



## **Ensuring Effective Remedies for an Objective, Critical and Pluralistic Secular Education**

Response from Atheist Ireland  
to the interim report of the Forum  
on Patronage and Pluralism

1 December 2011

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# 1. Overview

## 1.1 We have four overriding recommendations for the final report.

1.2 \* To comply with your terms of reference, your advice must be stronger and must be enforceable. You are mandated to advise on how best to “ensure” that certain outcomes can happen, not simply on how best to make those outcomes more likely.<sup>i</sup>

1.3 \* The final report must include effective remedies that enable parents and students to vindicate in practice and law their right to ensure that the education of their children is in conformity with their convictions, as enshrined in Human Rights treaties and based on rulings of the European Court of Human Rights.

1.4 \* Whatever their model of patronage, the State must ensure that all schools convey all parts of the curriculum in an “objective, critical and pluralistic manner”, as recommended by the Irish Human Rights Commission, as enshrined in the Toledo Guiding Principles, and as ruled on by the ECHR.

1.5 \* Ensuring “a sufficiently diverse number and range of primary schools catering for all religions and none” must in practice ensure that secular non-denominational schools are widely available in all regions of the State, as noted by the United Nations Human Rights Committee.

1.6 We also make other specific recommendations throughout this response, including on ERB, opting out, the right to private and family life and access to schools.

## 1.7 The interim report fails to vindicate the human right of parents who want their children educated in conformity with secular convictions.

1.8 The European Convention obliges the State to respect the right of parents to ensure that the education and teaching of their children is “in conformity with their own religious and philosophical convictions” (Article 2 of Protocol 1).<sup>ii</sup> The ECHR has stated that the secular viewpoint is worthy of respect in a democratic society, and must be regarded as a “philosophical conviction” within the meaning of the Convention.<sup>iii</sup>

1.9 The European Court of Human Rights has said this obligation on the State:

(a) presupposes that the parents’ choice between public and private education be respected, and also that teaching be neutral.<sup>iv</sup>

(b) is binding upon the State in the exercise of “each and every” function that it undertakes in the sphere of education and teaching. The State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.<sup>v</sup> The State must provide itself with the means of efficiently establishing and punishing violations.<sup>vi</sup>

## 1.10 The Forum does not seem to appreciate the obligation to respect secularism as a legitimate philosophical conviction.

1.11 The opening presentation explicitly disrespected a core secular belief, in a way that we suspect you would not even consider disrespecting any religious beliefs, by describing the suggested removal of crucifixes in classrooms as “sensationalist nonsense”.<sup>vii</sup>

1.12 The right to a classroom free of religious symbols is central to mainstream secularism, and is not an extremist position. The European Court of Human Rights upheld this right in Italy as protecting freedom of conscience. This was overturned on appeal, citing the otherwise secular nature of Italian state schools.<sup>viii</sup> The situation is different in Ireland, where we do not have secular state schools to counterbalance the influence of symbols.

1.13 We ask you to reconsider this issue, resisting any preconceptions that it is “sensationalist nonsense”. Please clarify that you have fully considered it as a legitimate proposal, and explain in this context the reasoning behind whatever you advise about it.

### **1.14 The interim report’s domestic appeals mechanism will not enforce the substance of Convention rights.**

1.15 It has not yet been determined whether schools governed by the Education Act 1998 are “organs of the state”<sup>ix</sup> for the purposes of the European Convention on Human Rights Act 2004. If they are not, then the interim report’s domestic appeals mechanism will not enforce the substance of Convention rights. This also raises issues with regard to Article 42.3.1 of the Irish Constitution and the compatibility of the education system with Ireland’s human rights obligations.<sup>x</sup> There is no legal aid for these matters and the prohibitive costs of legal action against the state are a deterrent to parents.

1.16 Any appeals mechanism must guarantee that the investigation and remedy is in accordance with the European Convention in practice and in law.<sup>xi</sup> The European Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (Article 6, 13 EC).<sup>xii</sup>

## **2. The right to an effective remedy**

2.1 The interim report considers that an expanded Role for the office of the Ombudsman for children could provide an appropriate appeal mechanism.

2.2 The European Court has said of Article 13 of the Convention (the right to an effective remedy) “Nevertheless, the remedy required by Article 13 must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent state”.<sup>xiii</sup>

2.3 If schools are not “organs of the state” within the meaning of the European Convention on Human Rights Act 2004, then the Ombudsman for Children cannot examine complaints in a Convention compliant manner nor give a remedy in practice as well as in law. This means that the State is ‘providing for’ the education of children in schools where parents cannot vindicate their rights under the European Convention and the various UN Conventions.

2.4 The section in the interim report on Complaints and Appeals does not refer to religious education but religious instruction. Nor does it refer to Section 7.3 (c) of the Equal Status

Act 200. In effect this means that the Forum has left out of the Complaints and Appeals section the very issues that the UN is raising with the state and the rights guaranteed under the European Convention.

2.5 See also the section on positive obligations and the horizontal effect of the Convention in the handbook number 7 of the Council of Europe Human Rights Handbooks.<sup>xiv</sup>

### **3. The religious integrated curriculum**

3.1 The interim report on Rules and Curriculum states: “Curriculum (1999) – school – to be flexible in making alternative arrangements for those who do not wish to avail of the particular religious education if offers”.

3.2 In 2008 the UN Human Rights Committee stated that it “notes with concern that the vast majority of Ireland’s primary schools are privately run denominational schools that have adopted a religious integrated curriculum thus depriving many parents and children who so wish to have access to secular primary education. (Arts. 2, 18, 24, 26). The State party should increase its efforts to ensure that non-denominational primary education is widely available in all regions of the State party, in view of the increasingly diverse and multi-ethnic composition of the population of the State party.”<sup>xv</sup>

3.3 The Irish Human Rights Commission has recommended that “Section 15 of the Education Act be amended to provide for modifications to the integrated curriculum to ensure that the rights of minority faith or non faith children are also recognised therein. In this regard, the State must take sufficient care that information and knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.”<sup>xvi</sup>

3.4 If the Forum is serious about upholding the human rights of all parents, it must include this recommendation from the Irish Human Rights Commission. Otherwise the State is failing in its positive obligation to take sufficient care that the curriculum is conveyed in an objective critical and pluralistic manner. That is the limit that must not be exceeded. The right to respect is an absolute right and not to be balanced against the rights of others or one that can be gradually achieved.<sup>xvii</sup>

3.5 The final report should also include the Human Rights Commission’s Recommendation to define in primary legislation the terms such as “denominational”, “multi-denominational”, “inter denominational, “non-denominational or “other” school.<sup>xviii</sup>

3.6 Simply removing Rule 68 will not guarantee the human rights of those parents seeking secular education. Last June Bishop Leo O’Reilly informed the Forum that you cannot really separate Religious Education from Faith Formation the way that some people seem to believe.<sup>xix</sup> A Religious integrated curriculum presupposes that children could learn about Christianity and the Catholic faith in detail and not objectively without being subjected mentally to what constitutes or might constitute unwanted influence or indoctrination.

3.7 Suggesting that schools take a flexible approach to opting out of a religious integrated curriculum is meaningless. If a school is not legally obliged to supervise children outside the Religious instruction class and religious ceremonies then they are hardly likely to make flexible arrangements for those who wish to opt out of religious education that is integrated into the curriculum. The Forum does not even suggest legal change to ensure that parents are aware of what exactly is being taught to their children through the religious integrated

curriculum and consequently parents cannot ensure that the teaching of their children is in conformity with their convictions.

## **4. Religious education (ERB)**

4.1 We welcome that consideration be given to learning about World Religion, Ethics and Morals (ERB) and that this should be part of the curriculum (Section VII Issues: Religious Education).

4.2 Teaching about Religions and Beliefs is supported by the Toledo Guiding principles but the interim report does not explicitly advise that any new course will be delivered in accordance with those principles. The Toledo Guiding Principles are based on human rights law. On page 68 (State neutrality and opt out rights – State Competences on Education vis-a-vis the Rights of Parents) it clearly says that the state must take sufficient care that the information and knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.<sup>xx</sup>

4.3 You advise that the Catholic Bishops consider that the revised Alive O Programme devote two or three classes a week to Religious Education (ERB) material and the remainder of the classes to Faith Formation, as “this could enhance provision of RE for All Primary School Pupils”. This means the Catholic Church will have control over the content and teaching of ERB for all students. It is also against Catholic Church rules for any teacher that is not trained by them to teach Religious Education (ERB) never mind Religious Instruction. This suggestion is not in accordance with the Toledo Guiding Principles as it breaches the human rights of minorities.<sup>xxi</sup>

## **5. Opting out**

5.1 The wording suggested for the amendment of Section 15 of the Education Act 1998 under the Section on Statutory Provision will not change anything on the ground. The Constitutional right to opt out in Irish schools has not been interpreted to mean the physical removal of students from religious instruction classes, prayers, preparation for Holy Communion/Confirmation, Religious ceremonies (Mass etc). Rule 69 – 2 (a) of the Rules for National Schools says that no pupil should receive or be present at any religious instruction of which his parents disapprove.<sup>xxii</sup>

5.2 Despite this Rule parents are still responsible for the supervision of their children if they wish to remove their children from religious instruction classes, prayers, preparation for Holy Communion/Confirmation or ceremonies (Mass etc).<sup>xxiii</sup> The Supreme Court recognises that Characteristic Spirit (ethos) influences children.<sup>xxiv</sup> The Education Act 1998 does not oblige schools to inform parents of the details of their ethos and consequently children that are opted out attend prayers and Religious services without their parents knowledge.

5.3 The interim findings from the Forum do not even suggest that schools should be legally obliged to inform parents the details of their Characteristic Spirit (ethos). The burden placed on parents by the failure to legally oblige schools to supervise children or to provide an alternative subject has rendered the right to opt out inoperable in practice. Parents are

deterred from even exercising the right to opt out because of the burden it will create for them.

5.4 Legal change is required to vindicate the rights of those parents that have the right to remove their child from religious instruction, prayers and religious ceremonies etc. Any legislation must show clearly what body is responsible for the supervision of children who are removed from religious instruction or ceremony.

## **6. The right to private and family life**

6.1 There is nothing in the interim report that recognises the human right to private and family life.

6.2 Article 8 of the European Convention guarantees the Right to respect for private and family life. Any interference with the Right to Private and Family life must be in accordance with the law and necessary in a democratic society. There is a positive obligation on the State to protect this right and any legislation must be in accordance with Section 2 of this Article.

6.3 There is no legitimate reason under Article 8.2 of the European Convention for seeking private information from parents in relation to access to education. Rule 69 (1) of the Rules for National Schools states that: "The Religious denomination of each pupil must be entered in the school register and roll-book.<sup>xxv</sup> This information should be ascertained from the parent (the father if possible) or the guardian of the pupil, where necessary."

6.3 In their Submission to the Department of Education on school enrolments the Irish Human Rights Commission states: "In this context there is a real risk that admission policies which require parents to disclose their religious or philosophical convictions may variously constitute a breach of Articles 8, 9, Article 2 of Protocol 1 and/or Article 14 of the ECHR."

6.4 The interim report does not reflect the Recommendations of the Irish Human Rights Commission which states that: "There should be an appropriate amendment to the Employment Equality Acts to ensure respect for the private life of teachers where their private life does not improperly encroach on the rights and freedom of others."

6.5 Respect for private and family life is a human right. Discrimination against teachers in this manner undermines the dignity of the human person. It is against the conscience of non-religious parents to send their children to schools that discriminate against teachers in this manner.

## **7. Access to schools**

7.1 Under Statutory provisions, the interim report refers to "Amendment of the Equal Status Act (2000) (2), (c) to be considered, particularly in the Context of Stand Alone Schools, to facilitate the DES in "Providing for" the Education of all children in the Area."

7.2 Did you mean to refer to Section 7 (3) (c), which allows denominational schools to discriminate on religious grounds if they have a shortage of places? Whatever section you meant, there is no reason to make this particular to stand alone schools.

7.3 Discrimination in access to schools is against human rights law and in particular Article 14 and Article 2 of Protocol 1 of the ECHR. The state is failing in its obligation to respect the philosophical convictions of those parents seeking secular education for their children if they ‘provide for’ their education in schools that discriminate in access to education.<sup>xxvi</sup>

7.4 In their Submission to the Department of Education on school enrolments the Irish Human Rights Commission states: “The IHRC recommends that pending further diversity in school provision the Government amend section 7 of the Equal Status Acts 2000-2008 which allows primary and second-level schools which have a particular denominational ethos to give preference in admission to students of a particular religious denomination over others and to refuse admission to such students where this is essential to uphold the ethos of the school.”<sup>xxvii</sup>

## **8. Conclusion**

8.1 There is a positive obligation on the state to respect the religious and philosophical convictions of parents. This binds them “in the exercise” of all the “functions” which they assume in relation to education and teaching. The state cannot absolve itself from responsibility for human rights violations by delegating its responsibilities to private bodies and institutions. There is no justification for denying parents their human rights including access to an effective remedy in practice and in law. It is not within the margin of appreciation of the state to disregard these rights. The European Court of Human Rights has said that: “Reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols”.<sup>xxviii</sup> If parents do not have access to an effective remedy in practice and in law then human rights are meaningless on the ground in Ireland. The interim findings from the Forum will not guarantee parents that seek secular education for their children their human rights.

## Notes

<sup>i</sup> The terms of reference of the Forum are to advise the Minister on:

1. how it can best be **ensured** that the education system can provide a sufficiently diverse number and range of primary schools catering for all religions and none;
2. the practicalities of how transfer/divesting of patronage should operate for individual primary schools in communities where it is appropriate and necessary;
3. how such transfer/divesting can be advanced to **ensure** that demands for diversity of patronage (including from an Irish language perspective) can be identified and met on a widespread basis nationally.

In undertaking this work the Forum will, in particular, have regard for the following:

- the expressed willingness of the Roman Catholic Church to consider divesting patronage of primary schools
- the current financial constraints within which the State is operating, the need for continued restraint into the future and the requirement in this context to make maximum use of existing school infrastructure in catering for future demands

<sup>ii</sup> Kjeldsen, Busk Madsen and Pedersen V Denmark 7<sup>th</sup> December 1976 (App No. 5095/71, 5926/7. Extract “The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.”

<sup>iii</sup> Lautsi v Italy (App No. 30814/06) 18<sup>th</sup> March 2011 – Extract “58. Secondly, the Court emphasises that the supporters of secularism are able to lay claim to views attaining the “level of cogency, seriousness, cohesion and importance” required for them to be considered “convictions” within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1 (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 36, Series A no. 48). More precisely, their views must be regarded as “philosophical convictions”, within the meaning of the second sentence of Article 2 of Protocol No. 1, given that they are worthy of “respect 'in a democratic society’”, are not incompatible with human dignity and do not conflict with the fundamental right of the child to education. “

<sup>iv</sup> Kjeldsen, Busk Madsen and Pedersen v. Denmark

<http://www.echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf> page 56

<sup>v</sup> Costello-Roberts v United Kingdom – (app. No. 13134/87 1993 para. 27

<sup>vi</sup> <http://www.echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf> page 59

<sup>vii</sup> From Professor Coolahan’s opening presentation: “Somebody said on a radio programme this morning that they were going to have a debate about taking crucifixes out of the classrooms in Irish schools. That’s the sensationalist nonsense that media can engage in. That’s completely off the wall, but can upset people. We’ve no one talking about that. We’re talking about incorporating respect for various belief systems by the artifacts and symbols which are on school walls.”

<sup>viii</sup> Lautsi and other v Italy (App No. 30814/06) 18<sup>th</sup> March 2011. Extract “78. The Court considers that, when read as it should be in the light of Article 9 of the Convention and the second sentence of Article 2 of Protocol No. 1, the first sentence of that provision guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe. It therefore understands why pupils who are in favour of secularism may see in the presence of crucifixes in the classrooms of the State school they attend an infringement of the rights they derive from those provisions.“

<sup>ix</sup> <http://www.irishstatutebook.ie/2003/en/act/pub/0020/sec0003.html> “ “organ of the state” includes a tribunal or any other body which is established by law or through which any of the legislative, executive or judicial powers of the state are exercised.”



x A,B and C v Ireland (app No 25579/05) 16th Dec 2010. Extract : 150. “ The rights guaranteed by the 2003 Act would not prevail over the provisions of the Constitution (paragraphs 92-94 above). In any event, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant proceedings, it could not form the basis of an obligatory award of monetary compensation. In such circumstances, and given the relatively small number of declarations to date (paragraph 139 above) only one of which has recently become final, a request for such a declaration and for an *ex gratia* award of damages would not have provided an effective remedy to the first and second applicants (*Hobbs v. the United Kingdom* (dec.), no. 63684/00, 18 June 2002; and *Burden v. the United Kingdom* [GC], cited above, §§ 40-44).”

xi <http://www.echr.coe.int/NR/ronlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf> page 15. Extract: “As the law stands at present, then, it may be said that the establishment and development of the horizontal effect of the Convention by the European Court is, in its entirety, a consequence of the theory of positive obligations. The state becomes responsible for violations committed between individuals because there has been a failure in the legal order, amounting sometimes to an absence of legal intervention pure and simple, sometimes to inadequate intervention, and sometimes to a lack of measures designed to change a legal situation contrary to the Convention. But while the positive obligations do cover the entire field of the theory of the Convention’s horizontal effect, they are not confined to it. The state also has the obligation to protect in the context of its own relations with persons under its jurisdiction. In other words, it is bound by a kind of “duty of schizophrenia” – the duty to take measures necessary to prevent or punish infringements committed by its own agents, representatives or emanations.”

xii *Airey v Ireland* (App No. 6289/73) 9<sup>th</sup> October 1979 para 24.

xiii recalled in *Kaya v Turkey* (App 158/1996/777/978 19<sup>th</sup> February 1998 para 106.

xiv <http://www.echr.coe.int/NR/ronlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf> page 15

xv International Covenant on Civil and Political Rights CCPR/C/IRL/CO/3:22. Article 2 is the Right to be free from Discrimination; Article 18 is the Right to Freedom of Conscience, Article 24 the Rights of the Child and Article 26 the Right to Equality before the law.

xvi Religion & Education : A Human Rights Perspective May 2011 – p. 104

xvii *Cambell & Cosans V UK* (App 7511/76; 7743/76 25<sup>th</sup> Feb 1982 – para 37

xviii Religion & Education: A Human Rights Perspective May 2011 – p. 104

xix <http://media.heanet.ie/page/945a5fbb23e1461ebc8efa87272fd930>

xx <http://www.osce.org/odihr/29154> - page 68, 69 Extract “The state may satisfy this duty of neutrality either by designing a curriculum that is itself sufficiently impartial and balanced, or, in those instances in which the state provides instruction in a particular religion or belief by granting rights to opt out on the ground of conscientious objection. This right must be realizable in practice, and not a mere theoretical possibility. Moreover, the requisite neutrality would be compromised if pupils were subjected to any disadvantage, discrimination or stigma on account of the exercise of this right to be exempted from such classes, or elements of classes.”

xxi *Manoussakis v. Greece* (ECHR, app 18748/91 1996) para 49-38. Toledo Guiding Principles p 68 – “Furthermore, while it is important to ensure that representatives of religious communities are allowed to give input and advice, this should not be taken to the extreme of giving them too much decision –making power at the cost of abdicating state responsibility. The European Court of Human Rights has made it clear that excessive involvement of religious authorities from one community in decisions that affect the rights of those belonging to another community may itself amount to a violation of the right to freedom of religion or belief.”

xxii [http://www.education.ie/servlet/blobServlet/rules\\_for\\_national\\_schools\\_7\\_13.pdf](http://www.education.ie/servlet/blobServlet/rules_for_national_schools_7_13.pdf)

<sup>xxiii</sup> Case of A, B and C V Ireland (app No. 25579/05) 16<sup>th</sup> Dec 2010 – Extract 249. “once that decision is taken the legal framework devised for this purpose should be “shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention” (*S.H. and Others v. Austria*, no. 57813/00, § 74, 1 April 2010).”

<sup>xxiv</sup> Barrington J. Campaign to Separate Church and State v Minister for Education 1998 (3 IR 321) Extract “A child who attends a school run by a religious denomination different from his own may have a constitutional right not to attend religious instruction at that school but the Constitution cannot protect him from being influenced, to some degree, by the religious ‘ethos’ of the school. A religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school.”

<sup>xxv</sup> [http://www.education.ie/servlet/blobServlet/rules\\_for\\_national\\_schools\\_7\\_13.pdf](http://www.education.ie/servlet/blobServlet/rules_for_national_schools_7_13.pdf)

<sup>xxvi</sup> Kjeldsen, Busk Madsen and Pedersen v Denmark 1976 para 52.

<sup>xxvii</sup> <http://www.ihrc.ie/legislationandpolicy/policysubs.html> (5)

<sup>xxviii</sup> Lautsi v Italy (App No. 30814/06) 18<sup>th</sup> March 2011 – para 68.