentally impacts upon the religious and moral education of their children by having their children exempted from attending those classes where such teaching is presented (this is the same human rights basis on which parents are entitled to have their children exempted from attending religious instruction classes in government schools where the instruction is contrary to the religious and moral convictions of the parents).[4]
2. The international jurisprudence acknowledges that parents' moral and religious convictions may be asserted in respect of the entire curriculum, including sexual education, in public schools (not just in relation to religious instruction).
3. Those rights require the State to ensure that all education is 'neutral and objective'[5] and does not 'pursue an aim of indoctrination that might be considered as not respecting

[3] *International Covenant on Civil and Political Rights* Article 18(4) and see the other rights set out in Parts II and III of this submission.

[4] See the discussion of the jurisprudence in Parts II and III.

[5] *Hartikainen et. al v Finland Communication No. 40/1978; Leirvåg U.N. Doc. CCPR/C/82/D/1155/2003 Communication No. 1155/2003 3 November 2004 (Leirvåg)*; UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion),* 30 July 1993, CCPR/C/21 Rev. 1/ Add.4.

parents' religious and philosophical convictions.'[6] As Langlaude has clarified, under the *International Covenant on Civil and Political Rights* 1966 (ICCPR) 'States are forbidden from pursuing an aim of indoctrination that does not respect the religious convictions of the parents.'[7] This reflects the stated aim of the Bill.

4. The occasions on which the United Nations Human Rights Committee have had opportunity to consider Article 18(4) of the ICCPR have been limited. No decision of the United Nations Human Rights Council (UNHRC) has yet considered the interaction of Article 18(4) in the context of sex education, or in respect of education about sexual orientation or gender identity. However, as recognised by the European Court of Human Rights (ECHR), the parental rights extend to the entirety of the public curriculum, including the provision of sex education. The strict application of the parental right to religious instruction, as developed within the jurisprudence of the UNHRC (as applied to NSW) is then informative of the appropriate protections that are to be afforded in respect of sex education and teaching on sexual orientation or gender identity that may conflict with the religious and moral convictions of parents whose children are being educated in public schools.

5. Although various judgements of the ECHR have left untouched the content of curriculum on sex education, within ECHR law it remains within the permissible margin of appreciation for States to determine their own acceptable regimes (subject to the proviso that any teaching must be conveyed in an objective, critical and pluralistic manner and not comprise indoctrination). This would extend to teaching on matters such as sexual orientation and gender fluidity. Thus, according to the principles of international human rights law developed by the ECHR, it is open to New South Wales to adopt the form of protections enshrined within the Bill (noting the margin of appreciation doctrine is not applicable under the ICCPR).

6. The Bill, through its prohibition on teaching 'gender fluidity' seeks to prevent the State from pursuing (in the words of the ECHR) 'an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions … the limit that must not be exceeded'. Relying on the conflict of loyalty analysis adopted in *Folgerø* and *Hasan and Zengin v Turkey*, it can be asserted that that the Bill seeks to ensure that (again in the words of the ECHR) 'the education provided [does not] put into question the

[6] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23 (*Kjeldsen*) [53].
[7] *The Right of the Child to Religious Freedom in International Law,* Sylvie Langlaude, 87.

parents' sexual education of their children based on their religious convictions' and to ensure that 'children [are not] influenced to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions'.

7. Failure to recognize the rights of parents to protect their children from teaching that detrimentally impacts upon the religious and moral education of their children would be a form of discrimination that is not reasonable and objective within the terms of the ICCPR. This is because the detriment placed upon such parents arises because of their religious or moral convictions and in a way that does not occur comparably for other parents.

1B. The Bill's Provisions about Education on Matters of Parental Primacy

The existing provision purporting to protect parental rights in section 26 of the Education Act 1990 (NSW) is inadequate and in practice gives parents no rights at all. The Bill's provisions about matters of parental primacy do give such rights, although the scope of the defined matters of parental primacy needs to be reduced to make the provisions workable.

The existing Section 26 of the Education Act 1990 provides as follows.

> *Certificate of exemption from attending particular classes*
>
> *26 Certificate of exemption from attending particular classes*
>
> *(1) The parent of a child enrolled at a government school may give the Secretary written notice that the parent conscientiously objects on religious grounds to the child being taught a particular part of a course of study.*
>
> *(2) The Secretary may accept any such objection and grant a certificate exempting the child from attending classes relating to the part of the course concerned if satisfied that the objection is conscientiously held on religious grounds.*
>
> *(3) A certificate of exemption under this section may be given subject to conditions.*
>
> *(4) A certificate of exemption under this section may be cancelled by the Secretary.*

The provision gives the Secretary a discretion, it does not give parents a right to have their children excused from classes on the basis of a religious conscientious objection. Moreover the Secretary may add any conditions to the certificate and cancel it at will. Most significantly, the provision has never been effectively operationalised. To use it parents would need to be prominently advised of their right to object, notified in advance about the parts of a course of study to which they might conscientiously

object on religious grounds, and provided with a simple mechanism, like an online form to lodge their objection.

The Bill provides a far superior alternative to the existing non-rights provision by mandating that education in government schools (and teacher training) must respect the primacy of parents in relation to instruction on matters of parental primacy (proposed new sections 6(1)(o) and (p)) including by giving parents advance notice and requiring consultation with parents each year as to what matters of parental primacy will be taught in the curriculum and where (proposed new section 17D), and giving parents the right to have their children exempted from attending those classes where the parent objects to that instruction on matters of parental primacy (proposed new section 17E), and requiring the Education Standards Authority to monitor and report on compliance with the matters of parental primacy requirement (proposed new section 27B) and the Minister to report on compliance after 2 years (proposed section 136).

The Institute for Civil Society supports the Bill's provisions in implementing the primacy of parents in the moral and religious education of their children and the international human rights of parents, subject to the following recommendations.

(a) Scope of the Definition of Matters of Parental Primacy

We consider that the definition of "matters of parental primacy" in clause 3(1) needs to be narrowed for these provisions to be workable in practice.

The Bill provides that:

> ***matters of parental primacy*** means, in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality.

This definition covers such a broad range of matters (e.g. political and social values) that schools will need to identify such large swathes of the curriculum in humanities subjects like English, History, Geography, Politics, Economics and Legal Studies as to make the task of parents to trawl through and identify matters to which they object practically infeasible.

We **recommend** an alternative, narrower definition which targets matters more likely to raise parental concerns on moral and religious grounds:

> ***matters of parental primacy*** means, in relation to the education of children:
>
> (a) moral and ethical standards;
>
> (b) matters of personal identity including gender identity and sexual identity; and

(c) matters of sexuality including sexual activity, sexual orientation and sexual health.

(b) The rights in proposed section 17E and 17D should not be avoided by very general disclosures

We **recommend** that this right in proposed section 17E should be amended to provide that:

(1) the summary of content to be taught about matters of parental primacy should give parents sufficient information to decide whether or not to object to the instruction under section 17D; and

(2) parents may request additional detail about the content and manner of teaching of matters of parental primacy and schools must provide that additional detail.

(c) Teaching not to advocate or promote dogmatic or polemical ideology – section 17B

Much teaching is ideological in the sense that it is based on or relates to a system of ideas and ideals, for example concerning economic or political theory and policy. We **recommend** that the provision would better suit the policy objectives of the Bill if it provided that:

> *17B In government schools, teaching on matters of parental primacy must:*
>
> *(a) not involve advocating or promoting dogmatic or polemical ideology; and*
>
> *(b) acknowledge that there may be different views on the matter and that students should consider their parents' views on the matter and discussing the matter with their parents.*

(d) New object s.6(1)(o)

This object requires provision of an education that is consistent with the moral and ethical standards and the political and social values of parents. Because those standards and values will differ among parents it will be difficult to provide an education that is *consistent* with all of them. We **recommend** substituting the following:

> *(o) provision of an education that is respectful of the political and social values of parents of students and respects the primacy of parents in relation to the education of their children on matters of parental primacy.*

1C. The Bill's Provisions on the Teaching of Gender Theory/Gender Fluidity

There are many versions of gender theory, some overlapping, some contradicting others. All of them are based on the theory that there is a difference between the biological sex of a person and the gender identity of a person. The biological sex of a person is fixed and always binary male or female at a chromosomal level and almost always binary male or female in anatomical features except for a small number of intersex people whose anatomy does not develop the typical sexual body differentiation based on their male or female chromosomes. By contrast gender theories say that

gender identity is not biologically determined but the theories differ as to whether it is socially constructed or self-determined (or both) and differ as to whether it is fixed or fluid and can change over a lifetime.

Some theories advocate for people to "gender transition" – to change their bodies by drugs and surgery to better conform to their gender identity (typically to change their body appearance and hormones to the opposite of their biological sex). There has been a massive increase in pre-pubertal and peri-pubertal children presenting at gender clinics in Western countries including Australia with gender dysphoria who believe they may be in the wrong body. [8] In the past a cautious and careful approach was taken to the management of childhood gender dysphoria. At least half a dozen medical studies show that between 61% and 98% of children presenting with gender-related distress were reconciled to their natal sex through puberty before adulthood.[9] But now some clinics, influenced by gender ideology, take an uncritical affirmation approach to children with wrong body feelings and encourage them to gender transition their bodies. Body transition may be the right choice for some children with gender dysphoria but the clinical studies suggest it is unnecessary for a large majority. Gender transition will typically involve puberty blockers to prevent or arrest the effects of puberty, cross-sex hormones which carry a risk of life long infertility and then some people will go on to "gender-affirming" surgeries such as a double mastectomy, hysterectomy and castration and the creation of an artificial penis. An increasing number of young people who body transitioned are regretting the gender transition in their 20s and seeking to de-transition their bodies back to resemble their biological sex to the extent they can but they may be left with irreversible consequences of the body transition process.[10]

Other gender theories criticise body transition to resemble the opposite biological sex as still being limited by a binary conception of gender and advocate for transition to non-binary appearance, names, forms of address and pronouns.

Some gender theories have caused and will continue to cause serious harm to some people by increasing the number of childhood gender dysphoria cases and justifying the more prevalent advice

[8] The number of referrals of cases of childhood gender dysphoria to the Melbourne Royal Children's Hospital Gender Clinic per year has increased forty-fold from 8 in 2011 to 336 in 2019, after being stable for the prior 8 years. Referrals to the London Tavistock NHS Gender Clinic have increased 30 fold from 2011 to 2019 (there were 2700 in 2019). Both clinics use the approach of affirming children who believe they are in the wrong body.

[9] See *After the Keira Bell verdict - An English ruling on transgender teens could have global repercussions* The Economist 12 December 2020

[10] Ibid.

to them to alter their bodies through gender transition. Some of these later find that was not the answer to psychological distress they were suffering and in fact has only added to their distress.

There are very good reasons to oppose the advocacy and promotion in schools of gender theories which have contributed to the recent explosion in cases of adolescent gender dysphoria and to a shift in some clinics from a cautious approach to the treatment of childhood gender dysphoria to an uncritical affirmation of a child's wrong body feelings and accelerated move to gender transition bodies. This will not prevent those with gender dysphoria seeking appropriate help and treatment through health practitioners.

We **recommend** that the Bill's provisions concerning the teaching of "gender fluidity" (the current definition of which does not contain any reference to fluidity or change) be replaced with a ban on the *advocacy or promotion of gender theory, gender change and gender transition* in schools and teaching colleges and that a definition of *gender theory* be developed which captures the breadth of harmful gender theories.

The Recent Cases of Gender Detransitioners Suing such as in Bell v Tavistock and Portman NHS Foundation Trust Emphasise the Dangers with Gender Ideology and Children

Legal concerns about an uncritical affirmation approach to gender dysphoria and gender transition became prominent after the 2020 judgement of the United Kingdom High Court in *Bell v Tavistock and Portman NHS Foundation Trust and ors.*[11] In that matter the Court gave consideration to a complaint by a biological female who had undergone gender transitioning to become a trans male under the advice of the Tavistock NHS GIDS Gender Clinic from the age of 16. Although the judgement concerned the ability of a minor to consent to the administration of puberty blockers [PB], a selection of primary findings from the judgement of the Court is illustrative of the concerns that may be held in respect of the teaching of what the Bill terms 'gender fluidity' to minors, including a lack of evidence, the possibly harmful effects, and the sudden explosion of diagnoses of gender dysphoria:

1. The Court expressed surprise that data on the administration of puberty blockers [(PB)] to children was not collated 'given the young age of the patient group, the experimental nature of the treatment and the profound impact it has.'[12]

2. There is a concern with an unexplained recent growth in children reporting to professionals with gender identity issues:

> in 2011 the gender split was roughly 50/50 between natal girls and boys. However, in 2019 the split had changed so that 76 per cent of referrals were natal females. That

[11] [2020] EWHC 3274 (Admin).
[12] Ibid [28].

change in the proportion of natal girls to boys is reflected in the statistics from the Netherlands (Brik et al "Trajectories of Adolescents Treated with Gonadotropin-Releasing Hormone Analogues for Gender Dysphoria" 2018). The defendant did not put forward any clinical explanation as to why there had been this significant change in the patient group over a relatively short time.[13]

3. There is a significant correlation with gender dysphoria and autistic spectrum disorder, with the Court finding 'the apparent lack of investigation of this issue [on the part of the Tavistock clinic] – surprising':

> It is recorded in the GIDS Service Specification and the wider literature that a significant proportion of those presenting with GD have a diagnosis of Autistic Spectrum Disorder (ASD). The Service Specification says:
>
> > "There seems to be a higher prevalence of autistic spectrum disorder (ASD) conditions in clinically referred, gender dysphoric adolescents than in the general adolescent population. Holt, Skagerberg & Dunsford (2014) found that 13.3% of referrals to the service in 2012 mentioned comorbid ASD (although this is likely to be an underestimate). This compares with 9.4% in the Dutch service; whereas in the Finnish service, 26% of adolescents were diagnosed to be on the autism spectrum (Kaltiala-Heino et al. 2015)."
>
> The court asked for statistics on the number or proportion of young people referred by GIDS for PBs who had a diagnosis of ASD. Ms Morris said that such data was not available, although it would have been recorded on individual patient records. We therefore do not know the proportion of those who were found by GIDS to be Gillick competent who had ASD, or indeed a mental health diagnosis.
>
> Again, we have found this lack of data analysis – and the apparent lack of investigation of this issue - surprising.[14]

4. 'For young people on PB that maturing process is stopped or delayed with potential social and psychological impacts which could be described as non-reversible.'[15]

5. 'the lack of a firm evidence base for their PB use is evident from the very limited published material as to the effectiveness of the treatment, however it is measured.'[16]

[13] Ibid [32].
[14] Ibid [33]-[35].
[15] Ibid [64].
[16] Ibid [71].

6. ‘the degree to which the treatment is experimental and has, as yet, an unknown impact, does go to the critical issue of whether a young person can have sufficient understanding of the risks and benefits to be able lawfully to consent to that treatment.’[17]

7. ‘the nature of this issue highlights the highly complex and unusual nature of this treatment and the great difficulty there is in fully understanding its implications for the individual young person. In short, the treatment may be supporting the persistence of GD in circumstances in which it is at least possible that without that treatment, the GD would resolve itself.’[18]

8. ‘in deciding what facts are salient and what level of understanding is sufficient, it is necessary to have regard to matters which are those which objectively ought to be given weight in the future although the child might be unconcerned about them now. On the facts of this case there are some obvious examples, including the impact on fertility and on future sexual functioning.’[19]

9. In respect of the administration of puberty blockers the Court concluded:

> The starting point is to consider the nature of the treatment proposed. The administration of PBs to people going through puberty is a very unusual treatment for the following reasons. Firstly, there is real uncertainty over the short and long-term consequences of the treatment with very limited evidence as to its efficacy, or indeed quite what it is seeking to achieve. This means it is, in our view, properly described as experimental treatment. Secondly, there is a lack of clarity over the purpose of the treatment: in particular, whether it provides a “pause to think” in a “hormone neutral” state or is a treatment to limit the effects of puberty, and thus the need for greater surgical and chemical intervention later, as referred to in the Health Research Authority report. Thirdly, the consequences of the treatment are highly complex and potentially lifelong and life changing in the most fundamental way imaginable. The treatment goes to the heart of an individual’s identity, and is thus, quite possibly, unique as a medical treatment.[20]

10. The Court also expressed concern with the irreversible effects of the treatment: ‘The condition being treated, GD, has no direct physical manifestation. In contrast, the treatment provided for that condition has direct physical consequences, as the medication is intended to and does prevent the physical changes that would otherwise occur within the body, in particular by

[17] Ibid [74].
[18] Ibid [77].
[19] Ibid [132].
[20] Ibid [134].

stopping the biological and physical development that would otherwise take place at that age.'[21]

The above is relevant to the Bill, to the extent that the Court was concerned with the novel and untested propositions made in respect of gender fluidity, particularly as pertains to minors. It demonstrates that there are legitimate grounds on which the Parliament may act to ensure that ideological teaching in respect of gender fluidity should be avoided in all public schools.

Part II - United Nations Jurisprudence in relevant human rights

The principal relevant international human rights obligations that support the Bill are found in the United Nations instruments that Australia has ratified. Direction can also be taken from the jurisprudence of the European Court of Human Rights developed within the context of the European Convention on Human Rights. This is because the Convention contains provisions that are modelled on the United Nations framework and United Nations organs frequently look to the European jurisprudence.

Applicable Treaty Framework

Australia has ratified the *International Covenant on Civil and Political Rights* (ICCPR), Article 18 of which provides:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 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.
> 4. 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.

[21] Ibid [135].

Article 18(4) is the primary protection relevant to the circumstances of this note, and further consideration is given below to the United Nations jurisprudence that has developed under that provision.

Children, as autonomous individuals, enjoy the freedom of religion or belief in their own right, as do adults. Article 14 of the Convention on the Rights of the Child (CRC), which Australia has ratified, provides for the protection of both the rights of the child and their parents in respect of religious belief:

> 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.

The CRC also includes in the substantive content of education the development of respect for the child's parents, and the child's own cultural identity, language, and values.[22] Article 29(1) of the CRC specifically concerns the education of the child, providing:

> that the education of the child shall be directed to: …
>
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
>
> (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
>
> (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin

Relevantly, the CRC also requires State Parties to 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents …'.[23]

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[22] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 243.

[23] *Convention on the Rights of the Child* (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(2) ('CRC').

Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights*, which Australia has also ratified, also emphasises the role of education in preparing a child for society:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Article 13 also concerns the right to establish private schools and, like Article 18(4) of the ICCPR, the right 'to ensure the religious and moral education of their children in conformity with their own convictions':

> (3) 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.
>
> (4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The *United Nations Universal Declaration of Human Rights* (UDHR) simply protects the prior right of parents to choose the kind of education that shall be given to their children.

Furthermore, in the context of faith-based schools, it is also relevant to note that United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981* Article 5 provides:

> 1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
>
> 2. 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.

Although non-binding, the United Nations Human Rights Committee (UNHRC) has relied upon the *1981 Declaration* in interpreting the content of Article 18 of the ICCPR.[24] Pursuant to the First Optional ICCPR Protocol, which Australia has signed, Australian citizens may initiate complaints to the UNHRC.

ICCPR Article 18(4)

The primary protection relevant to Australia's obligations is contained in Article 18(4) of the *International Covenant on Civil and Political Rights*. It 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.

This right also protects the right to establish private religious schools. In his commentary on the ICCPR Nowak concludes that '[w]ith respect to the express rule in Art.13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the 3d Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'[25] Similarly, and as further discussed below, the jurisprudence of the European Court of Human Rights (ECHR), has also confirmed that the right under Article 2 of the First Protocol to the *European Convention on Human Rights* (which is closely aligned to Article 18(4)) establishes a human right to found and maintain private schools. Decisions of that court have been highly influential in the Views of the UNHRC issued pursuant to the First Protocol of the ICCPR.

However Article 18(4) is not limited to the right to establish private schools. It extends to parents of children within public schools.[26] As Nowak recognises, 'Art 18(4) focuses on the obligation of States parties to respect the liberty of parents "to ensure" ("de faire assurer") the religious and moral education of their children, in both curricular and extra-curricular areas.'[27] This right grounds the requirement that public education be 'neutral and objective' and also provides the right of parents to excuse their children from instruction (including religious instruction) where such is provided by public schools. The occasions on which the United Nations Human Rights Committee have had opportunity to consider Article 18(4) have been limited. No decision of the UNHRC has yet considered the

[24] *Sister Immaculate,* UNHRC.
[25] Manfred Nowak, *CCPR Commentary, 2nd revised edition* (Kehl: N P Engel, 2006), 443.
[26] Gen Comment 22.
[27] Manfred Nowak, *CCPR Commentary, 2nd revised edition* (Kehl: N P Engel, 2006), 432.

interaction of Article 18(4) in the context of sex education, or in respect of education about homosexuality or gender identity. However, as recognised by the European Court of Human Rights, the parental rights extend to the entirety of the public curriculum, including the provision of sex education. The strict application of the parental right to religious instruction, as developed within the jurisprudence of the UNHRC is then informative of the appropriate protections that are to be afforded in respect of sex education and teaching on homosexuality or gender identity that may conflict with the religious and moral convictions of parents whose children are being educated in public schools.

In its General Comment on Article 18 the UNHRC sets outs its approach in the following way:

> The Committee is of the view that article 18 (4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18 (4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18 (1). The Committee notes 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.[28]

On one reading, the General Comment could appear to assert that the right of parents can be enfolded within the preceding subprovisions of Article 18. However that was clearly not the understanding of the drafters of the Covenant, who incorporated the provision following discussion of the need for a separate stand-alone protection. Although it is related to Article 18(1), Article 18(4) provides a stand-alone right that lies within a schema of interpretation that is distinct from the remainder of Article 18. As has been recently noted by the Australian Human Rights Commission, the [United Nations] Human Rights Committee has recognised that 'the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.'[29] Unlike Article 18(3), Article 18(4) is not subject to limitation. The AHRC position relies upon General Comment 22 of the UNHRC, in which that body clarifies that 'the liberty of the parents and guardians to ensure religious and moral education cannot be restricted.'[30] As noted in the Office for Democratic Institutions and Human Rights Advisory Council of Experts on Freedom of Religion or Belief *Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools* (Toledo Guiding Principles):

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[28] Gen Comment 22

[29] Australian Human Rights Commission, *Submission to the Expert Panel*, February 2018, available at https://www.humanrights.gov.au/submissions/religious-freedom-review-2018, 10.

[30] United Nations Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993).

> as important as the state's interest in promoting education is, education per se is not one of the permissible grounds for limiting the right to manifest one's religion or belief. Thus, the state's interest in carrying out its educational programme is not, in and of itself, a ground for limiting rights asserted by pupils, parents or others under international human rights provisions.[31]

It is therefore not consistent with the provisions of the ICCPR to subject the rights of parents under Article 18(4) to the limitation provisions either under Article 18(3) of the ICCPR.

In its treaty monitoring role, the UNHRC has paid a great deal of attention to State compliance with Article 18(4) and has often asked States whether parental rights are respected in the education of their children.[32] As Langlaude has clarified, under the ICCPR 'States are forbidden from pursuing an aim of indoctrination that does not respect the religious convictions of the parents.'[33] In its capacity as a treaty-monitoring body, the UNHRC has also questioned states as to whether parents are required to disclose their religious or philosophical beliefs when requesting an exemption for their children, inferring that it should be enough for them to state that religious instruction is incompatible with their beliefs.[34] The UNHRC has also made it clear that students not wishing to attend religious education classes should not be obliged to declare their religion.[35] The Committee has also emphasised that where opt-out provisions are available, children whose parents do exercise those rights must not be made to feel like the 'black sheep' of the class.[36]

Hartikainen et al. v. Finland (1984)

The first occasion in which the UNHRC considered the parental rights was in 1984 in *Hartikainen et al. v. Finland*. Therein, the UNHRC approved the provision of religious instruction in State schools, provided the convictions of parents and guardians who do not believe in any religion were recognised through an ability to withdraw their children from that instruction. The UNHRC concluded that schools providing religious instruction are to respect the convictions of parents and guardians who do not believe in any religion through the provision of an exemption that enables the child to access 'neutral

[32] See the list of examples provided in *The Right of the Child to Religious Freedom in International Law* Sylvie Langlaude, 85-6.
[32] See the list of examples provided in *The Right of the Child to Religious Freedom in International Law* Sylvie Langlaude, 85-6.
[33] *The Right of the Child to Religious Freedom in International Law,* Sylvie Langlaude, 87.
[34] Human Rights Committee, Summary Record of the 1786th meeting: Ireland, UN Doc. CCPR/C?SR. 1786, paragraph 20 (1999).
[35] Human Rights Committee, Concluding Observations: Greece, UN Doc. CCPR/CO/83/GRC, paragraph 14 (2005).
[36] Human Rights Committee, *Summary Record of the 1936th meeting: Ireland,* UN Doc. CCPR/C/SR.1936 paragraph 30 (2001).

and objective' alternative teaching, which teaching may include teaching in the history of religion and ethics:

> The Committee does not consider that the requirement of the relevant provisions of Finnish legislation that instruction in the study of the history of religions and ethics should be given instead of religious instruction to students in schools whose parents or legal guardians object to religious instruction is in itself incompatible with article 18 (4), if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion.

In so doing it affirmed that religious instruction in public schools was permissible provided exemptions were available which enable parents to direct children to alternative instruction that is itself provided in a 'neutral and objective' way. The Committee considered that the requirements of Article 18(4) were met by the Finnish legislation providing for religious instruction in schools as:

> paragraph 6 of the School System Act expressly permits any parents or guardians who do not wish their children to be given either religious instruction or instruction in the study of the history of religions and ethics to obtain exemption therefrom by arranging for them to receive comparable instruction outside of school.[37]

Waldman v Canada (1999)

In *Waldman v Canada* the UNHRC applied the prohibition on discrimination in Article 26 of the ICCPR to private schooling, finding that Canada's refusal to fund private Jewish schools amounted to discrimination in light of the fact that Canada funded private Catholic schools. In his concurring opinion, Scheinin M linked a State's acquittal of Article 18(4) to its ability to avoid discrimination against religious parents:

> In general, arrangements in the field of religious education that are in compliance with article 18 are likely to be in conformity with article 26 as well, because non-discrimination is a fundamental component in the test under article 18 (4).[38]

Failure to recognize the rights of parents to protect their children from teaching that detrimentally impacts upon the religious and moral education of their children would be a form of discrimination that is not reasonable and objective within the terms of the Covenant.[39] This is because the detriment

[37] Communication No. 40/1978 Paragraph 10.4.
[38] Paragraph 3.
[39] General Comment 18, paragraph 13.

placed upon such parents arises *because of* their religious or moral convictions and in a way that does not occur comparably for other parents.

Leirvåg and ors v. Norway (2004)

That Article 18(4) protects the right of parents to excuse their children from religious instruction that is inconsistent with their religious or moral convictions was again affirmed in *Leirvåg and ors v. Norway (Leirvåg).*[40] There is no provision in the ICCPR that would limit the same principle from applying where a public education authority allows for instruction to be made available by external providers, whether in curriculum time or in extra-curriculum time. In that matter the UNHRC found that Norway's system of religious education which required dissenting parents to identify the aspects of the teaching to which they had a philosophical or religious objection breached Article 18(4).

Partial exemption regime

A partial exemption only was available to parents - a full exemption was not provided by statute. This, it was asserted, was to fulfil the purposes of the program, which were

> to combat prejudices and discrimination, and to cater for mutual respect and tolerance between different groups religions and life stances as well as a better understanding of one's background and identity. Another explicit aim was to contribute to the enhancement of a collective cultural identity.[41]

For this reason the State party considered 'unnecessary a full exemption as the subject is multidisciplinary, with components of social science, world religions, philosophy and ethics, in addition to Christian knowledge.'[42]

The evidence was that students had been required to participate in religious activities, despite the fact that the State asserted that it had attempted to set up an exemption regime that operated to give parents an exemption in respect of 'activities that clearly may be perceived to be of a religious nature' as listed by the State,[43] as opposed to the impartation of knowledge on religious matters. The regime allowed for a further stream of:

> exemption … be granted from other activities, provided that they may reasonably be perceived as being the practice of another religion or adherence to another philosophy of life. For these cases, parents must present brief reasons for their request to enable the schools to

[40] *Leirvåg and ors v. Norway* C/82/D/1155/2003.
[41] 9.13.
[42] 11.2.
[43] 9.18.

> consider whether the activity may reasonably be perceived as the practice of another religion or adherence to another life philosophy.[44]

The State party claimed that 'The partial exemption arrangement provides for exemptions from certain activities but not from certain knowledge. Consequently, the pupils may be exempted from praying but not from knowing the prayer.'[45] The authors of the complaint asserted that:

> religious doctrines form an uncritical basis, availing their daughter of no opportunity or means to distance herself from, make any reservation against, or criticize the basis. Guro started to use certain expressions that indicate that the things she learns about Christianity are synonymous with "good". [46]

'Neutral and objective'

The Committee asserted that the exemption regime is not compliant with the Covenant as, even when exercised, the teaching the students were exposed to was not 'neutral and objective':

> The Committee concludes that the teaching of CKREE cannot be said to meet the requirement of being delivered in a neutral and objective way, unless the system of exemption in fact leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective.[47]

Importantly, the Committee placed weight upon the authors own subjective assertion that they themselves perceived that the education was not given in a neutral and objective way:

> the research results invoked by the authors, and from their personal experience that the subject has elements that are not perceived by them as being imparted in a neutral and objective way. The Committee concludes that the teaching of CKREE cannot be said to meet the requirement of being delivered in a neutral and objective way, unless the system of exemption in fact leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective.[48]

Importantly, it should be said in reply to the Committee' view that, it is not enough that an exemption be given only for teaching that is not 'neutral and objective'. This does not provide sufficient resources for mutually acceptable outcomes, as what is 'neutral and objective' may be legitimately contested by differing parties. Religious convictions may be offended by certain teaching that could be considered

[44] 9.18.
[45] 10.5.
[46] 3.2.
[47] 14.3.
[48] 14.3

to be 'neutral and objective' by a majority, but is not considered to be neutral by a minority when considered against the moral and religious worldview of parents.

'Conflict of Loyalties'

The Committee was particularly focussed on the prospect of a situation in which 'a conflict of loyalties arose between school and home':

> Against her parents' will, Guro found herself in a situation where a conflict of loyalties arose between school and home. The situation is such that Guro feels obliged to adapt what she tells her parents about school to match what she feels is acceptable to her parents.[49]
>
> The authors submit that their daughter was on at least two occasions instructed to learn and recite psalms and Bible texts in connection with the end of term Christmas celebrations. The children were also required to learn a number of psalms and Bible texts by heart, a fact that is confirmed by their workbooks. As a result of the religious instruction, Pia often experienced conflicts of loyalty between her home and her school.[50]

Similarly the authors asserted that 'the introduction of the CKREE has lowered the respect for their own life stances.'[51] The Committee concluded that 'loyalty conflicts experienced by the children' illustrated the fact that the State exemption regime did not comply with Article 18(4) of the Covenant.[52] As has been confirmed by the European Court of Human Rights in its own equivalent jurisdiction (see the discussion at Part III below), the same principles are applicable to sex education. These principles clearly support the Bill as a statutory articulation permitting the exercise of the parental rights in New South Wales.

Indoctrination

The authors also contended that:

> In relation to the children, it is submitted their right to choose and hold a religion or life stance of their own is violated, in that the compulsory CKREE subject forces them to participate in a learning process that includes indoctrination into the direction of a religious/Christian life stance. The authors have no wish to be incorporated in such a religious/Christian conception of reality.[53]

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[50] 5.3.
[50] 5.3.
[51] 7.4.
[53] 7.7.
[53] 7.7.

The State party conceded that:

> the applicable law, regulations or instructions may be incorrectly applied in individual cases. Some teachers may include themes or choose words for their instruction that may be found indoctrinating or that particular schools or municipalities may practice the exemption clause in a manner that is inconsistent with the Act and the secondary legislation.[54]

Teacher education is critical to avoiding such a circumstance within sex education.

Detriment to the Exempted Child

The Committee noted that:

> Maria attended segments of the tutoring under the partial exemption arrangement. The authors state that Maria on several cases came home from school and said that she had been teased because her family did not believe in God.[55]

The authors asserted that:

> In relation to the children, it is submitted that the partial exemption means that they shall not participate in the activity stipulated in the syllabus, but would gradually obtain the same knowledge of the theme in question as other pupils. The approach of those exempted to the material will therefore be qualitatively inferior to the other pupils. This entails a sense of being different which can be experienced as problematic and creates a sense of insecurity and conflicts of loyalty.[56]

The evidence obtained by the authors was 'that both children and parents (and in all likelihood the school) experience conflicts of loyalty, pressure to conform and acquiesce to the norm, and for some of the children bullying and a feeling of helplessness.'[57] Referencing *Leirvåg,* the former United Nations Special Rapporteur on freedom of religion or belief has noted:

> Such instruction must not be a mandatory requirement and it should always be connected with the option of receiving a low-threshold exemption. Requests for an exemption must not lead to any punitive consequences and must not influence the assessment of the general performance of students in school.[58]

[54] 9.5.
[55] 4.2.
[56] 7.12.
[57] 2.5.
[58]

Discrimination Arising due to Absence of Exemption

Although due to the finding of breach on Article 18(4), the Committee did not proceed to consider the claim of breach of Article 26 pertaining to non-discrimination, it did offer the following view:

> The State party challenged the admissibility of the authors' claim under article 26 because of non-substantiation, since the exemption clause under the Norwegian Education Act applies to all parents, regardless of their religion or life stance. The Committee does not share this view. Consideration of whether there has been a differentiation between Christians and other groups, and whether such differentiation is based on objective and reasonable criteria, would be part of the merits consideration. The Committee considers that the authors have sufficiently demonstrated, for purposes of admissibility, that the exemption arrangements applicable to the CKREE subject may differentiate between non-Christian parents and Christian parents and that such differentiation may amount to discrimination within the meaning of article 26.[59]

As noted in respect of the comments of Sheinin M in *Waldman v Canada,* by the same principle, failure to recognize the rights of parents to protect their children from teaching that detrimentally impacts upon the religious and moral education of their children would be a form of discrimination that is not reasonable and objective within the terms of the Covenant.[60]

Concluding Remarks

In conclusion, the Committee considered that a range of factors, including the requirement that the exemption right be exercised with respect to the specific aspects of the curriculum that they had identified as inconsistent with their convictions, and also the requirement to give reasons for the requested exemption did not comply with the Covenant:

> 14.6 The Committee considers, however, that even in the abstract, the present system of partial exemption imposes a considerable burden on persons in the position of the authors, insofar as it requires them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek – and justify – exemption from. Nor would it be implausible to expect that such persons would be deterred from exercising that right, insofar as a regime of partial exemption could create problems for children which are different from those that may be present in a total exemption scheme. Indeed as the experience of the authors demonstrates, the system of exemptions does not currently protect the liberty of

[59] 13.5.
[60] General Comment 18, paragraph 13.

parents to ensure that the religious and moral education of their children is in conformity with their own convictions. In this respect, the Committee notes that the CKREE subject combines education on religious knowledge with practising a particular religious belief, e.g. learning by heart of prayers, singing religious hymns or attendance at religious services (para 9.18). While it is true that in these cases parents may claim exemption from these activities by ticking a box on a form, the CKREE scheme does not ensure that education of religious knowledge and religious practice are separated in a way that makes the exemption scheme practicable.

14.7 In the Committee's view, the difficulties encountered by the authors, in particular the fact that Maria Jansen and Pia Suzanne Orning had to recite religious texts in the context of a Christmas celebration although they were enrolled in the exemption scheme, as well as the loyalty conflicts experienced by the children, amply illustrate these difficulties. Furthermore, the requirement to give reasons for exempting children from lessons focusing on imparting religious knowledge and the absence of clear indications as to what kind of reasons would be accepted creates a further obstacle for parents who seek to ensure that their children are not exposed to certain religious ideas. In the Committee's view, the present framework of CKREE, including the current regime of exemptions, as it has been implemented in respect of the authors, constitutes a violation of article 18, paragraph 4, of the Covenant in their respect.

Although, as a result of this conclusion, the Committee did not consider the allegation of a breach of the right to privacy under Article 17, or formally consider the breach of Article 26, the Committee clearly considered that the compulsion to provide reasons was inconsistent with Article 18(4).

Part III - European Court of Human Rights Jurisprudence

A ruling of the European Court of Human Rights (ECHR) is not binding in Australian law. It is however influential as a statement of the requirements of international human rights law, to which Australian courts look for guidance and may be informative in considering the application of human rights law to religious educational institutions.[61] As noted above, the Court's decisions have also been influential in the decisions of the United Nations Human Rights Committee concerning ICCPR rights, as in many respects, the ECHR and ICCPR provide closely aligned, mirroring rights.

Article 2 of the First Optional Protocol states:

[61] See for example *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] AVSCA 75. As a further example, reference to such judgements may be had by Courts applying the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).

> 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.

As noted by Rivers:

> [t]he two sentences of the article are connected, in that parents have the prior duty to ensure that children receive an education, and the right to determine what that education shall be. State provision is only legitimate if it respects this prior parental responsibility.[62]

The European Court of Human Rights has provided this overview of its own jurisprudence pertaining to Article 2 of the First Protocol:

> The word "respect" means more than "acknowledge" or "taken into account"; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State (*Campbell and Cosans v. the United Kingdom*, § 37). As to the word "convictions", taken on its own, it is not synonymous with the terms "opinions" and "ideas". It denotes views that attain a certain level of cogency, seriousness, cohesion and importance (*Valsamis v. Greece*, §§ 25 and 27). The refusal of parents to accept corporal punishment at their child's school was thus covered by their philosophical convictions (Campbell and Cosans v. the United Kingdom, § 36).
>
> Article 2 of Protocol No. 1 applies to all subjects and not only religious instruction. Sexual education and ethics thus fall within the scope of Article 2 of Protocol No. 1 (Jimenez Alonso and Jimenez Merino v. Spain; Dojan and Others v. Germany (dec.); Appel-Irrgang and Others v. Germany).
>
> Moreover, the provision applies to both the content of the teaching and the manner of its provision. Article 2 of Protocol No. 1 thus also applied to an obligation to parade outside the school precincts on a holiday. The Court was surprised that pupils could be required to take part in such an event on pain of suspension from school – even if only for a limited time. However, it found that such commemorations of national events served, in their way, both pacifist objectives and the public interest, and that the presence of military representatives at some of the parades did not in itself alter the nature of those parades. Furthermore, the obligation on the pupil did not deprive her parents of their right to enlighten and advise their

[62] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 245, commenting upon the decision of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711.

> children, or to guide their children on a path in line with the parents' own religious or philosophical convictions (*Efstratiou v. Greece*, § 32; *Valsamis v. Greece*, § 31).
>
> The setting and planning of the curriculum fall in principle within the competence of the Contracting States (ibid., § 28) and there is nothing to prevent it containing information or knowledge of a religious or philosophical nature (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, § 53).[63]

In his summary of the ECHR jurisprudence, Julian Rivers concludes that:

> international human rights law is arguably pointing in the direction of a general parental right to exempt children from any school activity on grounds of religion or belief. Of course, there must be a plausibility threshold. It is accepted that the objection must meet a certain level of 'cogency, seriousness, cohesion and importance'. But courts—and anyone for that matter—should be cautious before concluding that a person's perception of forced breach of their own commitments, or unwilling complicity in another religion or belief, is simply wrong.[64]

We turn to consider the specific relevant decisions further below.

The Relevance of the Margin of Appreciation Doctrine to NSW

The ECHR has on several occasions left the content of permissible religious education and sex education teaching to the 'margin of appreciation' it affords to States when determining their human rights obligations, when determining what comprises a legitimate aim in limiting those rights and when determining what comprises the appropriate balance between competing rights.[65] The 'margin of appreciation' doctrine provides that:

> According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference [with a human right] is necessary.[66]

That doctrine provides that, subject to consideration of the nature of the right, the aims pursued, as well as the presence or absence of a European consensus, the Court will leave to the domestic authorities the determination as to the proper effectuation of human rights. The ECHR applies the

[63] https://www.echr.coe.int/Documents/Guide_Art_2_Protocol_1_ENG.pdf, cited 27 February 2019, paragraphs 57 – 60.
[64] 251.
[65] [89]
[66] *Ladele v the London Borough of Islington* [2009] EWCA Civ 1357, 84.

doctrine as it considers that these local authorities are often best placed to weight the relevant local democratic, cultural, political and other factors.

It is important to note that the consequence of the application of the 'margin of appreciation' doctrine to the content of the curriculum is that the teaching on sex education it has permitted States to provide cannot be said to be mandated under its jurisprudence. Instead such teaching is within the permissible range that may be provided. However, for the same reason, the exercise of an exemption to excuse children from such teaching is also within the States permissible 'margin of appreciation'. Accordingly, the ECHR rulings concerning sex education canvassed below do not amount to statements that the outcomes are required to be applied to all domestic jurisdictions. By the 'margin of appreciation' doctrine, it is entirely open to conclude that there would be nothing precluding a European State Party from providing that parents could exercise an exemption in respect of the particular content. Although the 'margin of appreciation' doctrine is not applicable to the United Nations jurisprudence under the ICCPR, assuming the application of the ECHR's reasoning, and consistent with the analysis provided above, assuming the application of that doctrine, it would be open to New South Wales to adopt a regime that provides a high level of accommodation to parental concern for the religious and moral education of their children in the context of sex education, as is reflected in the Bill.

Specifically, as further set out below, in one of its seminal original judgements adopting the 'margin of appreciation', the Court left the consideration of what is morally acceptable in the context of publications containing sexual content directed at children to the margin of appreciation accorded to States. This decision has not been subsequently distinguished.[67] Thus although various judgements of the ECHR have left untouched the content of curriculum on sex education (subject to the boundary line that any teaching must be conveyed in an objective, critical and pluralistic manner and not comprise indoctrination), it remains within the permissible margin of appreciation for States to determine their own acceptable regimes. In effect, notwithstanding the ECHR's judgements on the content of sex education in public schools, by application of the 'margin of appreciation doctrine', if NSW were subject to ECHR jurisprudence, it would be open to New South Wales to adopt the Bill and its requirements in respect teaching on matters such as homosexuality and gender fluidity. To say such is to provide a point of mere clarification, noting that the margin of appreciation doctrine does not apply to New South Wales. Rather, as a State within the Federated Australian Commonwealth, the applicable standard applying to New Souths Wales is that set out in the ICCPR, as ratified by the

[67] A more recent equivalent example may be found in *Mouvement raëlien suisse v. Switzerland*, 201

Commonwealth (in accordance with Article 50 of the ICCPR). The margin of appreciation doctrine has not been adopted with the jurisprudence of the ICCPR.

Kjeldsen, Busk Madsen and Pedersen v Denmark (1976)

The seminal judgement in the jurisprudence of the ECHR is *Kjeldsen, Busk Madsen and Pedersen v Denmark (Kjeldsen)*. The decision considered the objection of various parents to mandated sex education in public schools. The Court rejected the contention of the State party that the Article 2 only extends to religious instruction, instead affirming that the parental right applies across the entire curriculum, including sex education:

> The Government pleaded in the alternative that the second sentence of Article 2 (P1-2), assuming that it governed even the State schools where attendance is not obligatory, implies solely the right for parents to have their children exempted from classes offering "religious instruction of a denominational character".
>
> The Court does not share this view. Article 2 (P1-2), which applies to each of the State's functions in relation to education and to teaching, 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.[68]

In an oft-quoted passage, the Court set down the following requirements:

> The second sentence of Article 2 (P1-2) 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.[69]

The Court considered that the requirement that 'information or knowledge must be conveyed in an objective, critical and pluralistic manner'[70] would not be met by material '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'.[71]

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[68] [51].
[69] [53].
[70] [53]
[71] [54]

In finding that the allowance for parents to exercise their exemption rights in respect of sex education fell within the scope of Article 2, the Court emphasised that article is a key protection of pluralism in a modern democratic state:

> The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.[72]

Importantly, the Court recognized that

> The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education [stated in the first sentence of Article 2 (P1-2)]. 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.[73]

As noted by Rivers '[t]he two sentences of the article are connected, in that parents have the prior duty to ensure that children receive an education, and the right to determine what that education shall be. State provision is only legitimate if it respects this prior parental responsibility.'[74] The primacy of the parental obligation in the education of children is an important foundational principle that is reflected in the Bill.

In *Kjeldsen*, the also ECHR also warned that, within the context of sex education in public schools:

> 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.[75]

In his dissent, Verdross J said:

> it seems to me necessary to distinguish between, on the one hand, factual information on human sexuality that comes within the scope of the natural sciences, above all biology, and,

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[72] [49]
[73] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711, 22.
[74] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 245, commenting upon the decision of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711.
[75] [54]

> on the other hand, information concerning sexual practices, including contraception. This distinction is required, in my view, by the fact that the former is neutral from the standpoint of morality whereas the latter, even if it is communicated to minors in an objective fashion, always affects the development of their consciences. It follows that even objective information on sexual activity when given too early at school can violate the Christian convictions of parents. The latter accordingly have the right to object.[76]

Rivers argues that the Court effectively applied Verdross J's approach in the next major case on Article 2 of the First Protocol, providing that a State could adopt a system of corporal punishment in public schools, provided that the objection of parents to such punishment was given due regard.[77]

The Court also noted the important role private schools play in offering an opportunity for parents to excuse their children from sex education that does not align with their religious or philosophical convictions:

> the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions.[78]

Thus, Article 2 will be breached where a state's education system fails to make reasonable provision for parental convictions across the entire education system. The presence of alternative private religious schools was held to be a critical component of a state's ability to satisfy this requirement.

Handyside v United Kingdom (1976)

It is also pertinent to note that the *Kjeldsen* judgement was delivered in the same year as the seminal judgement of the Court in *Handyside v United Kingdom.*[79] That judgement represents one of the Court's earliest statements of the margin of appreciation, applied to the notion of a State's unique conception of morality. Salient to the circumstances of this note, the matter concerned the publication of a Danish children's book that discussed sexual behaviour in explicit terms. While it had been

[76] Page 28.
[77] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010), 246.
[78] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711, 24.
[79] *Handyside v United Kingdom* (Application no. 5493/72), 7 December 1976.

published in other contracting states, the applicant publisher was convicted under domestic United Kingdom laws prohibiting offensive publication. The Court held:

> it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them…[80]
>
> Here again, the national margin of appreciation and the optional nature of the "restrictions" and "penalties" referred to in Article 10 para. 2 (art. 10-2) prevent the Court from accepting the argument. The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, inter alia, to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the Inner London Quarter Sessions was a breach of Article 10 (art. 10). Besides, some of the editions published outside the United Kingdom do not include the passages, or at least not all the passages, cited in the judgment of 29 October 1971 as striking examples of a tendency to "deprave and corrupt".[81]

Salient to the matters considered in this note, the Court considered that the publication could have the effect of convincing very young children to engage in activities that might be harmful to them, and so accepted as the aim the protection of the morals of young people. It noted that the publication:

> included, above all in the section on sex and in the passage headed "Be yourself" in the chapter on pupils (paragraph 32 above), sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences. In these circumstances, despite the variety and the constant evolution in the United Kingdom of views on ethics and education, the competent English judges were entitled, in the exercise of their

[80] [48]
[81] [57]

> discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it.[82]

The decision is mentioned, as it is informative of the position that the Court has taken in allowing States to determine the permissible content of material provided to children and which is relevant to morality. Specifically, the Court has left the consideration of what is morally acceptable in the context of childhood education and sex to the margin of appreciation accorded to States. This decision has not subsequently been distinguished.[83] Thus although various judgements of the ECHR have left untouched the content of curriculum on sex education, it remains within the permissible margin of appreciation for States to determine their own acceptable regimes (subject to the proviso that any teaching must be conveyed in an objective, critical and pluralistic manner and not comprise indoctrination). This would extend to teaching on matters such as homosexuality and gender fluidity.

Folgerø and others v Norway (2007)

The authors in *Folgerø* were common complainants with those authors who took their complaint to the UNHRC in *Leirvåg*. The complaint thus concerned the partial exemption regime for religious instruction discussed in detail above in respect of *Leirvåg*. The ECHR has provided this summary of its judgement:

> It is sometimes necessary, if the parents' philosophical convictions are to be respected, for pupils to have the possibility of being exempted from certain classes. In the case of *Folgerø and Others v. Norway* [GC] (§§ 95-100), a refusal to grant the applicant parents full exemption from "Christianity, religion and philosophy" classes for their children in State primary schools gave rise to a violation of Article 2 of Protocol No. 1. Not only quantitative but even qualitative differences applied to the teaching of Christianity as compared to that of other religions and philosophies. There was admittedly the possibility of partial exemption but it related to the activity as such, not to the knowledge to be transmitted through the activity concerned. This distinction between activity and knowledge must not only have been complicated to operate in practice but also seems likely to have substantially diminished the effectiveness of the right to a partial exemption as such. The system of partial exemption was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and the potential for conflict was likely to deter them from making such requests.[84]

[82] [52]
[83] A more recent example may be found in *Mouvement raëlien suisse v. Switzerland*, 201
[84] , 62.

Importantly, the Court regarded that the fact that the teaching gave particular emphasis on Christianity to be within the 'margin of appreciation':

> That being so, the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court's opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (see, mutatis mutandis, *Angeleni v. Sweden*, no 10491/83, Commission decision of 3 December 1986, Decisions and Reports 51). In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State's margin of appreciation in planning and setting the curriculum.[85]

However on closer analysis, the Court considered that the teaching could not satisfy the requirements of Article 2 of the First Protocol in the absence of an effective exemption regime. Similar to the UNHRC, the ECHR had regard to the detrimental effect on the exempted children and developed its analysis in part through the lens of a 'conflict of loyalty' test:

> as a result of the partial-exemption arrangement, the relationship between parent and child suffered. The children's function as a "go-between" between the parents and the school and the children's feeling of pressure from being different from others had caused frustration and conflicts of loyalty between the applicants and their children, as had their sense of stigmatisation ... The applicants had experienced how their children had suffered under the pressure of being different from other children, acting as "go-betweens" between the home and the school and living with conflicts of loyalty. An exempted pupil might be removed from the classroom and placed in a separate room or might remain in the classroom and be told not to listen or to participate in the activity concerned. The arrangement offered ample potential for conflict and stigmatisation.[86]

The Court noted its prior findings that:

> 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

[85] [89]
[86] [66-67]

> importance (see *Valsamis*, cited above, §§ 25 and 27, and *Campbell and Cosans*, cited above, §§ 36-37)…[87]

The Court had specific regard to the effect of the teaching on the 'pupils' minds':

> Moreover, section 2-4(4) implied that pupils could engage in "religious activities", which would in particular include prayers, psalms, the learning of religious texts by heart and the participation in plays of a religious nature (see paragraphs 23-24 above). … In the Court's view, it can be assumed that participation in at least some of the activities concerned, especially in the case of young children (see, mutatis mutandis, *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V), would be capable of affecting pupils' minds in a manner giving rise to an issue under Article 2 of Protocol No. 1.[88]

Similar outcomes may follow from the teaching of 'gender fluidity'. Considering the ability of parents to exercise their partial exemption rights, the Court criticised the level of effort required by parents:

> the operation of the partial-exemption arrangement presupposed, firstly, that the parents concerned be adequately informed of the details of the lesson plans to be able to identify and notify to the school in advance those parts of the teaching that would be incompatible with their own convictions and beliefs. This could be a challenging task not only for parents but also for teachers, who often had difficulty in working out and dispatching to the parents a detailed lesson plan in advance … In the absence of any formal obligation for teachers to follow textbooks … it must have been difficult for parents to keep themselves constantly informed about the contents of the teaching that went on in the classroom and to single out incompatible parts. To do so must have been even more difficult where it was the general Christian leaning of the KRL subject that posed a problem.[89]

The Court also criticised the obligation to give reasons for the request:

> save in instances where the exemption request concerned clearly religious activities – where no grounds had to be given – it was a condition for obtaining partial exemption that the parents give reasonable grounds for their request ... The Court observes that information about personal religious and philosophical conviction concerns some of the most intimate aspects of private life. It agrees with the Supreme Court that imposing an obligation on parents to disclose detailed information to the school authorities about their religious and

[87] [84(c)]
[88] [91].
[89] [97].

> philosophical convictions may constitute a violation of Article 8 of the Convention and possibly also of Article 9 (ibid.). In the present instance, it is important to note that there was no obligation as such for parents to disclose their own convictions. Moreover, Circular F-03-98 drew the school authorities' attention to the need to take duly into account the parents' right to respect for their private life (ibid.). The Court finds, nonetheless, that inherent in the condition to give reasonable grounds was a risk that the parents might feel compelled to disclose to the school authorities intimate aspects of their own religious and philosophical convictions. The risk of such compulsion was all the more present in view of the difficulties highlighted above for parents in identifying the parts of the teaching that they considered as amounting to the practice of another religion or adherence to another philosophy of life. In addition, the question whether a request for exemption was reasonable was apparently a potential breeding ground for conflict, a situation that parents might prefer simply to avoid by not expressing a wish for exemption.[90]

The Court was also concerned by the distinction that was drawn by the State between participation in religious activities and the transmission of knowledge through the observance of those activities:

> even in the event that a parental note requesting partial exemption was deemed reasonable, this did not necessarily mean that the pupil concerned would be exempted from the part of the curriculum in question. Section 2-4 provided that "the school shall as far as possible seek to find solutions by facilitating differentiated teaching within the school curriculum". A detailed outline with examples of how differentiated teaching was to be implemented may be found in Circular F-03-98, from which it can be seen that the teacher was to apply, in cooperation with the parents, a flexible approach, having regard to the parents' religious or philosophical affiliation and to the kind of activity in issue. The Court notes in particular that for a number of activities, for instance prayers, the singing of hymns, church services and school plays, it was proposed that observation by attendance could suitably replace involvement through participation, the basic idea being that, with a view to preserving the interest of transmitting knowledge in accordance with the curriculum, the exemption should relate to the activity as such, not to the knowledge to be transmitted through the activity concerned (see paragraph 48 above). However, in the Court's view, this distinction between activity and knowledge must not only have been complicated to operate in practice but also

[90] [98].

> seems likely to have substantially diminished the effectiveness of the right to a partial exemption as such.[91]

Importantly the ECHR held that the ability of parents to place their children in private schooling did not absolve the State of its obligations in respect of the content of teaching in public schools. It stated that 'the Court considers that, in the instant case, the existence of such a possibility [of parents to seek alternative education in private schools] could not dispense the State from its obligation to safeguard pluralism in State schools which are open to everyone.'[92]

As a result of these factors the Court concluded that the 'refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation of Article 2 of Protocol No. 1.'[93]

Hasan and Zengin v Turkey (2008)

Hasan and Zengin v Turkey considered a complaint against religious instruction provided in Turkish public schools that was lodged by a follower of Alevism, a branch of Islam that differs from the majority Sunni branch in Turkey. The complaint asserted that the instruction was not neutral in its depiction of Alevism. The Court again emphasised the pivotal role that individual teaching preference can play:

> 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 (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 54).[94]

In particular the Court applied its long-standing aversion to State assessments of the legitimacy of religious belief to the parental right:

> The Court reiterates that it has always stressed that, in a pluralist democratic society, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, judgment

[91] [98].
[92] *Folgerø [*101].
[9393] *Folgerø* [102].
[94] Paragraph 53.

> of 26 September 1996, Reports 1996-IV, p. 1365, § 47, and *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI).[95]

The Court again drew on its 'conflict of loyalty' analysis:

> Where a Contracting State includes religious instruction in the curriculum for study, it is then necessary, in so far as possible, to avoid a situation where pupils face a conflict between the religious education given by the school and the religious or philosophical convictions of their parents.[96]

The Court again noted that the obligation to disclose one's religious convictions was inconsistent with the Convention. The fact that schools retained absolute discretion to refuse the request also meant that the parental right was not adequately protected:

> In this connection, it notes that, according to Article 24 of the Turkish Constitution, "no one shall be compelled ... to reveal religious beliefs and convictions...". Furthermore, it reiterates that it has always stressed that religious convictions are a matter of individual conscience (see, inter alia, *Sofianopoulos and Others v. Greece* (dec.), nos. 1977/02, 1988/02 and 1997/02, ECHR 2002-X, and also, mutatis mutandis, *Buscarini and Others*, cited above, § 39)…
>
> The Court notes that, according to the Government, this possibility for exemption may be extended to other convictions if such a request is submitted. Nonetheless, whatever the scope of this exemption, the fact that parents are obliged to inform the school authorities of their religious or philosophical convictions makes this an inappropriate means of ensuring respect for their freedom of conviction. In addition, in the absence of any clear text, the school authorities always have the option of refusing such requests, as in Ms Zengin's case.
>
> In consequence, the Court considers that the exemption procedure is not an appropriate method and does not provide sufficient protection to those parents who could legitimately consider that the subject taught is likely to give rise in their children to a conflict of allegiance between the school and their own values. This is especially so where no possibility for an appropriate choice has been envisaged for the children of parents who have a religious or philosophical conviction other than that of Sunni Islam, where the procedure for *exemption is likely to subject the latter to a heavy burden and to the necessity of disclosing their religious*

[95] Paragraph 54.
[96] Paragraph 69.

or philosophical convictions in order to have their children exempted from the lessons in religion (internal references omitted).[97]

Appel-Irrgang and Others v. Germany (2009)

In *Appel-Irrgang and Others v. Germany* concerned an objection to compulsory attendance at ethics classes. The Court reiterated its prior rulings on the parental right:

> 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.[98]

In respect of the obligations placed on teachers the Court said:

> although in the course outline it was expected that teachers would have their own point of view about the ethical issues addressed in the classes and explain it to their pupils in a credible manner, they were not allowed to unduly influence the pupils

Again the Court applied the margin of appreciation to determine that the scope of the exemption falls within the permissible discretion left to the State:

> The Berlin legislature's view that the stated objectives would be better achieved through one common compulsory class rather than separating pupils on the basis of which religious or philosophical groups they belong to or addressing the subject of ethics during other classes falls within the State's margin of appreciation and is a question of expediency which, in principle, it is not for the Court to review (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 53, Series A no. 23; *Jiménez Alonso and Jiménez Merino v. Spain* (dec.), no. 51188/99, ECHR 2000-VI; and *Valsamis v. Greece*, 18 December 1996, §§ 28, 31 and 32, Reports of Judgments and Decisions 1996-VI)…
>
> 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, a provision

[97] Paragraph 73, 75-6.
[98]

which imposes an obligation on the State to secure to children their right to education (see *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 27, Series A no. 247-C, and *Martins Casimiro and Cerveira Ferreira v. Luxembourg* (dec.), no. 44888/98, 27 April 1999). The Court therefore concludes that the Berlin authorities were not obliged to provide for a general exemption from the ethics classes.

Dojan v Germany (2011)

Dojan v Germany was an admissibility decision that concerned sex education in public schools. Along with the judgement in *Kjeldsen, Dojan v Germany* provides authority that the parental right does extend to sex education. The Court has provided this summary of the decision:

> The possibility of an exemption does not have to be offered systematically. In the case of *Dojan and Others v. Germany* (dec.), compulsory sexual education classes were on the curriculum of primary school pupils. The school had decided that a theatre workshop would be organised at regular intervals as a mandatory event for the purpose of raising awareness of the problem of sexual abuse of children. In addition, it was a school tradition to organise an annual carnival celebration, but there was an alternative activity for children who did not wish to attend. The applicants prevented their children from taking part in all or some of the above-mentioned activities and were consequently fined. When two of the parents refused to pay they were imprisoned. The Court observed that the sex-education classes at issue aimed at the neutral transmission of knowledge regarding procreation, contraception, pregnancy and child birth in accordance with the underlying legal provisions and the ensuing guidelines and the curriculum, which were based on current scientific and educational standards. The theatre workshop was consonant with the principles of pluralism and objectivity. As to the carnival celebrations at issue, these were not accompanied by any religious activities and in any event the children had the possibility of attending alternative events. Consequently, the refusal to exempt the children from classes and activities that were regarded by their parents as incompatible with their religious convictions was not in breach of Article 2 of Protocol No. 1. In the same vein, the Court took the view that the inclusion of compulsory secular ethics classes without any possibility of exemption fell within the margin of appreciation afforded to States under Article 2 of Protocol No. 1 (Appel-Irrgang and Others v. Germany).

In the view of the complainant applicants, the materials '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.'[99] They asserted that the teaching:

> was incompatible with their religious convictions to make a child's own feelings and will the basis of his or her sexual behaviour, as this would encourage them to act according to their sexual desire like an adult, lose their sense of shame and engage in sexual acts with adults. The biblical doctrine of chastity, limiting sexuality to matrimony, constituted sufficient protection against sexual abuse and there was no scientific proof that the theatre workshop had a preventive effect in this respect.[100]

Citing *Kjeldsen* the Court noted that:

> 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 (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 51). 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 Court outlined its existing jurisprudence as follows:

> 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 (see *Valsamis v. Greece*, 18 December 1996, § 28, Reports of Judgments and Decisions 1996-VI). In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent the States from disseminating in State schools, by means of the teaching given, objective information or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 53). 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. The same is true of religious affinities if one observes the existence of religions forming a very broad dogmatic and moral belief system which has or may have answers to every question of a philosophical, cosmological or moral nature (ibid, § 53).

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> The second sentence of Article 2 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 (see *Folgerø and Others*, cited above, § 84).

The Court provided the following description of the teaching in question:

> 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 child birth 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.

Importantly, the Court held that the following boundary line is to be observed, that the information be 'conveyed in an objective, critical and pluralistic manner' and should not

> put into question the parents' sexual education of their children based on their religious convictions or [influence] the children … to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions

Critically, the Court again employed its unique 'margin of appreciation' doctrine to find that the particular curriculum content falls within the discretion permitted to the State (with the boundary line being that any teaching must be conveyed in an objective, critical and pluralistic manner and not comprise indoctrination):

> 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 (*Hasan and Eylem Zengin*, cited above, § 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 and Others v. Germany* (dec.), no. 45216/07, 6 October 2009). …
>
> In the light of the above considerations, the Court considers that, in refusing exemption from the compulsory sex education classes, theatre workshop and carnival celebrations, the national authorities have not overstepped the margin of appreciation accorded to them within the scope of Article 2 of Protocol No. 1.[101]

As noted above, given the application of the margin of appreciation doctrine to the permissible curriculum content, with the result that teaching such as considered in *Dojan* is within the permissible range that may be provided, similarly, the exercise of an exemption to excuse children from such teaching is also within the States permissible 'margin of appreciation'. The Bill, through its prohibition on 'gender fluidity' seeks to prevent the State from pursuing (in the words of the ECHR) 'an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions… the limit that must not be exceeded'. Relying on the conflict of loyalty analysis adopted in *Folgerø* and *Hasan and Zengin v Turkey*, it can be asserted that that the Bill seeks to ensure that (again in the words of the ECHR) 'the education provided [does not] put into question the parents' sexual education of their children based on their religious convictions' and to ensure that 'children [are not] influenced to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions'.

Mansur Yalcin and others v Turkey (2015)

This most recent judgement on Article 2 of the First Protocol follows on from *Hasan and Zengin v Turkey*, and was made by members of the Alevi faith in respect of the provisions of the Turkish religious instruction curriculum that were modified subsequent to *Hasan and Zengin v Turkey*. Again, the Court relied on an assessment of whether a 'conflict of loyalties' could arise, noting that the applicants asserted:

> the fact that the surahs of the Koran and the practice of prayer (Salat) were regarded as elements to be acquired meant that children were liable to face a conflict of allegiances with the beliefs handed down by their parents…[102]

101

102 [68].

> Where a Contracting State includes religious instruction in the curriculum for study, it is then necessary, in so far as possible, to avoid a situation where pupils face a conflict between the religious instruction given by the school and the religious or philosophical convictions of their parents.[103]

The Court held:

> in view of the particular features of the Alevi faith compared with the Sunni understanding of Islam (see *Hasan and Eylem Zengin*), and in view also of the applicants' submissions, which are borne out by several studies produced before the domestic courts and before this Court, the Court considers that the applicants could legitimately consider that the arrangements for teaching the subject in question are liable to create a conflict of allegiance for their children between their school and their own values, giving rise to a possible issue under Article 2 of Protocol No. 1 to the Convention.[104]

On the question of the assessment of the applicant's claims as to the content of their religion and whether the teaching gave rise to a conflict with their religious convictions the Court emphasised the importance of the subjective understanding of the complainant:

> The State's duty of neutrality and impartiality excludes any discretion on its part to determine whether religious beliefs or the means used to express such beliefs are legitimate… Religious and philosophical beliefs concern individuals' attitudes towards religion, an area in which even subjective perceptions may be important [omitting citations][105]

The Court considered that the disparity between the belief system of the parents and the teaching provided in the school 'could not easily be bridged to an adequate extent'. This disparity could not be bridged simply by the fact that parents retained their ability to guide their children within their private educational directions:

> Admittedly, parents may always enlighten and advise their children, exercise with regard to their children natural parental functions as educators, or guide their children on a path in line with the parents' own religious or philosophical convictions (see *Valsamis*, cited above, § 31 in fine). Nevertheless, in the Court's view, the disparity complained of by the applicants between, on the one hand, the approach taken by the syllabus and, on the other hand, the particular features of their faith when compared with the Sunni understanding of Islam is such

[103] [72].
[104] [71]
[105] *Mansur Yalcin* [70].

> that it could not easily be bridged to an adequate extent solely by means of the information concerning Alevi beliefs and practice inserted in the textbooks. As to the Government's argument that more detailed information could be imparted to pupils in the context of the optional religion classes, the Court considers that this possibility does not exempt the State from its obligation to ensure that the teaching of such compulsory subjects satisfies the criteria of objectivity and pluralism while respecting religious or philosophical beliefs.[106]

The Court concluded:

> Consequently, notwithstanding the significant changes made in 2011/12 to the syllabus for religious culture and ethics and to the corresponding textbooks, it appears that the education system of the respondent State still does not provide appropriate means in order to ensure that parents' convictions are respected. In particular, the Court notes that the Turkish education system offers no appropriate options for the children of parents who have a religious or philosophical conviction other than that of Sunni Islam, and that the very limited procedure for exemption is likely to subject pupils' parents to a heavy burden and to the necessity of disclosing their religious or philosophical convictions in order to have their children exempted from the lessons in religion. There has therefore been a violation of Article 2 of Protocol No. 1 in the present case.[107]

Mark Sneddon, Executive Director, Institute for Civil Society
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3. Promote a sensible and civil discussion about how to balance competing rights and freedoms in Australian society.

[106] [75]
[107] [77].