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<https://doi.org/10.1163/26663236-bja10020>

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The Inclusion of Sexual Orientation and Gender Identity in Relationships Education

Faith-Based Objections and the European Convention on Human Rights

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Abstract

All primary schools in England are under a statutory requirement to provide 'relationships education', which includes 'LGBT content'. The inclusion of content relating to sexual orientation and gender identity has attracted faith-based opposition. Such opposition, which is based on assertions about relationships education interfering with the right of parents to ensure that the education of their children is in conformity with their religious convictions, is likely to lead to legal action in the English courts and perhaps the European Court of Human Rights. This article anticipates the claims that would be made in any such legal action and critically interrogates them through the lens of the European Convention on Human Rights.

Keywords

European Convention on Human Rights – parental rights – relationships education
– religion – SOGI

1 Introduction

In this article we critically interrogate faith-based objections to the introduction of mandatory relationships education (hereinafter ‘RE’) in English primary schools. We do so in the context of widespread hostility to the inclusion of ‘LGBT content’¹ – which we refer to throughout this article as content relating to sexual orientation and gender identity (hereinafter ‘SOGI’) – in primary school teaching. Such hostility has become manifest in a number of ways, most visibly in the form of public protests against teaching in particular schools, which has received widespread coverage in mainstream media. The commencement of the statutory framework regulating RE in primary schools is likely to intensify this hostility.² This is because the statutory framework applies to all primary schools in England, which means that RE must be taught in all state-funded schools³ and fee-paying independent schools. This includes all ‘faith schools’ – schools which are designated as having a religious character – which make up approximately one third of state-funded schools in England.⁴ As a consequence, parents who object, on grounds of faith, to a child being taught SOGI content in RE in a primary school in England have no capacity to withdraw a child from that specific teaching, or the scope to move a child to another school to avoid such teaching.

This article attempts to anticipate the legal claims that could be made by those who may seek to challenge, on religious grounds, the statutory framework regulating RE in primary schools. We interrogate these claims through the lens of the European Convention on Human Rights (hereinafter ‘ECHR’) and critically assess their merits in light of the relevant jurisprudence of the European Court of Human Rights (hereinafter ‘ECtHR’). We do so on the basis that the ECHR would be of central relevance to the core issues raised by any legal dispute in relation to the teaching of SOGI content in RE. The introduction of RE has already been said, for example, to potentially infringe rights and freedoms guaranteed by the ECHR, not least Article 2 of Protocol 1

1 Department for Education, ‘Relationships Education, Relationships and Sex Education (RSE) and Health Education: Statutory Guidance for Governing Bodies, Proprietors, Head Teachers, Principals, Senior Leadership Teams, Teachers’ (25 June 2019) para 37.

2 The statutory framework regulating RE comprises primary and secondary legislation, as well as guidance (Department for Education, ‘Statutory Guidance’ (n 1)), which we discuss in detail below.

3 This includes local education authority maintained schools and schools that receive funding directly from the Department for Education.

4 R Long and S Danечи, ‘Faith Schools in England: FAQ s’ (House of Commons Library Briefing Paper 06972, 20 December 2019) 4.

ECtHR (right to education; hereinafter 'P1-2').⁵ One faith-based group is already pursuing a judicial review of the statutory framework regulating RE on the grounds that it constitutes an 'unlawful interference with important parental rights'.⁶ Moreover, it has been argued that the teaching of SOGI content in RE creates a competition – or, as it is commonly described in mainstream, popular discourse, a 'clash' – between the right of individuals to freedom of religion (under Article 9 ECHR) and the right of individuals to respect for their private and family lives, which includes the intimate aspects of sexual orientation and gender identity (under Article 8 ECHR).⁷ The jurisprudence of the ECtHR would, therefore, be central to any legal consideration of the issues in dispute in the English courts – which are required, when determining a question arising in connection with an ECHR right, to take into account relevant ECtHR jurisprudence⁸ – as well as to any complaints made to the ECtHR.

Our focus in this article is on the statutory framework regulating RE in primary schools and we do not consider, except where it is relevant to RE, the statutory framework regulating Relationships and Sex Education (hereinafter 'RSE') in secondary schools. This is because the main focus of the challenges to the teaching of SOGI content is currently on the teaching of primary school age children. Although this article focuses on the teaching of SOGI content in RE in English primary schools, it addresses a broader issue that is relevant to a wide range of societies around the world, namely the issue of the extent to which religious belief should form a legitimate basis for limiting or preventing actions or activities related to SOGI. This issue is pertinent in many European societies, which have recently undergone a significant transformation in respect of enhancing rights and freedoms for lesbian, gay, bisexual, and transgender people (hereinafter 'LGBT'), whilst also witnessing a 'backlash' against the development of these rights and, in some cases, an attempt to roll them back.⁹

5 See, for example, HL Deb 24 April 2019, vol 797, col 640, Lord Curry of Kirkharle.

6 Let Kids Be Kids Coalition, 'JR & Case Updates': <<https://letkidsbekidscoalition.org/judicial-review>>. Permission to apply for judicial review has been refused on the grounds of being out of time (*Colchester, R. (On the Application Of) v Secretary of State for Education* [2020] EWHC 3376 (Admin)), but the group is seeking to appeal this decision. A key argument advanced is that aspects of the statutory framework regulating RE encourage or lead to the teaching of 'moral/ideological views' contrary to parents' religious or philosophical convictions and, in so doing, fail to encourage 'plurality' in education and amount to 'indoctrination' (ibid [3]). We discuss the substance of these claims throughout the article.

7 See, for example, S Maini-Thompson, 'LGBT Relationships and the School Curriculum: A Human Rights Analysis' (UK Human Rights Blog, 4 June 2019): <<https://ukhumanrightsblog.com/2019/06/04/lgbt-relationships-and-the-school-curriculum-a-human-rights-analysis>>.

8 Human Rights Act 1998, s 2(1).

9 This 'backlash' is widely acknowledged. For example, the Steering Committee for Human Rights of the Council of Europe has addressed 'the wider human rights backlash led by populist

This hostility to LGBT rights is, in some cases, based on and motivated by the religious faith of individuals and communities, as demonstrated in the recent jurisprudence of the ECtHR.¹⁰ This article thus seeks to answer one aspect of a broader question relevant to many societies, which is the question of when and to what extent rights and freedoms associated with religious belief should provide a basis for 'exemptions' from legislative measures designed to enhance equality for LGBT people.

Our answer to this question is largely based on doctrinal analysis, since our aim is to show how the domestic courts and/or the ECtHR may respond, in light of extant ECHR jurisprudence, to a legal challenge to the statutory framework regulating RE. We do, however, recognise that the issue in dispute goes beyond legal doctrine and embraces broader questions about the nature and extent of religious freedoms in liberal democratic societies. There is a growing body of literature that addresses social, philosophical, and political questions about religious human rights and freedoms in contemporary European democratic societies,¹¹ and the appropriateness and merits of accommodating faith-based objections, either at an individual or organisational level, to measures designed to eliminate discrimination against LGBT people.¹² Whilst we

or far-right groups, which consider LGBT defenders among their first targets'. See, Council of Europe Steering Committee for Human Rights (CDDH), 'CDDH Report on the Implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity' (Adopted by the CDDH at its 92nd Meeting, 26–29 November 2019) para 53.

- 10 See, for example, the prohibition of gay pride events in the Russian Federation on the basis that, inter alia, they are 'incompatible with the "religious doctrines for the majority of the population" [and] would be perceived by believers as an intentional insult to their religious feelings and a "terrible debasement of their human dignity"'. *Alekseyev v Russia* 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010) para 59.
- 11 For example, see, W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1996); R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005); GB Levey and T Modood (eds), *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press 2009); R Sandberg, *Law and Religion* (Cambridge University Press 2011); M Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Ashgate 2012).
- 12 For a discussion, see, R Sandberg and N Doe, 'Religious Exemptions in Discrimination Law' (2007) 66(2) *The Cambridge Law Journal* 302; I Leigh, 'Recent Developments in Religious Liberty' (2009) 11(1) *Ecclesiastical Law Journal* 65; CF Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29(4) *Oxford Journal of Legal Studies* 729; D Cooper and D Herman, 'Up Against the Property Logic of Equality Law: Conservative Christian Accommodation Claims and Gay Rights' (2013) 21(1) *Feminist Legal Studies* 61; E Bonthuys, 'Irrational Accommodation: Conscience, Religion and Same-Sex Marriages in South Africa' (2008) 125(3) *South African Law Journal* 473; LS Underkuffler, 'Odious Discrimination and the Religious Exemption Question' (2010–11) 32(5) *Cardozo Law Review* 2069; D Nejaime,

are not explicitly concerned with addressing these broader social, philosophical, and political questions, we recognise that, given the controversial nature of these issues, they are undoubtedly relevant and would likely be raised by the parties in any legal dispute. The social, philosophical, and political positions adopted by individual judges may also result in decisive disagreements, in both the domestic courts and the ECtHR, about the extent to which religious freedoms can be lawfully curtailed to pursue the legitimate aim of protecting LGBT people in a democratic society – disagreements which might result in ‘heated’ disputes over the extent to which, as ECtHR Judges Vučinić and De Gaetano contentiously put it, legal measures favour “gay rights” over fundamental human rights’.¹³

We also recognise that our analysis is focused on a legal issue that currently concerns only one of the 47 member states over which the ECtHR has jurisdiction: that is, the only state to have introduced compulsory RE involving SOGI content for primary school children.¹⁴ As such, as we explain below, any case in the ECtHR is likely to principally focus on whether the UK, in having introduced this measure, has exceeded the margin of appreciation available to it.¹⁵ This would be similar to the approach taken by the ECtHR in *Eweida*

‘Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination’ (2012) 100 *California Law Review* 1169; NM Stolzenberg and D Nejaime, ‘Introduction: Religious Accommodation in the Age of Civil Rights’ (2015) 38 *Harvard Journal of Law and Gender* vii; J Lindberg, ‘Renegotiating the Role of Majority Churches in Nordic Parliamentary Debates on Same-Sex Unions’ (2016) 58(1) *Journal of Church and State* 80; P Johnson and RM Vanderbeck, ‘Sacred Spaces, Sacred Words: Religion and Same-Sex Marriage in England and Wales’ (2017) 44 (2) *Journal of Law and Society* 228.

13 *Eweida and Others v the United Kingdom* 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) Joint Partly Dissenting Opinion of Judges Vučinić and De Gaetano para 5.

14 See, Council of Europe CDDH (n 9) para 84. The Steering Committee for Human Rights concluded, on the basis of the data that it collected from member states, that ‘Belgium and the United Kingdom were the only states that indicated a move towards mandatory LGBT-inclusive curricula’ (ibid). In the case of Belgium, mandatory SOGI content is in respect of the first year of secondary school. Only the UK, according to these data, mandates SOGI content, in relation to RE, in primary schools.

15 We consider issues related to the concept of the margin of appreciation throughout this article. The concept has long been central to ECHR jurisprudence and arises from the principle that states have the primary responsibility to secure the rights and freedoms defined in the ECHR and that, in doing so, they enjoy a margin of appreciation subject to the supervisory jurisdiction of the ECtHR. The concept and use of the margin of appreciation by the ECtHR is multifarious and, therefore, we limit our consideration of it to ECHR jurisprudence that is directly relevant to the issues in dispute. For a general overview of the concept of the margin of appreciation, see, A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012).

and *Others v the United Kingdom*,¹⁶ which concerned the question of whether anti-discrimination measures relating to sexual orientation limited freedom of religion or belief to the extent that they violated the ECHR. We recognise that our consideration of aspects of the margin of appreciation is ‘context dependent’¹⁷ to the specific legal framework in place in the UK and, as such, that the relevant factors for determining a state’s available margin would differ in other contexts. For example, determining a state’s margin would be very different in a case in which an applicant complained about the absence of compulsory RE and SOGI content in primary schools and asserted that the state is under a positive obligation to provide it. In such a case, issues relevant to assessing a state’s margin – not least, the absence or existence of a European consensus¹⁸ – would likely be approached very differently by the ECtHR to the ways that we suggest the ECtHR would approach a complaint concerning the negative obligation of the state to abstain from introducing a form of compulsory education that interferes with ECHR rights. One key difference would be that, if asked to consider whether a state is under a positive obligation to introduce compulsory RE involving SOGI content, the ECtHR would proceed cautiously, acknowledging the ‘deep-rooted social and cultural connotations’¹⁹ of objections to SOGI content and the lack of consensus across member states in approaches to education, and be sensitive to the problems of ‘legitimacy’ that would arise from imposing such a positive obligation.²⁰ The ECtHR may invoke its long-standing principle that, because of their ‘direct and continuous contact with the vital forces of their countries’,²¹ it is for the national authorities to decide this issue. As we explore below, applying this principle in the context of any complaint against the UK would allow the ECtHR to decide issues ‘narrowly’, deferring to the UK’s margin and thereby avoiding larger questions about positive obligations upon states.

16 *Eweida and Others* (n 13) para 106, in respect of Ms Ladele’s complaint, and para 109, in respect of Mr McFarlane’s complaint.

17 N Lavender, ‘The Problem of the Margin of Appreciation’ (1997) 4 *European Human Rights Law Review* 380, 384.

18 For example, see, D Kagiros, ‘When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights’, in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights and Beyond*, P Kapotas and V Tzevelekos (eds), (Cambridge University Press 2019) 283. We discuss the relevance of European consensus below.

19 *Schalk and Kopf v Austria* 30141/04 (ECtHR, 24 June 2010) para 62.

20 For a discussion, see, K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015).

21 *Handyside v the United Kingdom* 5493/72 (ECtHR, 7 December 1976) para 48.

We begin the article by outlining the development and content of the statutory framework regulating RE in respect of the teaching of SOGI content. We then provide an overview and assessment of recent objections to the teaching of SOGI content in primary schools, which have been concurrent with the development of the statutory framework regulating RE. We then consider four key claims that we anticipate, from our assessment of recent objections to the teaching of SOGI content, would be central to any legal challenge to the statutory framework regulating RE. These four claims are that the teaching of SOGI content in RE: amounts to the ‘indoctrination’ of children and encourages their early sexualisation; disregards parents’ religious beliefs and undermines their authority; is not ‘age appropriate’ for primary school children; and discriminates against parents on the grounds of religious belief. In interrogating these four claims in light of existing ECHR jurisprudence, we provide an assessment of the likelihood of such claims forming a basis for establishing that the statutory framework regulating RE is in violation of one or more provisions of the ECHR. We reach the conclusion that claims brought under the ECHR relating to indoctrination, age-appropriateness, and discrimination are unlikely to be successful. With respect to claims regarding parental authority, and specifically parental ‘choice’, we reach the conclusion that the inability of parents to enrol a child in an independent fee-paying school to avoid a child receiving RE may be found to amount to a violation of the ECHR, but that a claim in respect of the lack of opportunity for parents to exempt a child from RE in a state school would be unlikely to be successful.

2 The Statutory Framework Regulating RE

In this section we provide an overview of the development, between 2017 and 2020, of the statutory framework that now regulates RE in primary schools in England.²² This development began in March 2017, when the then Secretary of State for Education, Justine Greening MP, announced her intention ‘to put relationships and sex education on a statutory footing’ with the aim of

22 For an in-depth history of the law prior to 2017, see, P Cumper, ‘Sex Education and Human Rights—a Lawyer’s Perspective’ (2004) 4(2) *Sex Education* 125; LA Hall, ‘In Ignorance and in Knowledge: Reflections on the History of Sex Education in Britain’, in *Shaping Sexual Knowledge: A Cultural History of Sex Education in Twentieth Century Europe*, LDH Sauerteig and R Davidson (eds), (Routledge 2009) 19; P Johnson and RM Vanderbeck, *Law, Religion and Homosexuality* (Routledge 2014); RM Vanderbeck and Paul Johnson, ‘The Promotion of British Values: Sexual Orientation Equality, Religion, and England’s Schools’ (2016) 30(3) *International Journal of Law, Policy and the Family* 292.

ensuring that ‘every child has access to age-appropriate provision, in a consistent way’.²³ To achieve this, Greening stated that provision would be made in primary legislation to place a duty on the Secretary of State for Education to make regulations requiring all primary schools in England to teach age-appropriate RE and all secondary schools in England to teach age-appropriate RSE.²⁴ Greening also stated that ‘faith schools will continue to be able to teach in accordance with the tenets of their faith’.²⁵ A policy statement issued by the Department for Education stated that the aim of the legislation would be to ‘ensure universal coverage for all pupils and improved quality’ in respect of RE, and that teaching would cover certain ‘themes and issues’, such as different types of relationships (including friendships, family relationships, and dealing with strangers) and how to recognise, understand, and build healthy relationships (including self-respect and respect for others, commitment, and tolerance), in an age-appropriate way.²⁶

On this basis, the UK Parliament made provision in the Children and Social Work Act 2017 to require regulations to be made requiring RE to be provided to pupils of compulsory school age receiving primary education at all schools in England.²⁷ The 2017 Act required that the regulations must include provisions requiring guidance to be given to schools, for schools to have regard to this guidance, and for schools to be required to make statements of policy in relation to the education to be provided and to make such statements available to parents or other persons.²⁸ Unlike in respect of RSE, no requirement was made for regulations to make provision about the circumstances in which a pupil could be excused from receiving RE.²⁹ The House of Commons, at report stage of the Children and Social Work Bill, did not accept a proposed amendment that would have allowed a parent of any pupil receiving RE to request that the pupil be excused from receiving that education.³⁰ The 2017 Act further specifies that guidance is to be given with a view to ensuring that, when RE is taught, ‘the education is appropriate having regard to the age and the religious background of the pupils’.³¹ This was welcomed by those concerned

23 HC Deb 1 March 2017, vol 622, col 10WS.

24 Ibid.

25 Ibid col 11WS.

26 Department for Education, ‘Policy Statement: Relationships Education, Relationships and Sex Education, and Personal, Social, Health and Economic Education’ (1 March 2017) 1 and 3.

27 Children and Social Work Act 2017, s 34(1)(a).

28 Ibid s 34(2)(a)-(c).

29 Ibid s 34(2)(d).

30 HC Deb 7 March 2017, vol 622, col 723, amendment (a), Sir Edward Leigh MP.

31 Children and Social Work Act 2017, s 34(3)(b).

with protecting the role of religion in the education of children, including the Church of England, which, as the Bishop of Peterborough stated, 'believes very strongly that all forms of education have to be in co-operation and partnership with parents, faith communities and, indeed, the wider community'.³² In this respect, the Bishop of Peterborough noted that the focus of the legislation on 'age-appropriate and religious background-appropriate education is entirely right and proper' because '[c]hildren must be allowed to be children'.³³

In December 2017, the Department for Education issued a call for evidence on the teaching of RE and RSE,³⁴ and in July 2018 a consultation was opened on draft statutory guidance and regulations.³⁵ The draft guidance contained a short general statement on the teaching of LGBT content, which explained that '[s]chools are free to determine how they address LGBT specific content, but the Department recommends that it is integral throughout the programmes of study'.³⁶ No explicit mention was made of 'LGBT content' in the part of the draft guidance specifically relating to RE, where the focus was placed on, for example, ensuring that children learn that '[f]amilies of many forms provide a nurturing environment for children' and that care is taken 'to ensure that there is no stigmatisation of children based on their home circumstances'.³⁷ On this basis, the draft guidance proposed that by the end of primary school children should know 'that others' families, either in school or in the wider world, sometimes look different from their family, but that they should respect those differences' and, in this respect, that marriage is available to both opposite and same-sex couples.³⁸ The draft guidance also recognised that primary-age pupils will often ask 'tricky questions' pertaining to sex or sexuality, which go beyond RE (sex education not being a requirement of RE), and that a school's policy should cover how the school handles such questions.³⁹

32 HL Deb 4 April 2017, vol 782, col 971.

33 Ibid.

34 Department for Education, 'Education Secretary Launches RSE Call for Evidence' (19 December 2017): <<https://www.gov.uk/government/news/education-secretary-launches-rse-call-for-evidence>>.

35 Department for Education, 'Relationships Education, Relationships and Sex Education, and Health Education' (19 July 2018): <<https://consult.education.gov.uk/pshe/relationships-education-rse-health-education>>.

36 Department for Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education: Guidance for Governing Bodies, Proprietors, Head Teachers, Principals, Senior Leadership Teams, Teachers' (July 2018) para 33.

37 Ibid para 55.

38 Ibid 16.

39 Ibid para 59.

A large proportion of responses to the consultation disagreed with the position taken in the draft guidance on the teaching of LGBT content.⁴⁰ Some respondents felt that ‘primary children’ were ‘too young to be taught about LGBT’, while others ‘felt it was important for children to be aware of LGBT content’.⁴¹ The government’s response was that ‘these two differing points of view cannot both be accommodated’ in the guidance and that, as such, the following principles should be applied:

Pupils should be able to understand the world in which they are growing up, which means understanding that some people are LGBT, that this should be respected in British society, and that the law affords them and their relationships recognition and protections. Pupils growing up in families with LGBT members, or who are beginning to understand that they are or may be LGBT themselves, should feel that Relationships Education and RSE is relevant to them.⁴²

The government stated that, in light of this, ‘the right approach to teaching about LGBT’ is that schools should make decisions about what is appropriate to teach with respect to the age and development of their pupils, and that they ought to involve their parent body in these decisions.⁴³ On this basis, the following statement was included in revised draft guidance:

Schools should ensure that all of their teaching is sensitive and age appropriate in approach and content. At the point at which schools consider it appropriate to teach their pupils about LGBT, they should ensure that this content is fully integrated into their programmes of study for this area of the curriculum rather than delivered as a stand-alone unit or lesson. Schools are free to determine how they do this, and we expect all

⁴⁰ Department for Education, ‘Relationships Education, Relationships and Sex Education, and Health Education in England: Government Consultation Response’ (February 2019) para 24. Out of 373 comments specifically about the teaching of LGBT content in the context of RE and RSE, there were ‘views polarised between those who were against the teaching of LGBT [content] (185) and those who thought [that the teaching of] LGBT [content] should be compulsory education for all (77)’ (ibid 33).

⁴¹ Ibid para 24. Overall, in respect of RE in primary schools, 58% of respondents disagreed that the content of RE is ‘age appropriate for primary schools’ and 60% of respondents considered that the draft guidance would not provide primary school pupils with ‘sufficient knowledge to help them have positive relationships’ (ibid 31).

⁴² Ibid para 25.

⁴³ Ibid.

pupils to have been taught LGBT content at a timely point as part of this area of the curriculum.⁴⁴

The draft guidance was also amended, with respect to teaching about families, to make specific provision for teaching about 'LGBT parents'.⁴⁵

When the draft regulations were considered by Parliament some concerns were raised in the House of Lords about the impact of RE on the 'long-established right [...] for parents to withdraw their children from subjects where there is likely to be teaching that clashes with the views of the family' which, it was asserted, is a right based on 'an acknowledgement that the responsibility for children's moral and religious education lies first and foremost with parents'.⁴⁶ In light of this, the House of Lords gave some consideration to the relevance of P1-2 ECHR and, specifically, whether it provides a right for parents to withdraw a child from education not in accordance with their religious convictions. Lord Curry of Kirkharle felt that P1-2 was relevant to the 'right of withdrawal' that parents should have in respect of RE,⁴⁷ whereas Lord Mackay of Clashfern stated that the issue of 'withdrawal' did not have 'much bearing' on this aspect of the ECHR.⁴⁸ The general view of their Lordships, however, was that an appropriate balance had been struck in respect of the rights of parents and the teaching of SOGI content because, as Lord Cashman stated,

whether a parent wishes to teach a child outside school according to their faith or none is entirely up to them. But, please, let us remember that people of all faiths and none are also lesbian, gay, bisexual and trans. It is vital that children and LGBT children receive comprehensive and inclusive sex and relationships education.⁴⁹

The regulations were made in May 2019⁵⁰ and the final guidance was published in June 2019.⁵¹ The regulations amend relevant primary and secondary

44 Department for Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education: Draft Statutory Guidance for Governing Bodies, Proprietors, Head Teachers, Principals, Senior Leadership Teams, Teachers' (February 2019) para 37.

45 Ibid para 59.

46 Lord Curry of Kirkharle (n 5).

47 Ibid.

48 HL Deb (n 5) col 643.

49 Ibid col 635.

50 Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, SI 924/2019.

51 Department for Education, 'Statutory Guidance' (n 1).

legislation to make provision requiring RE to be provided to pupils in maintained schools (by making RE part of the basic curriculum) and in non-maintained and independent schools (by making RE compulsory).⁵² The guidance confirms that the mandatory requirement to provide RE applies to all schools, and provides an overview of what children must learn by the end of primary school. In respect of teaching SOGI content, the guidance repeats the text contained in the previous draft guidance (quoted above), which begins with the principle that 'schools should ensure that the needs of all pupils are appropriately met, and that all pupils understand the importance of equality and respect'.⁵³ The guidance also reminds schools that they must comply with relevant provisions in the Equality Act 2010 (which we discuss below), under which sexual orientation and gender reassignment are protected characteristics. Provisions in the Equality Act 2010 allow schools 'to take positive action' and, in this respect, they 'should be alive to issues such as [...] homophobia and gender stereotypes and take positive action to build a culture where these are not tolerated, and any occurrences are identified and tackled'.⁵⁴ Sarah Hewitt-Clarkson (the headteacher of Anderton Park Primary School, discussed below) has argued that the emphasis placed on what schools 'should' do in respect of SOGI content and the discretion that they are given to achieve this, alongside the emphasis on what they 'must' do in respect of the Equality Act 2010, creates 'grey areas and mixed messages'.⁵⁵

The guidance also includes the requirement that all schools must take into account the religious background of all pupils when planning teaching, 'so that the topics that are included [...] are appropriately handled'.⁵⁶ In this respect, the guidance states that all schools may teach about faith perspectives and that 'schools with a religious character may teach the distinctive faith perspective on relationships'.⁵⁷ Importantly, however, all teaching 'should reflect the law [...] as it applies to relationships, so that young people clearly understand what the law allows and does not allow, and the wider legal implications of decisions they may make'.⁵⁸ Sex education is not a requirement of RE in primary schools and, if a primary school decides that they need to include any

52 Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, SI 924/2019 reg 2 and schedule.

53 Department for Education, 'Statutory Guidance' (n 1) para 36.

54 Ibid paras 29 and 31.

55 A Gibbons, 'Change RSE Policy or Prejudices Will Take Root' (Tes, 9 October 2020): <<https://www.tes.com/news/change-rse-policy-or-prejudices-will-take-root>>.

56 Department for Education, 'Statutory Guidance' (n 1) para 20.

57 Ibid para 21.

58 Ibid para 22.

additional content on sex education, they must allow parents a right to withdraw their children.⁵⁹

The changes made by the regulations to RE in primary school came into force on 1 September 2020.⁶⁰ In July 2020, the government confirmed that, in light of the coronavirus pandemic, schools that are not ready to teach or are unable to adequately meet the requirements because of the challenging circumstances, should 'aim to start preparations to deliver the new curriculum as soon as possible and start teaching the new content by at least the start of the summer term 2021'.⁶¹ If a school cannot start teaching until the start of the summer term 2021, it needs to decide how much of the content it will be able to cover and how it will cover the whole curriculum in the future.⁶²

3 Faith-Based Objections to SOGI Content in RE

In this section we provide an overview and assessment of recent faith-based objections to the inclusion of SOGI content in RE in primary schools. In many ways, these objections can be seen to continue a longstanding hostility towards schools – and particularly, faith schools – teaching material related to homosexuality.⁶³ The dispute over the extent to which schools should include such material in the education that they provide has been characterised by some commentators as 'the latest battleground in the culture wars' between religion and sexual orientation.⁶⁴ This 'war' has a long history, with its best-known 'battle' consisting of the 15-year struggle over the passage and repeal of so-called 'Section 28', which prohibited local authorities from promoting homosexuality in schools and other contexts.⁶⁵ Since the repeal of Section

⁵⁹ Ibid para 68.

⁶⁰ Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, SI 924/2019 reg 1(2).

⁶¹ Department for Education, 'Implementation of Relationships Education, Relationships and Sex Education and Health Education 2020 to 2021' (9 July 2020): <<https://www.gov.uk/government/publications/relationships-education-relationships-and-sex-education-rse-and-health-education/implementation-of-relationships-education-relationships-and-sex-education-and-health-education-2020-to-2021>>.

⁶² Ibid.

⁶³ For discussion of this history, see, Vanderbeck and Johnson (n 22).

⁶⁴ A Higginson, 'Faith Schools: What Really Goes on Behind Closed Doors' (The Huffington Post, 5 July 2013): <https://www.huffingtonpost.co.uk/A.J.%20Higginson/faithschools-what-really-goes-on_b_3545981.html>.

⁶⁵ Local Government Act 1988, s 28 (creating Local Government Act 1986, s 2A). Repealed by Ethical Standards in Public Life etc. (Scotland) Act 2000; Local Government Act 2003.

28, debates have continued about how information about homosexuality is circulated, censored, and shaped in schools by programmes of sex education, religious education, and other aspects of the curriculum.⁶⁶ The character of faith-based challenges and objections to the teaching of SOGI content in schools has evolved in recent years. Given the significant recent advancement of LGBT equality in the UK – through, for example, the enactment of comprehensive equality legislation⁶⁷ and the making lawful of same-sex marriage⁶⁸ – faith-based arguments against the teaching of SOGI content in schools are no longer characterised by the explicit homophobia that was present in previous decades.⁶⁹ Rather, those who present faith-based objections to the teaching of SOGI content in schools focus principally on the threat that such teaching is alleged to pose to ‘religious freedom’.⁷⁰

A recent manifestation of faith-based objections to the teaching of SOGI content in schools occurred in Birmingham in 2019, at a time when the statutory framework regulating RE was being created. Between February and September 2019, up to 300 people gathered on a daily basis outside of two Birmingham primary schools to protest about the inclusion of SOGI content in the education being provided by the schools.⁷¹ The protests took the form of sustained demonstrations that included the use of megaphones and sound amplification systems, the making of public statements about school staff members, and the displaying of signs and placards. These demonstrations were reported to have a significant adverse impact on pupils and staff members at the schools. The headteacher of Anderton Park Primary School, Sarah Hewitt-Clarkson, received threatening calls,⁷² and several members of staff

66 For an in-depth discussion, see, Vanderbeck and Johnson (n 22).

67 For example, Equality Act 2010.

68 Marriage (Same Sex Couples) Act 2013; Marriage and Civil Partnership (Scotland) Act 2014; Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019, SI 1514/2019.

69 For an in-depth discussion see, Johnson and Vanderbeck, *Law, Religion and Homosexuality* (n 22).

70 Ibid.

71 The two schools are Anderton Park Primary School and Parkfield Community School.

72 Ms Hewitt-Clarkson received threatening emails, telephone calls, and messages warning her to ‘watch her back’ and was subject to verbal abuse by some protesters. For instance, a religious leader who took part in the protests described Ms Hewitt-Clarkson as ‘devilish’ and said that she ‘needs to be broken’. In recognition of her commitment to championing equality in schools, Ms Hewitt-Clarkson was chosen as the Tes person of the year and she received a Pride of Birmingham award. See, D Ferguson, ‘“We Can’t Give in”: The Birmingham School on the Frontline of Anti-LGBT Protests’ (The Guardian, 26 May 2019): <<https://www.theguardian.com/uk-news/2019/may/26/birmingham-anderton-park-primary-muslim-protests-lgbt-teaching-rights>>; N Parveen, ‘LGBT Lessons Protester “Inflamed Tensions” by Inviting Imam, Court Hears’ (The Guardian, 16 October 2019):

experienced 'physical and mental health difficulties'.⁷³ Andrew Moffat, the then deputy headteacher of Parkfield Community School, was criticised during the demonstrations because of his leadership role with the 'No Outsiders' programme⁷⁴ and received hostile communications stating, for example, that he 'wouldn't last long'.⁷⁵ Moreover, on at least one occasion a school was forced to close earlier in order to avoid pupils witnessing the protests outside the school gates.⁷⁶ In response to the demonstrations, Birmingham City Council took legal action to prevent protesters from gathering outside Anderton Park Primary School, which resulted in several interim and then a final injunction to restrict street protests outside the school.⁷⁷ The protests in Birmingham were not isolated episodes of faith-based opposition to the teaching of SOGI content in schools. Between March and June 2019, parent-led groups were set up to challenge teaching relating to SOGI in schools in other cities⁷⁸ and several primary schools in England began receiving letters objecting to the introduction of RE.⁷⁹ In light of this, the government emphasised that it was 'strengthening the requirements on schools to consult parents' on their RE policies to address the 'deeply held views on what is right to teach children about LGBT people'.⁸⁰

<<https://www.theguardian.com/uk-news/2019/oct/16/birmingham-lgbt-lessons-row-protester-invited-imam-high-court-hears>>; C Lough, 'Head "Bowled over" by Tes Person of the Year Honour' (Tes, 20 December 2019): <<https://www.tes.com/news/head-bowled-over-tes-person-year-honour>>; Pride of Birmingham Awards, 'Birmingham Winners 2020: Special Recognition – Sarah Hewitt-Clarkson': <<https://prideofbritain.com/birmingham/special-recognition-sarah-hewitt-clarkson>>.

73 *Birmingham CC v Afşar (No 3)* [2019] EWHC 3217 (QB) [94].

74 The 'No Outsiders' programme provides teaching resources for primary schools with the aim of teaching pupils about equality and promoting community cohesion 'through understanding and acceptance of difference'. This programme includes resources about all of the protected characteristics under the Equality Act 2010, including sexual orientation and gender reassignment. For an overview of this programme, see: <<https://no-outsiders.com/about-us>>.

75 'Birmingham LGBT Teaching Row: How Did it Unfold?' (BBC News, 22 May 2019): <<https://www.bbc.co.uk/news/uk-england-48351401>>.

76 Ferguson (n 72).

77 *Birmingham CC* (n 73).

78 See, N Parveen, 'Parents Complain to Manchester Schools About LGBT Lessons' (The Guardian, 19 March 2019): <<https://www.theguardian.com/education/2019/mar/19/fresh-complaints-about-lgbt-lessons-at-greater-manchester-primary-schools>>; 'LGBT School Lessons Protests Spread Nationwide' (BBC News, 16 May 2019): <<https://www.bbc.co.uk/news/uk-england-48294017>>; N Parveen, 'LGBT Lesson Protests Hijacked by Religious Extremists, MPs Say' (The Guardian, 24 May 2019): <<https://www.theguardian.com/education/2019/may/24/lgbt-lesson-protests-hijacked-religious-extremists-mps-say>>.

79 'LGBT School Lessons Protests' (n 78).

80 HC Deb 25 June 2019, vol 662, col 633, Nick Gibb MP.

The objections raised to the inclusion of SOGI content in primary school education since 2019 can be seen to focus on four key claims. First, SOGI content has been described as an ‘aggressive’ promotion of same-sex relationships⁸¹ that promotes ‘child sexualisation’⁸² and, on this basis, schools have been urged to ‘stop exploiting children’s innocence’⁸³ with teaching materials that encourage them to ‘enter into gay relationships’ and be ‘more promiscuous as they grow older’.⁸⁴ Secondly, SOGI content has been claimed to be in contradiction with the religious faith of parents and their ‘traditional family values’⁸⁵ and, in this respect, schools have been criticised for teaching pupils that ‘it is okay for you to be Muslim and for you to be gay’.⁸⁶ Thirdly, it has been claimed that primary school pupils are too young to learn about ‘gender and sexual relationship issues’⁸⁷ and unable to understand the concept of ‘two mummies and two daddies’.⁸⁸ Fourthly, it has been claimed that teaching SOGI content involves ‘discrimination’ against parents on grounds of religion (and, in some cases, ethnicity) because it exposes children to values that are fundamentally opposed to the religious faith of their parents.⁸⁹

These claims are now advanced by a number of faith-based groups that oppose the teaching of SOGI content in RE.⁹⁰ One of the most common claims made by these groups is that RE will ‘prematurely sexualise’ children,⁹¹ and

81 ‘Birmingham School LGBT Lessons Protest Investigated’ (BBC News, 8 March 2019): <<https://www.bbc.co.uk/news/uk-england-birmingham-47498446>>.

82 S Kotecha, ‘Birmingham LGBT Lessons: Head Teacher Threatened’ (BBC News, 20 May 2019): <<https://www.bbc.co.uk/news/uk-england-birmingham-48339080>>.

83 N Parveen, ‘Birmingham School Stops LGBT Lessons after Parents Protest’ (The Guardian, 4 March 2019): <<https://www.theguardian.com/education/2019/mar/04/birmingham-school-stops-lgbt-lessons-after-parent-protests>>.

84 ‘LGBT School Lessons Protests’ (n 78).

85 ‘Birmingham LGBT Teaching Row’ (n 75).

86 ‘Birmingham School LGBT Lessons Protest’ (n 81).

87 *Birmingham CC* (n 73) [74].

88 N Iqbal, ‘Birmingham School Row: “This is Made Out to Be Just Muslims v Gays. It’s Not”’ (The Guardian, 21 September 2019): <<https://www.theguardian.com/uk-news/2019/sep/21/birmingham-anderton-park-primary-school-row-parents-teachers-demonstrators>>.

89 *Birmingham CC* (n 73) [37].

90 Faith-based groups that object to the introduction of RE and RSE include: ‘40 Days’; ‘RSE Authentic’; ‘Let Kids Be Kids Coalition’; ‘School Gate Campaign’; ‘Stop RSE’; ‘ParentPower’; ‘Voice for Justice UK’; ‘The Values Foundation for Faith and Families in Education’. In materials produced by these groups, the words ‘RE’ and ‘RSE’ are often used interchangeably, and ‘RSE’ is often used to indicate both ‘RE’ and ‘RSE’. For a discussion about the link between these groups and international faith organisations, see, S Norris, ‘The Global Religious Right and its War on Relationship and Sex Education’ (Byline Times, 11 September 2020): <<https://bylinetimes.com/2020/09/11/the-global-religious-right-their-war-on-relationship-and-sex-education>>.

91 School Gate Campaign: <<https://schoolgatecampaign.org>>.

promote 'controversial secular liberal sexual beliefs' to the 'youngest of children who have no means of critical defence'.⁹² On this basis, parents have been urged to challenge RE in order to protect the 'safety and wellbeing of the nation's children and young people',⁹³ and to prevent a 'state-takeover of the parenting role' and an undermining of 'parental and religious authority'.⁹⁴ The requirement placed on faith schools to deliver RE has been described as an attack on 'foundational religious beliefs' and the imposition of the principle that 'all protected characteristics are equal, but some characteristics are more equal than others'.⁹⁵ These faith-based groups commonly assert that they are not motivated by homophobia but, rather, by the 'assault' upon the religious freedoms and human rights of parents and children created by the teaching of SOGI content.⁹⁶

The individuals and faith-based groups that object to the inclusion of SOGI content in RE engage in and encourage three key strategies of resistance. First, parents are encouraged to 'combine with other parents',⁹⁷ become 'proactive in school',⁹⁸ and 'take their child out' of school if necessary.⁹⁹ Some groups have provided letter templates that parents can send to headteachers and school governors, and offer parents 'on the spot advocacy and support'.¹⁰⁰ Secondly, some groups encourage the lobbying of parliamentarians to influence changes in policy and legislation.¹⁰¹ For example, one group has called for individuals to urge their MPs to 'delay the implementation' of RE and RSE and to 'restore the parental right of withdrawal' from these subjects.¹⁰² Thirdly, some groups advocate legal challenges to the statutory framework regulating RE on the basis that its 'politically motivated LGBT' content¹⁰³ violates rights recognised and protected by 'international and UK law'.¹⁰⁴

92 Stop RSE, 'Why "Stop" RSE': <<https://stoprse.com/index.php/whats-the-problem>>.

93 ParentPower: <<https://parentpower.family>>.

94 Stop RSE, 'Why "Stop" RSE' (n 92).

95 The Values Foundation for Faith and Families in Education, 'Mission': <<https://values.foundation/mission/>>.

96 'The Civil Rights of RSE' (ParentPower, October 2019): <<https://parentpower.family/wp-content/uploads/2019/10/CIVIL-RIGHTS-OF-RSE-PP.pdf>>. See also, The Values Foundation for Faith and Families in Education, 'Mission' (n 95).

97 'The Civil Rights of RSE' (n 96).

98 Stop RSE: <<https://stoprse.com>>.

99 'The Civil Rights of RSE' (n 96).

100 Ibid.

101 The Values Foundation for Faith and Families in Education: <<https://values.foundation>>.

102 'Action! Write to your MP' (ParentPower, 30 April 2020): <<https://parentpower.family/action-alert>>.

103 'Protect Children from Indoctrination' (ParentPower, 12 June 2020): <<https://parentpower.family/rse-right-of-withdrawal>>.

104 'Pushback' (ParentPower, 17 September 2020): <<https://parentpower.family/pushback>>.

Given the number of groups and individuals that have publicly stated their faith-based opposition to the statutory framework regulating RE, we think that it is highly likely that some individuals and groups will pursue legal action in order to challenge the inclusion of SOGI content. As we noted above, one faith-based group instigated, in 2020, proceedings for judicial review of the statutory framework regulating RE on the basis that it undermines 'parental rights to direct the upbringing of their children according to their religious and philosophical beliefs'.¹⁰⁵ Such judicial review has so far failed on the grounds that it was brought out of time,¹⁰⁶ but the group is committed to pursuing legal action in the higher courts.¹⁰⁷ Significantly, the Christian Institute is actively campaigning in this area and has, for example, expressed concern that RE provides 'an opportunity for campaign groups opposed to Christian teaching to push forward their controversial agendas in schools'.¹⁰⁸ The Christian Institute has a track record of supporting legal actions, taken in the defence of 'religious liberty', challenging measures designed to enhance and protect equality on the grounds of sexual orientation.¹⁰⁹ The recent history of such actions in the UK shows that the individual claimants who take action are often aided and resourced by faith-based campaign groups¹¹⁰ and the recent growth in 'crowd-funding' litigation increases the potential for individuals and faith-based groups to access funds to support their action.¹¹¹ Any legal action would likely be opposed by LGBT and other groups supportive of RE.¹¹²

105 Let Kids Be Kids Coalition, 'JR & Case Updates' (n 6).

106 *Colchester, R. (On the Application Of)* (n 6).

107 'Court of Appeal Is the Next Step...' (Let Kids be Kids Coalition, 23 December 2020): <<https://letkidsbekidscoalition.org/court-of-appeal-is-next>>.

108 The Christian Institute, 'Relationships and Sex Education': <<https://www.christian.org.uk/campaign/rse/>>.

109 The Christian Institute, 'Cases': <<https://www.christian.org.uk/case/>>.

110 The Christian Institute supported the applicants in, for example, *Bull and another (Appellants) v Hall and another (Respondents)* [2013] UKSC 73; *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49.

111 For example, via: <<https://www.crowdjustice.com/>>.

112 A number of groups and organisations actively support the inclusion of SOGI content in RE. For instance, Stonewall campaigns to 'ensure that all children receive an education which reflects themselves, their families, and which celebrates diversity' and offers teaching resources about SOGI for primary and secondary schools. Similarly, in response to the Birmingham protests, Humanists UK urged the Secretary of State for Education 'not to dilute guidance stipulating that independent schools must teach acceptance for LGBT people at both primary and secondary level' and a group of individuals and organisations, which include the National Secular Society and Southall Black Sisters,

4 The ECHR and Faith-Based Objections to the Teaching of SOGI Content

In this section, we consider how the courts – both the English courts and the ECtHR – may respond, in light of existing ECHR jurisprudence, to faith-based objections to the inclusion of SOGI content in RE. We begin by reviewing relevant general principles established by the ECtHR and how these have been applied to balance parental rights with the discretion granted to national authorities to plan and set school curricula. We then assess, in light of ECHR jurisprudence, four main claims that have been made about the inclusion of SOGI content in RE. First, we examine the claim that SOGI content is a form of illegitimate indoctrination that promotes homosexuality and encourages pupils' early sexualisation. Second, we examine the claim that SOGI content disregards parents' religious beliefs and undermines their authority over their children. Third, we examine the claim that primary school pupils are too young to learn SOGI content and that it is not 'age appropriate'. Finally, we consider the claim that the compulsory inclusion of SOGI content discriminates against parents who wish to have their children exempted from it on the basis of their religious convictions.

4.1 General Relevant Principles

ECHR jurisprudence relevant to objections to SOGI content in RE has evolved in a number of cases concerning parental complaints about compulsory sex education,¹¹³ ethics classes,¹¹⁴ religious education,¹¹⁵ and activities that are

called the government to defend 'without reservation the right of schools to teach an inclusive school curriculum' and to 'promote equality and age-appropriate sex and relationships education for all children and young people'. See, 'LGBT-Inclusive Education: Everything You Need to Know' (Stonewall, 15 July 2019): <<https://www.stonewall.org.uk/lgbt-inclusive-education-everything-you-need-know#stonewall>>; Humanists UK, 'PSHE and Relationships & Sex Education': <<https://humanism.org.uk/campaigns/schools-and-education/school-curriculum/pshe-and-sex-and-relationships-education/>>; National Secular Society, 'In Defence of Equality in Birmingham Schools': <<https://www.secularism.org.uk/sex-education/in-defence-of-equality-in-birmingham.html>>.

- 113 *Kjeldsen, Busk Madsen and Pedersen v Denmark* 5095/71, 5920/72 and 5926/72 (ECtHR, 7 December 1976); *Jimenez Alonso and Jimenez Merino v Spain* 51188/99 (ECtHR, dec, 25 May 2000); *Dojan and Others v Germany* 319/08, 2455/08, 7908/10, 8152/10 and 8155/10 (ECtHR, dec, 13 September 2011); *AR and LR v Switzerland* 22338/15 (ECtHR, dec, 19 December 2017).
- 114 *Bernard and Others v Luxembourg* 17187/90 (ECmHR, dec, 8 September 1993); *Appel-Irrgang and Others v Germany* 45216/07 (ECtHR, dec, 6 October 2009).
- 115 *Angeleni v Sweden* 10491/83 (ECmHR, dec, 3 December 1986); *Folgerø and Others v Norway* [GC] 15472/02 (ECtHR, 29 June 2007); *Hasan and Eylem Zengin v Turkey* 1448/04 (ECtHR, 9 October 2007); *Mansur Yalçın and Others v Turkey* 21163/11 (ECtHR, 16 September 2014).

part of the school curriculum.¹¹⁶ In these cases, parents of school-aged children argued that national authorities had introduced subjects and activities in schools that were incompatible with their religious and philosophical convictions. On this basis, parents have alleged violations of their rights under P1-2, Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), and Article 14 (prohibition of discrimination) ECHR.¹¹⁷ The majority of applicants in these cases relied principally on the second sentence of P1-2, which secures the right of parents to ensure teaching and education in accordance with their religious and philosophical convictions. In some cases, applicants have invoked Article 8 and/or Article 9, alone or in conjunction with other provisions of the ECHR, but the ECtHR has held that P1-2 is the *lex specialis* in the area of education and teaching and, on this basis, has considered Article 8 and Article 9 complaints in light of its P1-2 jurisprudence.¹¹⁸

In light of this, P1-2 forms the principal provision for considering objections by parents to the inclusion of SOGI content in RE. P1-2 provides that:

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.

The ECtHR's interpretation of P1-2 is oriented by the key principle that this provision constitutes 'a whole'¹¹⁹ that is dominated by the first sentence – which enshrines 'the right of everyone to education'¹²⁰ – and the two sentences must be interpreted 'in the light of each other' and the other provisions in the ECHR, particularly Article 8, Article 9, and Article 10 (freedom of expression).¹²¹ Parental rights under P1-2 are, therefore, 'grafted' on to the fundamental right

116 *Valsamis v Greece* 21787/93 (ECtHR, 18 December 1996); *Efstathiou v Greece* 24095/94 (ECtHR, 18 December 1996); *Osmanoğlu and Kocabaş v Switzerland* 29086/12 (ECtHR, 10 January 2017). See also *Dojan and Others* (n 113).

117 In *Valsamis* (n 116) and *Efstathiou* (n 116) the applicants also invoked Article 3 (prohibition of torture) and Article 13 (right to an effective remedy). In *Jimenez Alonso and Jimenez Merino* (n 113), the applicants also invoked Article 6 (right to a fair trial).

118 *Osmanoğlu and Kocabaş* (n 116) para 35; *AR and LR* (n 113) para 38. See also, *Angeleni* (n 115); *Bernard and Others* (n 114).

119 *Folgerø and Others* (n 115) para 84. See also, *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 52.

120 *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 50.

121 *Ibid* para 52.

to education secured by the first sentence of this provision, and parents 'may require the State to respect their religious and philosophical convictions' in the discharge of a 'natural duty' towards their children.¹²² On this basis, the ECtHR has acknowledged that parents are 'primarily responsible' for the education and teaching of their children, and that parental rights guaranteed under P1-2 are 'closely linked' to the enjoyment and the exercise of the right to education.¹²³

In respect of the second sentence of P1-2, the ECtHR has established that the word 'convictions' is not synonymous with the words 'opinions' and 'ideas', but rather denotes 'views that attain a certain level of cogency, seriousness, cohesion and importance', and that the verb 'respect' means more than 'acknowledge' or 'take into account' and implies 'some positive obligation' in addition to a primarily negative undertaking by the state.¹²⁴ The ECtHR has, however, established that the requirements of the notion of 'respect' imply that national authorities enjoy a wide margin of appreciation in 'determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals' and that, significantly, parents cannot 'require the State to provide a particular form of teaching'.¹²⁵ Moreover, the ECtHR has concluded that, in examining national legislation under P1-2, 'one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet'.¹²⁶ ECHR jurisprudence on P1-2 is further guided by the principles that this provision does not distinguish between 'State and private teaching'¹²⁷ or between religious instruction and other subjects, but requires national authorities to respect parents' religious and philosophical convictions 'throughout the entire State education programme'.¹²⁸ Accordingly, the ECtHR has established that the duty stemming from P1-2 is 'broad in its extent' and applies not only to the 'content of education and the manner of its provision'

¹²² *Folgerø and Others* (n 115) para 84; *Kjeldsen, Busk Madsen and Pedersen* (n 113) paras 50 and 52.

¹²³ *Folgerø and Others* (n 115) para 84; *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 52.

¹²⁴ *Folgerø and Others* (n 115) para 84. The ECtHR has held that the word 'convictions' is akin to the term 'beliefs'. *Campbell and Cosans v the United Kingdom* 7511/76 and 7743/76 (ECtHR, 25 February 1982) para 36.

¹²⁵ *Papageorgiou and Others v Greece* 4762/18 and 6140/18 (ECtHR, 31 October 2019) para 76.

¹²⁶ *Folgerø and Others* (n 115) para 84. See also, *Papageorgiou and Others* (n 125) para 77.

¹²⁷ *Folgerø and Others* (n 115) para 84. See also, *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 50.

¹²⁸ *Folgerø and Others* (n 115) para 84. See also, *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 51.

but also to ‘the performance of all the “functions” assumed by the State’ in the area of education.¹²⁹

The ECtHR has recognised that the setting and planning of the school curriculum falls in principle ‘within the competence of the Contracting States’, which are better placed to evaluate ‘questions of expediency on which it is not for the Court to rule’.¹³⁰ In particular, P1-2 does not prevent imparting information or knowledge of a ‘directly or indirectly’ religious or philosophical kind, because institutionalised teaching would risk becoming impracticable.¹³¹ The ECtHR has, however, established that the second sentence of P1-2 aims at ‘safeguarding the possibility of pluralism in education’¹³² and, to this end, national authorities must avoid ‘any abuse of a dominant position’ and ensure the ‘fair and proper treatment of minorities’.¹³³ In this respect, information or knowledge in the school curriculum must be conveyed in an ‘objective, critical and pluralistic manner’, and national authorities are forbidden to pursue an aim of ‘indoctrination’ that might be considered to not respect parents’ religious and philosophical convictions.¹³⁴ The limit placed on indoctrination thus forms a key threshold that the ECtHR applies when assessing whether national legislation is consistent with the parental rights enshrined in P1-2. The ECtHR has further held that national authorities have a duty to ensure that the application of any provisions by a school or teacher do not result in parents’ religious and philosophical convictions being disregarded by ‘carelessness, lack of judgment or misplaced proselytism’¹³⁵ – which is in accordance with the general principle that the ECHR is designed to guarantee rights that are ‘practical and effective’.¹³⁶

4.2 *Applying ECHR Jurisprudence to the Issues in Dispute*

We now analyse the four key claims, discussed above, that could form the basis of a legal challenge to the statutory framework regulating RE and its inclusion

¹²⁹ *Folgerø and Others* (n 115) para 84.

¹³⁰ *Ibid.* See also, *Valsamis* (n 116) para 28.

¹³¹ *Folgerø and Others* (n 115) para 84. See also, *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 53.

¹³² *Folgerø and Others* (n 115) para 84. See also, *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 50.

¹³³ *Folgerø and Others* (n 115) para 84. See also, *Valsamis* (n 116) para 27.

¹³⁴ *Folgerø and Others* (n 115) para 84. See also, *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 53.

¹³⁵ *Folgerø and Others* (n 115) para 84. See also, *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 54.

¹³⁶ *Airey v Ireland* 6289/73 (ECtHR, 9 October 1979) para 24.

of SOGI content. In respect of each claim, we consider how those making a claim might articulate it in any legal action and, in turn, how the UK government might respond. Our primary aim is to assess, in light of ECHR jurisprudence, the merits of each claim and the likelihood of it being successful in establishing a violation of the ECHR.

4.2.1 'Indoctrination'

A key claim made by those who object to the teaching of SOGI content in RE is that it amounts to indoctrination. For example, during the Birmingham protests it was claimed that teaching about same-sex relationships and gender identity is an example of 'social engineering'¹³⁷ that promotes the 'sexualisation of children'.¹³⁸ Some of the slogans written on placards read 'education not indoctrination' and 'say no to promoting of homosexuality and LGBT ways of life to our children'.¹³⁹ According to some, teaching that promotes the idea that 'same-sex relationships are morally fine' is unacceptable and constitutes an attempt to plant a 'seed' into pupils' minds.¹⁴⁰ Similarly, faith-based organisations that object to teaching about SOGI have described RE as an attempt to indoctrinate pupils into 'LGBT values and behaviours'.¹⁴¹ On this basis, some may argue that the aim of RE to promote respect for difference and to teach pupils about the existence of different types of families – including 'LGBT parents'¹⁴² – amounts to indoctrination in violation of the ECHR.

In response to these claims, the government could argue that RE does not promote any particular sexual orientation but, rather, provides children with the 'fundamental building blocks'¹⁴³ necessary to form 'healthy friendships, family relationships and other relationships' in the course of their lives.¹⁴⁴ To this end, the government could note that by the end of primary school pupils should have learned that there are different types of families, which are characterised by 'love and care', and that marriage represents a 'formal and legally recognised commitment of two people to each other'.¹⁴⁵ Whilst schools are

¹³⁷ Kotecha, 'Birmingham LGBT Lessons' (n 82).

¹³⁸ S Kotecha, 'LGBT Teaching Row: Schools Minister Rejects "Silence" Claim' (BBC News, 20 September 2019): <<https://www.bbc.co.uk/news/uk-england-birmingham-49755250>>.

¹³⁹ Parveen, 'Birmingham School Stops LGBT Lessons' (n 83).

¹⁴⁰ 'LGBT School Lessons Protests' (n 78).

¹⁴¹ 'New RSE Guidance Not Quite Victory – But We're Getting There!' (ParentPower, 7 October 2020): <<https://parentpower.family/new-rse-guidance-not-quite-victory-but-were-getting-there>>.

¹⁴² Department for Education, 'Statutory Guidance' (n 1) para 59.

¹⁴³ Ibid para 54.

¹⁴⁴ Ibid para 57.

¹⁴⁵ Ibid 20–21.

'strongly encouraged and enabled'¹⁴⁶ to cover SOGI content and teach children about the importance of respecting others when they make 'different choices or have different preferences or beliefs',¹⁴⁷ the government could point out that schools are not expected to focus on SOGI content to the detriment of teaching about other types of families or relationships. The government could, therefore, contest the claim that this type of teaching indoctrinates children on the grounds that it has been carefully designed to meet the needs of children growing up in an 'increasingly complex world'¹⁴⁸ and aims to provide them with objective and evidence-based knowledge that is essential for a 'happy and successful adult life'.¹⁴⁹

If a domestic court or the ECtHR was required to adjudicate this issue, an important starting point is that the ECtHR has accepted that teaching about sexuality and relationships sometimes pursues legitimate aims. For example, the ECtHR recognised that in Danish society children could access information on sexual life 'without difficulty' and acknowledged that compulsory sex education classes are an appropriate instrument to provide pupils with knowledge 'more correctly, precisely, objectively and scientifically' than other sources of information.¹⁵⁰ The ECtHR reiterated this approach when it upheld the decision of Swiss authorities to introduce sex education in kindergarten and primary schools with a view to addressing the 'legitimate questions' that arise from children who are exposed to a 'multitude of external influences and information' on sexuality.¹⁵¹ The ECtHR has further recognised that, through sex education and ethics lessons, national authorities can achieve aims and objectives that are 'consonant' with the principles of 'pluralism and objectivity'¹⁵² embodied in P1-2, such as promoting tolerance between human beings 'irrespective of their sexual orientation and identity', enabling children to 'deal

¹⁴⁶ Department for Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education: FAQs' (9 July 2020): <<https://www.gov.uk/government/news/relationships-education-relationships-and-sex-education-rse-and-health-education-faqs>>.

¹⁴⁷ Department for Education, 'Statutory Guidance' (n 1) 21.

¹⁴⁸ Ibid 4.

¹⁴⁹ Ibid para 1.

¹⁵⁰ *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 54.

¹⁵¹ *AR and LR* (n 113) para 35 (Authors' translation). The Court stressed, as Frank Cranmer notes, that 'one of the objectives of state education was to prepare children for social realities, which tended to justify sex education for very young children at kindergarten or primary school'. For an in-depth discussion of this case, see, F Cranmer, 'Compulsory Sex Education and Article 9 ECHR: *AR & LR v Switzerland*' (Law & Religion UK, 19 January 2018): <<https://lawandreligionuk.com/2018/01/19/compulsory-sex-education-and-article-9-echr-ar-lr-v-switzerland/>>.

¹⁵² *Dojan and Others* (n 113) 'The Law' para 2. See also, *Appel-Irrgang and Others* (n 114).

critically with influences from society instead of avoiding them',¹⁵³ and teaching children to be 'open to people whose beliefs differ from theirs'.¹⁵⁴

This jurisprudence is relevant in three specific ways for assessing whether the statutory framework regulating RE amounts to unlawful indoctrination. First, information about same-sex relationships and gender identity routinely feature in a wide variety of public media that children can easily access in contemporary British society. Indeed, children increasingly spend considerable time online¹⁵⁵ and are likely to come across material, whether intentionally or unintentionally, concerning SOGI. Moreover, information about same-sex relationships and gender identity routinely feature in mainstream broadcast and print media that are likely to be available to most children.¹⁵⁶ Secondly, children can encounter examples of non-heterosexual relationships in their everyday lives and this may arouse curiosity in them. For instance, in the UK same-sex marriage is lawful and many same-sex couples have children. Consequently, some children live, or know children that live, with parents of the same sex and this may provoke legitimate questions about same-sex relationships. Thirdly, teaching SOGI content sits within a broader framework that aims to foster respect for others¹⁵⁷ and favours the development of personal values such as 'honesty', 'integrity', and 'kindness'.¹⁵⁸ When these factors are considered in light of ECHR jurisprudence, it is unlikely, in our view, that a domestic court or the ECtHR would find that the aim of the statutory framework regulating RE represented 'a departure from the principles of pluralism and objectivity amounting to indoctrination' in violation of the ECHR.¹⁵⁹

However, even if it is acknowledged that the aim of RE does not amount to indoctrination, it would remain to be seen whether SOGI content in RE is taught in a way that is consistent with the principles enshrined in P1-2. A starting point for assessing this is the ECtHR's view that compulsory sex education cannot be considered to offend P1-2 if it does not amount to 'advocating a specific kind of sexual behaviour' or 'make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health

153 *Dojan and Others* (n 113) 'The Law' para 2.

154 *Appel-Irrgang and Others* (n 114).

155 Department for Education, 'Statutory Guidance' (n 1) 4.

156 For example, CBBC's 'The Next Step' featured a same-sex kiss. See, 'CBBC's The Next Step's First Same-Sex Kiss!' (BBC Newsround, 26 July 2020): <<https://www.bbc.co.uk/newsround/53536242>>.

157 Department for Education, 'Statutory Guidance' (n 1) para 56.

158 *Ibid* para 60.

159 *Folgerø and Others* (n 115) para 89.

or future or that many parents consider reprehensible'.¹⁶⁰ On this basis, the domestic courts or the ECtHR could observe that, since RE does not include mandatory sex education, it does not require teaching that would offend the established limits of P1-2 in respect of education of a 'moral order'.¹⁶¹ Indeed, the government has acknowledged that RE must be taught 'sensitively',¹⁶² in a way that 'respects everyone', and teaching SOGI content should be integrated into broader discussions about 'the society in which [pupils] are growing up'.¹⁶³

The government may be further protected by the fact that the ECtHR has established that national authorities enjoy a certain margin of appreciation in planning the school curriculum and are free to structure the content 'according to their needs and traditions'.¹⁶⁴ For instance, national authorities are entitled to privilege knowledge of a particular religion – in respect of the 'majority religion'¹⁶⁵ or in consideration of national 'history and tradition'¹⁶⁶ – and this choice cannot on its own be viewed as amounting to indoctrination.¹⁶⁷ As such, providing that it does not lead to a form of indoctrination, the ECtHR 'has a duty in principle' to respect the decisions taken by national authorities.¹⁶⁸ A domestic court or the ECtHR may, therefore, note that the UK national authorities have acted to address a widely recognised social 'need' to ensure and promote LGBT equality, and that this 'need' forms part of an established 'tradition' to protect the rights of individuals in minority groups.¹⁶⁹ Moreover, international organisations established to promote the maintenance and further realisation of human rights, such as the Council of Europe, recommend the inclusion of teaching that promotes tolerance and respect regardless of sexual orientation and gender identity, in order to safeguard pupils' right to education in an environment free from homophobic violence and bullying.¹⁷⁰

160 *Kjeldsen, Busk Madsen and Pedersen* (n 13) para 54.

161 *Ibid.*

162 Department for Education, 'Statutory Guidance' (n 1) 4.

163 Department for Education, 'FAQ s' (n 146).

164 *Osmanoğlu and Kocabaş* (n 116) para 95.

165 *Hasan and Eylem Zengin* (n 115) para 63.

166 *Folgerø and Others* (n 115) para 89.

167 *Ibid.* See also, *Angeleni* (n 115).

168 *Lautsi and Others v Italy* [GC] 30814/06 (ECtHR, 18 March 2011) para 69; *Perovy v Russia* 47429/09 (ECtHR, 20 October 2020) para 63.

169 For evidence of the now widely recognised need to promote equality for LGBT people in the UK, see, Government Equalities Office, 'National LGBT Survey: Summary Report' (July 2018).

170 Council of Europe Committee of Ministers, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity* (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st Meeting of the Ministers' Deputies) paras 31–32.

Arguably, since LGBT equality is a majority concern that now forms part of the history and tradition of the UK, the teaching of SOGI content in RE is likely to be determined to fall within the margin of appreciation available to the state. For these reasons, in our view, a domestic court or the ECtHR is unlikely to conclude that teaching SOGI content in the context of RE constitutes a form of indoctrination in violation of the ECHR.

4.2.2 Parental Rights and Religious Convictions

A second claim made by those who object to the inclusion of SOGI content in RE is that it violates the right of parents to ensure education and teaching in conformity with their own religious convictions. During the Birmingham protests some parents objected to teaching about SOGI on the grounds that it undermined 'parental rights and authority'¹⁷¹ and instilled views in pupils that were contrary to the 'moral values' of their families.¹⁷² Some protestors displayed signs saying 'my child, my choice', indicating that the teaching of SOGI content erodes the right of parents to respect for their religious and philosophical convictions.¹⁷³ On this basis, some may challenge the statutory framework regulating RE on the grounds that it does not afford parents the opportunity to withdraw a child from education that offends their religious beliefs. Faith-based groups that object to the teaching of SOGI content could, for example, argue that the government is attempting to 'crush' the rights of parents.¹⁷⁴ Relatedly, some may claim that the statutory framework regulating RE applies equally to state and independent schools and, on this basis, that the government has deprived parents of the choice to have their children educated in an independent school in accordance with their religious convictions.

In response to these claims, the UK government could argue that the decision to place RE on a compulsory footing in all schools aims to ensure 'universal coverage'¹⁷⁵ that is important 'for all children'¹⁷⁶ and supports them to

¹⁷¹ 'LGBT People "Never Felt More Vulnerable" in Birmingham' (BBC News, 29 March 2019): <<https://www.bbc.co.uk/news/uk-england-birmingham-47742085>>.

¹⁷² 'LGBT School Lessons Protests' (n 78).

¹⁷³ S Kotecha, 'Birmingham LGBT Row: "Homophobic Protests Must Stop"' (BBC News, 7 June 2019): <<https://www.bbc.co.uk/news/uk-england-birmingham-48545247>>.

¹⁷⁴ W Jones, 'Peers Crush Parents Forcing Schools to Indoctrinate Children in LGBT Dogma' (ParentPower, 2 May 2019): <<https://parentpower.family/peers-crush-parents-forcing-schools-to-indoctrinate-children-in-lgbt-dogma>>. See also, A Tully, 'Parents: The Enemy of their Children' (ParentPower, 21 February 2020): <<https://parentpower.family/parents-the-enemy>>.

¹⁷⁵ Department for Education, 'Policy Statement' (n 26) 1.

¹⁷⁶ Department for Education, 'FAQ's' (n 146).

'stay safe and prepare for life in modern Britain'.¹⁷⁷ In acknowledging that parents are the prime educators of their children, the government could point out that legislative provision has been made to ensure that any education about relationships 'is appropriate having regard to the [...] religious background of the pupils'.¹⁷⁸ The government could argue that compliance with this requires schools to consult parents when developing written policies for RE and to take into account pupils' religious backgrounds when planning teaching. Moreover, schools are expected to 'work closely' with parents,¹⁷⁹ provide them with examples of the resources that they plan to use,¹⁸⁰ and give parents 'every opportunity' to understand the 'purpose and content' of RE.¹⁸¹ The government could further argue that the statutory framework regulating RE recognises that 'positive relationships between the school and local faith communities'¹⁸² help constructive teaching and that schools may decide to teach pupils about different 'faith perspectives'¹⁸³ on the topics covered in RE. The government could also argue that RE does not include mandatory sex education and, as such, leaves to parents the decision about how to teach children about sex in accordance with their beliefs and convictions.¹⁸⁴ Taken together, these arguments could provide the government with a basis for asserting that the statutory framework regulating RE is appropriately respectful of the right of parents to ensure that education conforms to their religious convictions.

Three key aspects of ECHR jurisprudence are relevant to adjudicating this dispute over the extent of parents' rights. First, the ECtHR has established that 'it is not possible to deduce from the Convention a right not to be exposed to convictions contrary to one's own' (bearing in mind, as we discussed above, that national authorities must not pursue an aim of indoctrination).¹⁸⁵ Although the ECtHR has held that a state should 'avoid a situation where pupils face a conflict' between religious education and the religious or philosophical convictions of their parents,¹⁸⁶ it has also held that parents cannot claim a right to have their children exempted from sex education lessons on the basis that

¹⁷⁷ Department for Education, 'Policy Statement' (n 26) 1.

¹⁷⁸ Children and Social Work Act 2017, s 34(3)(b).

¹⁷⁹ Department for Education, 'Statutory Guidance' (n 1) para 41.

¹⁸⁰ *Ibid* para 24.

¹⁸¹ *Ibid* para 42.

¹⁸² *Ibid* para 19.

¹⁸³ *Ibid* para 21.

¹⁸⁴ See, Department for Education, 'Policy Statement' (n 26) 4.

¹⁸⁵ *Appel-Irrgang and Others* (n 114). See also, *Dojan and Others* (n 113) 'The Law' para 2.

¹⁸⁶ *Hasan and Eylem Zengin* (n 115) para 71. This relates specifically to 'religious instruction in the curriculum for study', not education generally.

these lessons are contrary to their religious convictions.¹⁸⁷ In reaching this conclusion, the ECtHR noted that pupils were not being encouraged to 'put into question' their parents' education or to 'approve of or reject specific sexual behaviour' contrary to their parents' religious and philosophical convictions.¹⁸⁸ In this respect, it is important to note that the statutory framework regulating RE explicitly requires schools to take into account pupils' religious backgrounds and, as such, does not put into practice any teaching designed to encourage pupils to question their or their parents' religious beliefs, or to adopt a view of relationships that is contrary to their religious convictions.¹⁸⁹

Secondly, the ECtHR has accepted that the protection of children's best interests may override parents' religious and philosophical convictions. For instance, the ECtHR has noted that, according to the United Nations Convention on the Rights of the Child, the protection of the right of parents to educate their children is not 'an end in itself' but must always 'be conducive to the child's well-being'.¹⁹⁰ On this basis, the ECtHR has upheld the decision of Swiss national authorities to introduce compulsory sex education.¹⁹¹ The ECtHR has also held that the interest of children in receiving an 'all-round education' and participating in activities that are of special importance for their development and health 'takes precedence' over parents' wishes to have their children exempted from such activities.¹⁹² Moreover, parents do not have the right to ensure that a child is 'kept ignorant'.¹⁹³ In light of this, it is important to note that RE aims to prepare children to deal with differences in wider society and to impart knowledge of law as it applies to relationships. Specifically, RE supports pupils to develop as citizens in the context of contemporary British society and, as such, can be seen to serve their best interests in receiving an all-round education about relationships, which includes factual teaching about different types of families.

Thirdly, the ECtHR has placed great emphasis on the right of parents to 'enlighten' their children outside of school hours and to guide them on a path

187 *Kjeldsen, Busk Madsen and Pedersen* (n 113); *Jimenez Alonso and Jimenez Merino* (n 113); *Dojan and Others* (n 113); *AR and LR* (n 113).

188 *Dojan and Others* (n 113) 'The Law' para 2.

189 For instance, the government has stated that in all schools, in the context of RE, 'the religious background of pupils must be taken into account when planning teaching' (Department for Education, 'FAQ s' (n 146)). See also, Department for Education, 'Statutory Guidance' (n 1) para 20.

190 *AR and LR* (n 113) para 41 (Authors' translation).

191 *Ibid* para 46.

192 *Osmanoğlu and Kocabaş* (n 116) paras 97–98.

193 *Folgerø and Others* (n 115) para 89.

that is in line with their own convictions.¹⁹⁴ For instance, the ECtHR has held that parents are free to educate their children after school and at weekends,¹⁹⁵ and that national authorities should not prevent pupils from attending religious classes in the curriculum that are in accordance with their faith background.¹⁹⁶ In this respect, it is important to note that the statutory framework regulating RE does not deprive parents of the freedom to discuss with their children the topics covered in RE outside of school hours. On this basis, RE does not deprive parents of the right to teach their children about relationships in a way that, for example, privileges different-sex relationships within marriage.

On the basis of the ECHR jurisprudence discussed above, it seems likely, in our view, that a domestic court or the ECtHR would conclude that the statutory framework regulating RE – and, specifically, the absence of an opportunity for parents to withdraw a child from teaching about SOGI content – does not violate the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. In our view, a court would conclude that the ECHR does not provide a right not to be exposed to convictions contrary to one's own, that the aim of RE to ensure the 'successful social integration' of every child takes precedence over the wishes of parents to have a child exempted on the basis of religious convictions,¹⁹⁷ and that the government had achieved a fair balance between the interests pursued by RE and the rights of parents. With respect to the latter point, it is important to note that national authorities enjoy a wide margin of appreciation to 'strike a balance between competing private and public interests or Convention rights'.¹⁹⁸

An important point to note, however, is that the ECtHR has not developed specific jurisprudence that addresses the lack of parental 'choice' created when all schools – both state and independent – are required to deliver the same education. As such, ECHR jurisprudence has no straightforward application to the problem faced by a parent who has no option to remove a child from a state-funded school, in order to avoid a particular aspect of education, and send the child to a fee-paying independent school instead. In our view, in the absence of established ECHR jurisprudence, there are two ways in which a domestic court or the ECtHR might approach this specific issue. On the one

194 *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 54. See also, *Jimenez Alonso and Jimenez Merino* (n 113); *Appel-Irrgang and Others* (n 114); *Valsamis* (n 116) para 31.

195 *Dojan and Others* (n 113).

196 *Appel-Irrgang and Others* (n 114).

197 *Osmanoğlu and Kocabaş* (n 116) para 97.

198 *Evans v the United Kingdom* [GC] 6339/05 (ECtHR, 10 April 2007) para 77.

hand, it is possible to infer from ECHR jurisprudence that the existence of a system of private institutions, that provide an alternative to state education, would not be a relevant factor for assessing whether the statutory framework regulating RE violates parents' right to respect for their religious convictions. This is because the ECtHR has not established that the existence of private institutions, not bound by the state curriculum, is a decisive criterion when assessing whether national authorities have complied with P1-2.¹⁹⁹ For example, the ECtHR has held that, although parents might have the option of sending a child to a private school that offers alternative education, P1-2 can still be violated if national authorities do not take 'sufficient care that information and knowledge included in the curriculum [of state schools] be conveyed in an objective, critical and pluralistic manner'.²⁰⁰ Arguably, therefore, the ECtHR's approach indicates that the existence of a choice to send a child to an independent school does not affect an assessment of whether mandatory teaching amounts to a violation of the right of parents to respect for their religious convictions. Indeed, the ECtHR's approach suggests that, insofar as RE is taught in accordance with the principles of objectivity and pluralism, those parents who object to the teaching of SOGI content cannot claim a violation of their ECHR rights solely on the basis that all schools – including fee-paying independent schools – must deliver RE.

On the other hand, it could be argued that the absence of an alternative for parents, who wish to send a child to an independent school that does not teach RE, may narrow the margin of appreciation available to the state with respect to the introduction of an aspect of education that some parents regard as sensitive and problematic. In this respect, the ECtHR has acknowledged the 'important expedient' offered by private schools to parents who wish to dissociate their children from compulsory teaching in state schools²⁰¹ and that this solution 'should not be disregarded'.²⁰² Moreover, the ECtHR has noted that, in a case in which no 'obstacle' prevented a child from attending a private school, '[i]nsofar as the parents opted for a state school', they could not demand different treatment in the education of their child on the grounds of their religious convictions.²⁰³ In light of this, a domestic court or the ECtHR may attach importance to the fact that the statutory framework regulating RE has introduced substantial limitations to parents' options by denying them the

199 *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 54.

200 *Folgerø and Others* (n 115) para 102.

201 *Kjeldsen, Busk Madsen and Pedersen* (n 113) para 54.

202 *Ibid* para 50.

203 *Jimenez Alonso and Jimenez Merino* (n 113) 'The Law' para 1.

possibility of having a child educated in an independent school where they would not be exposed to teaching about relationships contrary to the parents' convictions. On this basis, insofar as parents cannot opt to enrol a child in an independent school to avoid that child receiving RE, a domestic court or the ECtHR may find that this aspect of the statutory framework regulating RE amounts to a violation of the right of parents to ensure that education is in conformity with their own religious convictions. This is not equivalent, however, to finding that the provisions made by the statutory framework regulating RE in state schools – and, specifically, the lack of opportunity for parents to withdraw a child from RE in state schools – amount to a violation of the ECHR (a finding that, as we discussed above, we think that a domestic court or the ECtHR would be unlikely to reach).

4.2.3 Age-Appropriateness

A third claim made by those who object to the inclusion of SOGI content in RE is that it is not appropriate for children of primary school age. One of the statements most widely made during the Birmingham protests was 'let kids be kids', which is indicative of the view held by some people that children at primary school lack the maturity required to understand concepts such as same-sex relationships.²⁰⁴ Some participants in the protests conceded that teaching SOGI content may be appropriate for older pupils, but questioned the utility of such teaching for younger children who 'barely know how to wipe their bottoms'²⁰⁵ and who should be 'allowed to be children rather than having to constantly think about equalities and rights'.²⁰⁶ Some faith-based groups have raised similar concerns about RE and, for instance, have argued that teaching SOGI content 'hijacks and potentially perverts' the course of 'natural' child development and may result in 'millions of children' being traumatised.²⁰⁷ These arguments may provide a basis for asserting that the sensitivity of certain topics covered in RE, such as families with 'LGBT parents',²⁰⁸ requires national authorities to respect the right of parents to determine the age at which a child has attained a level of maturity suitable for receiving RE.

In response, the government would undoubtedly agree that it is essential that children receive teaching that is suited to their stage of development and,

204 L Wright, 'Birmingham LGBT Row: The View from the School Gates' (BBC News, 25 May 2019): <<https://www.bbc.co.uk/news/uk-england-birmingham-48395868>>.

205 'Birmingham School LGBT Lessons Protest' (n 81).

206 Parveen, 'Birmingham School Stops LGBT Lessons' (n 83).

207 School Gate Campaign: <<https://schoolgatecampaign.org>>.

208 Department for Education, 'Statutory Guidance' (n 1) para 59.

in this respect, would probably point out that the principle of age-appropriateness is enshrined in the Children and Social Work Act 2017.²⁰⁹ The government could draw attention to the fact that schools must ensure that all teaching in the context of RE is 'age appropriate in approach and content'²¹⁰ and that teaching materials are appropriate for the 'maturity' of pupils.²¹¹ The government could concede that some pupils may raise questions that go beyond what is required for the teaching of RE, but may also point out how schools are expected to deal with questions relating to sex or sexuality.²¹² In this respect, the statutory framework regulating RE explicitly requires that a school's policy on RE should illustrate how teachers will handle 'difficult' questions and creates the expectation that teachers will employ methods that are appropriate to deal with pupils that are 'developmentally at different stages'.²¹³ For example, if a teacher considers that the discussion of certain topics is not appropriate in a whole class setting, they are able to opt for one-to-one or small group discussions. Moreover, it is recognised that a teacher may require support and training in order to deal with difficult questions in an appropriate manner. The government could, therefore, argue that the statutory framework regulating RE is consistent with the general principle established by the ECtHR that '[i]n sensitive matters such as public discussion of sex education' the national authorities 'have no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience'.²¹⁴ On this basis, the government could argue that the statutory framework regulating RE is based on the fundamental principle that any form of teaching and information about relationships must be age and developmentally appropriate.

209 Children and Social Work Act 2017, s 34(3)(b).

210 Department for Education, 'Statutory Guidance' (n 1) para 37.

211 Ibid para 23.

212 Ibid para 63.

213 Ibid paras 63–64.

214 *Bayev and Others v Russia* 67667/09, 44092/12 and 56717/12 (ECtHR, 20 June 2017) para 82. In this judgment the ECtHR found, for the first time, a violation of Article 10, taken alone and in conjunction with Article 14, in respect of Russian legislation prohibiting the dissemination of so-called 'propaganda' to minors in relation to 'non-traditional sexual relations' (ibid para 3). In doing so, the ECtHR established that states which restrict sexual minorities' right to freedom of expression 'reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society' (ibid para 83). For an in-depth discussion of this case, see, P Johnson and S Falcetta, 'Sexual Orientation Equality in Central and Eastern Europe: The Role of the European Convention on Human Rights' (2019) 5 *European Human Rights Law Review* 482.

A starting point for considering this issue is the principle established by the ECtHR that young pupils must be protected from teaching that has ‘some kind of proselytising effect’.²¹⁵ On this basis, the ECtHR upheld a decision by Swiss authorities to forbid a primary school teacher from wearing the Islamic headscarf in a class comprising pupils of a young age on the grounds that they could be ‘more easily influenced’ than older pupils by the display of powerful religious symbols.²¹⁶ In light of this, a domestic court or the ECtHR would probably accept that the age of pupils receiving RE is relevant for assessing whether the statutory framework regulating RE is in violation of the ECHR. In this respect, two key principles established by the ECtHR, in response to a complaint by a mother about the introduction of compulsory sex education lessons for children of an age considered to be ‘particularly sensitive and easily influenced’,²¹⁷ are relevant.

First, the ECtHR has recognised that society may have a ‘particular’ interest in ensuring that young children receive teaching that promotes their physical and psychological wellbeing.²¹⁸ Notably, the ECtHR observed that Swiss authorities had introduced compulsory sex education lessons with a view to preventing ‘violence and sexual exploitation’ of minors²¹⁹ and held that this aim was consistent with the ECHR and international human rights law on children’s rights. Specifically, the ECtHR recalled that the United Nations Convention on the Rights of the Child requires national authorities to take appropriate educational measures to protect minors from all forms of violence and abuse.²²⁰ On this basis, the ECtHR concluded that, through sex education lessons, Swiss authorities had pursued a legitimate aim. In light of this, a domestic court or the ECtHR could acknowledge that the UK government had introduced RE in order to support children’s wellbeing. In this respect, it could be noted that RE is designed to enable children to recognise features of healthy

²¹⁵ *Dahlab v Switzerland* 42393/98 (ECtHR, dec, 15 February 2001) ‘The Law’ para 1.

²¹⁶ *Ibid.*

²¹⁷ *AR and LR* (n 113) para 40 (Authors’ translation).

²¹⁸ *Ibid* para 35.

²¹⁹ *Ibid.*

²²⁰ *Ibid* para 41. Article 19 para 1 of the United Nations Convention on the Rights of the Child reads: ‘States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

relationships and to help them to identify and report 'emotional, physical and sexual abuse'.²²¹ It could, therefore, be concluded that the government had acted within the margin of appreciation available to it to strike a fair balance between 'competing public and private interests'²²² in order to instigate measures designed to protect children from ill-treatment and abuse.

Secondly, the ECtHR has established that the teaching of 'controversial' subjects²²³ to young pupils is compliant with the ECHR if national authorities adopt appropriate measures to regulate how individual teachers and schools deliver the content. In this respect, the ECtHR found that the Swiss national authorities had acted in accordance with the margin of appreciation available to them under the ECHR by recommending that schools adopt a 'non-systematic' approach to the teaching of sex education that involved teachers being prepared to 'react to children's questions and actions'.²²⁴ In acknowledging that sex education lessons were intended to complement teaching imparted by parents, the ECtHR concluded that the national authorities had struck an appropriate balance between the different interests at stake.²²⁵ This suggests that the statutory framework regulating RE could be considered compliant with the ECHR on the basis that teachers are expected to tailor teaching materials and methods to each pupil's age and level of maturity, and schools must develop a written policy about the ways in which teachers will manage questions about sexuality during RE.²²⁶ The statutory framework regulating RE might also be found to be compliant with the ECHR on the basis that schools have discretion to decide the point at which it is appropriate to introduce SOGI content in RE²²⁷ and are recognised to 'complement' parents' role as the 'prime educators' in matters relating to relationships.²²⁸ On this basis, the statutory framework regulating RE can be seen to encourage schools to adapt and react to pupils' needs and, therefore, not impose a 'systematic' approach.

In light of this, it is our view that a domestic court or the ECtHR would likely conclude that the government had carefully considered all of the interests at stake and introduced sufficient safeguards to protect pupils' interest in receiving teaching that is tailored to their level of maturity. Such a conclusion is reinforced by the general principle established by the ECtHR that '[t]here is no

221 Department for Education, 'Statutory Guidance' (n 1) para 62.

222 *Evans* (n 198) para 76.

223 *AR and LR* (n 113) para 35 (Authors' translation).

224 *Ibid* para 43.

225 *Ibid* para 45.

226 Department for Education, 'Statutory Guidance' (n 1) paras 63–64.

227 *Ibid* para 37.

228 *Ibid* 4.

scientific evidence or sociological data' which suggests that 'the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children'.²²⁹ In our view, it is, therefore, unlikely that a domestic court or the ECtHR would accept the claim that the statutory framework regulating RE put into practice age-inappropriate measures that amounted to a violation of the ECHR. This does not preclude a domestic court or the ECtHR from finding a violation of the ECHR if an individual school or teacher deviates from the statutory framework regulating RE and delivers age-inappropriate material but, if such a case and finding arose, this would not be equivalent to finding that the statutory framework itself was in violation of the ECHR.

4.2.4 Discrimination Against Parents on Grounds of Religion

A fourth claim made by those who object to the inclusion of SOGI content in RE is that it discriminates against particular parents on the grounds of their religion, thereby amounting to a violation of Article 14 in conjunction with P1-2 and/or Article 9 ECHR. During the Birmingham protests, for example, some parents argued that teaching about same-sex relationships amounted to 'unlawful discrimination' against parents whose religious, philosophical, and cultural values are centred on 'heterosexual relationships in marriage'.²³⁰ Some may argue, therefore, that RE discriminates against parents who adhere to a faith-based understanding of sexual orientation and/or gender identity because their children are compelled to undergo education that promotes values in contradiction with their religious convictions. On this basis, it could be argued that certain parents with religious convictions who object to RE are treated less favourably than other parents whose religious and/or philosophical convictions are not offended by RE and who, as a consequence, have access to education and teaching for their children that conforms with their convictions.

In response, the government may state that schools are under an 'equality duty' to have due regard to the need to, *inter alia*, eliminate discrimination, advance equality of opportunity, and foster good relations between persons who share a relevant protected characteristic and persons who do not share it, which includes sexual orientation, gender reassignment, and religion or belief.²³¹ The government may note that nothing in the statutory framework

²²⁹ *Alekseyev* (n 10) para 86.

²³⁰ *Birmingham CC* (n 73) [37].

²³¹ Equality Act 2010, s 149 (this does not apply to non-public functions in independent schools). See, Department for Education, 'Statutory Guidance' (n 1) paras 27–31.

regulating RE suggests that it has been designed in order to treat differently or disadvantage children or parents with certain religious convictions. The government could state that, whilst some parents consider teaching SOGI content to be contrary to their religious beliefs, the statutory framework regulating RE has been designed to provide evidence-based teaching that is tailored to the age and religious backgrounds of pupils. On this basis, the government could argue that the statutory framework regulating RE does not treat any individual or group differently or put them at a disadvantage but, rather, provides every child with the same opportunity to learn about relationships in a way that is consistent with existing equality legislation and respectful of different faith backgrounds in contemporary British society. The government could conclude that the statutory framework regulating RE is a vital means by which to achieve the aim of preventing discrimination against and ensuring equality for LGBT people.

If a domestic court or the ECtHR was asked to adjudicate these competing claims under Article 14 ECHR, it would begin with the principle that Article 14 has effect 'solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols',²³² but that its application 'does not necessarily presuppose the violation of one of the substantive rights protected by the Convention' and it is 'sufficient' that the facts of a case fall 'within the ambit' of one or more provisions of the ECHR.²³³ It is highly likely, in our view, that a domestic court or the ECtHR would accept, for the purposes of dealing with a complaint brought by parents under Article 14 about RE offending their religious convictions, that the facts fell within the ambit of one or more of the rights protected by the ECHR – most likely, as discussed above, P1-2 and Article 9 – and conclude that Article 14 was, therefore, engaged. In respect of similar complaints involving parents who objected to compulsory teaching and invoked Article 14, the ECtHR has not previously explicitly refused to recognise that the facts fell within the ambit of one or more provisions of the ECHR.²³⁴

Accepting that Article 14 was engaged, a domestic court or the ECtHR would apply the relevant discrimination test which, in respect of the issues under discussion here, is most likely to be that discrimination exists when a state, without an 'objective and reasonable justification', fails to 'treat differently persons

²³² *Lautsi and Others* (n 168) para 81.

²³³ *EB v France* [GC] 43546/02 (ECtHR, 22 January 2008) para 47. See also, *Abdulaziz, Cabales and Balkandali v the United Kingdom* 9214/80, 9473/81 and 9474/81 (ECtHR, 28 May 1985) para 71.

²³⁴ For example, *Kjeldsen, Busk Madsen and Pedersen* (n 113); *Jimenez Alonso and Jimenez Merino* (n 113); *Dojan and Others* (n 113); *Folgerø and Others* (n 115); *AR and LR* (n 113).

whose situations are significantly different'.²³⁵ To establish that discrimination has taken place for the purposes of Article 14, a complainant would, therefore, be required to identify a comparator, in a significantly different situation, that the complainant claims the state should treat them differently to and is failing to do so. Moreover, a complainant would need to show that the failure of the state to treat the complainant and the comparator differently had no objective and reasonable justification. In this respect, the complainant would need to show that the failure to treat them differently 'does not pursue a legitimate aim' or 'there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.²³⁶ A domestic court or the ECtHR would treat these two aspects separately and, only if a comparator was accepted, go on to consider whether the statutory framework regulating RE had an objective and reasonable justification.

Existing ECHR jurisprudence on objections to compulsory teaching indicates that parents who object to RE on religious grounds are likely to be able to establish a relevant comparator for the purposes of Article 14. The ECtHR has not previously held that parents who object to compulsory teaching on the basis of their religious or philosophical convictions cannot establish a relevant comparator. It is likely, in our view, that a domestic court or the ECtHR would accept the argument that a parent whose religious convictions puts them at odds with the teaching of SOGI content in RE are in a significantly different situation to parents whose convictions align with RE and that the statutory framework regulating RE does not treat them differently. This conclusion is supported by the ECtHR having accepted that in cases of 'indirect discrimination' an applicant can belong to 'a category of individuals' who are particularly affected by a legislative measure, and that such a measure can have 'disproportionately prejudicial effects on a particular group' even when 'it is not specifically aimed at that group and there is no discriminatory intent'.²³⁷

If a domestic court or the ECtHR accepted that a relevant comparator existed, it would go on to consider whether there is an objective and reasonable justification for the failure to treat the complainant and the comparator differently. This would involve considering whether the statutory framework regulating RE pursued a legitimate aim and was proportionate. Existing ECHR jurisprudence indicates that the aim pursued by the statutory framework regulating RE could be considered legitimate for two key reasons. First, the ECtHR has accepted that a failure to treat people differently under certain circumstances

235 *Thlimmenos v Greece* [GC] 34369/97 (ECtHR, 6 April 2000) para 44.

236 *Pretty v the United Kingdom* 2346/02 (ECtHR, 29 April 2002) para 88.

237 *SAS v France* [GC] 43835/11 (ECtHR, 1 July 2014) paras 160–161.

may pursue the legitimate aim of protecting values ‘without which there is no democratic society’.²³⁸ Notably, in this respect, the ECtHR held that a statutory ban on wearing clothing designed to conceal the face in public pursued the legitimate aim of protecting ‘a principle of interaction between individuals’, which is essential ‘for the expression not only of pluralism, but also of tolerance and broadmindedness’.²³⁹ Similarly, the former European Commission of Human Rights (hereinafter ‘ECmHR’) concluded that the expectation that all pupils receive moral education lessons pursued the legitimate aim to ‘transmit to young people rules of conduct which are necessary for the preservation of a democratic society’.²⁴⁰ On this basis, it could be accepted that RE aims to ensure that all pupils ‘understand the importance of equality and respect’²⁴¹ and are prepared for ‘the opportunities, responsibilities and experiences of adult life’ in a democratic society.²⁴² As such, it could be concluded that RE pursues the legitimate aim of conveying rules of conduct that are essential for the preservation of a democratic society and that are in accordance with the principles of pluralism, tolerance, and broadmindedness. Secondly, ECHR jurisprudence has established that national authorities may introduce compulsory teaching with a view to provide factual knowledge about certain subjects. For instance, the ECmHR concluded that the requirement that all pupils receive some education in religious instruction pursued the legitimate aim of ‘providing all children with sufficient factual religious knowledge’.²⁴³ In this respect, the UK government could point out that RE has been designed to provide evidence-based teaching that reflects the law as it applies to relationships and aims to ensure that all pupils in primary education receive factual knowledge about relationships.

In light of the above, our view is that the statutory framework regulating RE would likely be viewed by a domestic court or the ECtHR as pursuing a legitimate aim for the purposes of Article 14. To support this conclusion, a domestic court or the ECtHR could draw on the fact that the Council of Europe has repeatedly supported the provision of education about SOGI. For example, the Committee of Ministers has recommended that states take appropriate measures in education to ‘promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity’ and that this should include

²³⁸ Ibid para 153.

²³⁹ Ibid.

²⁴⁰ *Bernard and Others* (n 114) 74.

²⁴¹ Department for Education, ‘Statutory Guidance’ (n 1) para 36.

²⁴² Ibid para 2.

²⁴³ *Angeleni* (n 115) 51.

providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity.²⁴⁴

Similarly, the Parliamentary Assembly has recommended that the Committee of Ministers 'ensure that its activities in the areas of youth, equality, human dignity and intercultural dialogue, including its religious dimension, mainstream the issue of non-discrimination on the grounds of sexual orientation and gender identity' and 'intensify its work against homophobia and transphobia, with a particular emphasis on prevention in schools'.²⁴⁵ The importance of including teaching about SOGI in the school curriculum has been recently reiterated by the Steering Committee for Human Rights, which recommended that member states ensure that pupils receive 'factual and non-judgmental' information on this subject.²⁴⁶ Moreover, the Commissioner for Human Rights has stated that the provision of mandatory 'comprehensive sexuality education' is essential, not only to prevent and address homophobia and transphobia, but to create a 'safer and more inclusive learning environment'²⁴⁷ for all pupils and to protect young women's 'sexual and reproductive health and rights' in particular.²⁴⁸ In deciding whether there is a reasonable relationship of proportionality between the means employed and the aims sought to be realised by the statutory framework regulating RE, a domestic court or the ECtHR may draw on the following two principles of ECHR jurisprudence in respect of Article 14. First, the ECtHR has established that a wide margin of appreciation is usually available to a state when it comes to 'general measures of economic or social strategy' and, because of 'their direct knowledge of their society and its needs', that 'the national authorities are in principle better placed than the international judge

²⁴⁴ Council of Europe Committee of Ministers (n 170) para 32.

²⁴⁵ Council of Europe Parliamentary Assembly, *Recommendation 2021 (2013) on Tackling Discrimination on the Grounds of Sexual Orientation and Gender Identity* (Adopted by the Parliamentary Assembly on 27 June 2013 at the 26th Sitting) paras 5.3–5.4.

²⁴⁶ Council of Europe CDDH (n 9) para 129.

²⁴⁷ Council of Europe Commissioner for Human Rights, 'Human Rights Comment: Comprehensive Sexuality Education Protects Children and Helps Build a Safer, Inclusive Society' (21 July 2020): <<https://www.coe.int/en/web/commissioner/-/comprehensive-sexuality-education-protects-children-and-helps-build-a-safer-inclusive-society>>.

²⁴⁸ Council of Europe Commissioner for Human Rights, 'Women's Sexual and Reproductive Health and Rights in Europe' (Council of Europe, 2017) 10.

to appreciate what is in the public interest on social or economic grounds'.²⁴⁹ On this basis, the ECtHR will 'generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"'.²⁵⁰ It is reasonable to assume that reforms in the area of education, such as RE, would be accepted to constitute a 'social strategy' for this purpose. On this basis, unless RE was considered manifestly without reasonable foundation – which, in our view, would be unlikely given its aims and the developing approaches, as discussed above, in the bodies and organs of the Council of Europe to education on SOGI issues – the statutory framework regulating RE would be considered by a domestic court or the ECtHR to be a general measure of social strategy which falls within the margin of appreciation available to the UK government.

Secondly, the ECtHR has established that the absence of a consensus among member states on an issue may result in a wide margin of appreciation being afforded to national authorities.²⁵¹ For instance, the ECtHR has recognised that, although France was one of very few European countries to impose a blanket ban on the wearing of a full-face veil in public places, there was 'little common ground' among member states as to whether and how the wearing of the full-face veil in public should be regulated and, on this basis, that national authorities enjoyed a wide margin of appreciation and, consequently, the ban was proportionate to the aim pursued.²⁵² A domestic court or the ECtHR may, therefore, consider that there is no European consensus on whether and how children should receive RE and, in the absence of common ground among states, that the UK government enjoys a wide margin of appreciation to determine the statutory approach to RE, including in respect of SOGI content. To support this conclusion, a domestic court or the ECtHR could draw on information provided to the Steering Committee for Human Rights of the Council of Europe, which indicates that, whilst the number of states that include

249 *Stec and Others v the United Kingdom* [GC] 65731/01 and 65900/01 (ECtHR, 12 April 2006) para 52.

250 *Ibid.*

251 See, for example, *Glor v Switzerland* 13444/04 (ECtHR, 30 April 2009) para 75: 'Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved. One of the relevant factors in determining the scope of the margin of appreciation left to the authorities may be the existence or non-existence of common ground between the laws of the Contracting States'.

252 *SAS* (n 237) paras 155–156. The ECtHR concluded that the ban introduced by the French national authorities had an 'objective and reasonable justification' under Article 14 for the 'reasons indicated' in the paragraphs that evaluate the applicant's claims under Article 8 and Article 9 ECHR (*ibid* para 161).

information about SOGI in the school curriculum has substantially increased, practices across states are highly variable.²⁵³ For example, two states have included mandatory teaching about SOGI in schools,²⁵⁴ whilst other states actively resist the introduction of such teaching.²⁵⁵ Such data would, in our view, support the conclusion that, in the absence of a European consensus, the UK government was acting within the margin of appreciation available to it in respect of the statutory framework regulating RE.²⁵⁶

Although we think it is likely that a domestic court or the ECtHR would reject a complaint about SOGI content in RE brought under Article 14 on the basis of accepting that the UK government was acting within its margin of appreciation, it is possible that either a domestic court or the ECtHR may consider the question of whether the statutory framework regulating RE has a reasonable and objective justification in isolation from an analysis of the margin of appreciation available to the UK. If that were the case, it is our view that a domestic court or the ECtHR would find that the statutory framework regulating RE is objectively and reasonably justified and, specifically, discloses a reasonable relationship of proportionality between the means employed and the aims sought to be realised. This is because it is long established in ECHR jurisprudence that legislation requiring children to attend ‘moral and social

253 Currently, 30 member states of the Council of Europe include teaching about SOGI in the school curriculum. See, Council of Europe CDDH (n 9) para 79.

254 The two states are Belgium and the UK. See, *ibid* para 84.

255 See, Council of Europe Commissioner for Human Rights, ‘Human Rights Comment’ (n 247); P Johnson, ‘“Homosexual Propaganda” Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?’ (2015) 3(2) *Russian Law Journal* 37.

256 Any conclusions that are drawn about the absence or existence of a European consensus as a basis for making a judgment about a state’s margin of appreciation are dependent on how questions about consensus are framed. As such, we acknowledge that a domestic court or the ECtHR could ask ‘is there a consensus in Europe that SOGI content should not be mandatory for primary school children?’ and conclude that, since the UK is the only state to have taken the step of making such content mandatory, national authorities are acting outside of the trend in other states and, therefore, have a limited margin available to them. Whilst this is a possibility – not least, because consensus analysis can sometimes be applied erratically (P Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) 65–89) – we think it is made less likely by the high level of variability in approaches to education across member states (see, n 253), which, we feel, would more likely lead to the conclusion that in the absence of a consensus the UK enjoyed a wide margin. For a discussion of the application of consensus analysis in judicial decision-making in the ECtHR, see, LR Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’ (1993) 26(1) *Cornell International Law Journal* 133; G Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26(4) *Oxford Journal of Legal Studies* 705; Dzehtsiarou (n 20); Kapotas and Tzevelekos (n 18).

education lessons', that are expected to involve 'the study of human rights' and be organised 'in such a way as to guarantee a plurality of opinions', meets the proportionality requirement of Article 14.²⁵⁷ This has been interpreted to mean that a compulsory attendance requirement can be regarded as proportionate 'inasmuch as the relevant legislation stated that the classes in question had to specifically cover study of human rights and be organised in such a way as to guarantee diversity of opinion'.²⁵⁸ On this basis, given all the steps undertaken by the UK government to ensure that RE is taught in a way that is responsive to the plurality of children's backgrounds and reflective of equality legislation, it is likely that a domestic court or the ECtHR would accept that the statutory framework regulating RE had an objective and reasonable justification. Overall, therefore, it is in our view unlikely that a domestic court or the ECtHR would find that parents who object on religious grounds to the inclusion of SOGI content in RE are suffering discrimination in violation of the ECHR.

5 Conclusions

In this article we have attempted to anticipate the legal claims that may be made by those who seek to challenge, on religious grounds, the statutory framework regulating RE in English primary schools and, in particular, its inclusion of SOGI content. We have considered four key claims that could be made in such a challenge in the English courts or the ECtHR and have interrogated these through the lens of extant ECHR jurisprudence. In respect of claims relating to indoctrination, age-appropriateness, and discrimination, we have concluded that any complaint brought under the ECHR against the statutory framework regulating RE is unlikely to be successful. In respect of the claim relating to lack of parental choice, we have concluded that the inability of parents to enrol a child in an independent fee-paying school to avoid a child receiving RE may amount to a violation of the ECHR. We have, however, also concluded that a complaint brought under the ECHR in respect of the lack of opportunity for parents to exempt a child from RE in a state school would be unlikely to be successful. As such, our overall conclusion is that the statutory framework regulating RE is, except in respect of the one issue that we have

²⁵⁷ *Bernard and Others* (n 114) 75.

²⁵⁸ European Court of Human Rights, 'Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion' (31 December 2020) para 116.

identified, likely to be found by the domestic courts or the ECtHR to be compliant with the ECHR.

Our aim has been to provide a balanced and objective assessment of the merits of the claims made by those opposed to the inclusion of SOGI content in RE in light of ECHR jurisprudence. It seems certain that individuals and faith-based groups opposed to SOGI content in primary school education will take legal action against the statutory framework regulating RE in the English courts and, if unsuccessful, in the ECtHR. Those who are in favour of SOGI content in RE, and those who deliver RE in primary schools, may find our conclusions reassuring and supportive. So too might the UK government, which, in our view, can continue its commitment to the inclusion of SOGI content in RE with the knowledge that it meets the standards for respecting the rights of parents in relation to the education of their children established by the ECtHR. This is particularly pertinent in the context of a 'post-Brexit' UK, where debates continue about the value of the ECHR and the impacts of the alleged 'overreach' or 'activism' of the ECtHR.²⁵⁹ Our general finding is that the content of RE required by the statutory framework is respectful of the human rights and fundamental freedoms enshrined in the ECHR. At its core, the statutory framework regulating RE aims to educate every child in England about the importance and value of respect – for themselves, and for others – regardless of differences between individuals and families. In our opinion, this accords with the very essence of the ECHR, which is respect for human dignity and human freedom.²⁶⁰

259 For example, see, T Lock, 'Human Rights Law in the UK After Brexit' (Brexit Special Extra Issue 2017) November Supplement *Public Law* 117; Lord Sumption, 'The Reith Lectures' (BBC Radio 4, 2019): <<https://www.bbc.co.uk/programmes/m00057m8>>; J Dawson, 'Insight: How Might Brexit Affect Human Rights in the UK?' (17 December 2019): <<https://commonslibrary.parliament.uk/how-might-brexit-affect-human-rights-in-the-uk/>>; L Moxham and O Garner, 'Will the UK Uphold its Commitment to Human Rights?' (LSE Brexit, 30 June 2020): <<https://blogs.lse.ac.uk/brexit/2020/06/30/long-read-will-the-uk-uphold-its-commitment-to-human-rights/>>.

260 *Christine Goodwin v the United Kingdom* [GC] 28957/95 (ECtHR, 11 July 2002) para 90.