

JAMES KANE
BARRISTER-AT-LAW

The Law Library,
Distillery Building,
145-151 Church Street,
Dublin 7.

Email: james.kane@lawlibrary.ie
Mobile: 087 646 2155
Tel: (01) 817 4530
DX: 816649

**Opinion on specific questions on the right to opt out of religious instruction
under Article 44.2.4° of the Constitution – Atheist Ireland***

Article 44.2.4° of the Constitution

1. Prior to addressing the specific questions referred, it is necessary to consider the text of Article 44.2.4° of the Constitution, the wider constitutional context of education and religious rights and present arrangements in schools.
2. Article 44.2.4° of the Constitution provides:

“Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.”
3. Article 44.2.4° refers to a right to attend a school receiving public money without attending religious instruction at that school. While the context of Article 44.2.4° is on funding, Article 44.2.4° appears to refer to a right which already exists (the text refers to affecting “... *prejudicially the right*...”). In my view, it follows that the nature and extent of the right to not attend religious instruction is greater than the stated context of Article 44.2.4°, being the level of funding for schools. Rather, it appears to be a personal right protected by the Constitution as a whole.
4. The following implications arise from that analysis. First, the right to not attend religious instruction in State funded schools subsists and must be protected whether or not public funding to any particular school might be said to be generous. Where a child is attending a school which is in receipt of *some* State funding, the child is entitled to not attend religious instruction regardless of the level of that funding. This right must be respected by the State and individual schools. Secondly, there is an express and separate obligation on the State to ensure that the issue of funding alone does not prejudicially affect the right.

* This opinion is provided solely for the benefit of Atheist Ireland. No liability whatsoever is accepted towards any other party for the content of this opinion. This opinion may not be relied upon as a substitute for obtaining legal advice.

5. The Constitution guarantees respect for personal rights. In this regard, Article 40.3.1° provides:

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”
6. The right to not attend religious instruction in State funded schools is protected under Article 40.3.1°
7. Further, the text of Article 44.2.4° is notable in referring to the right of the “child.” Since the Thirty-First Amendment to the Constitution, the rights of children have found greater express constitutional recognition. However, other constitutional articles vest educational rights in “parents” (including the “*inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children*” protected by Article 42.1). Accordingly, the invocation of Article 44.2.4° may become more complex where the child’s wishes differ from those of the parents, although it does not appear to be necessary to read these as disjunctive rights for the purpose of answering the questioned referred.
8. It is notable however that legislation¹ and departmental circulars² concerning the right to opt out provide that it is for the *parents* to exercise this right, unless the student is aged 18 or above.

The wider constitutional context

9. A constitutional article is generally not interpreted in isolation from other articles, unless it is sensible in a particular context to do so.³ Accordingly, while the questions referred stem from Article 44.2.4°, a number of other articles are relevant to the questions referred and it is sensible to refer to them at the outset.
10. In that regard, some of the remaining parts of Article 44.2 are relevant, including Article 44.2.1°, which reads:

“Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”
11. The guarantee of freedom of conscience extends to persons holding no religious beliefs. In *McGee v Attorney General*⁴ it was stated by Walsh J. that:

“The whole context in which the question of conscience appears in Article 44 is one dealing with the exercise of religion and the free profession and practice of

¹ Section 30(2)(e) of the Education Act 1998.

² Circular 0013/2018, page 3.

³ See *Tormey v Ireland* [1985] IR 285 per Henchy J. at p 296: “... *the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme.*”

⁴ [1974] IR 284.

*religion. Within that context, the meaning of Article 44.2.1° is that no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned and, subject to public order and morality, is free to profess and practise the religion of his choice in accordance with his conscience. Correlatively, he is free to have no religious beliefs or to abstain from the practice or profession of any religion.”*⁵

12. Fitzgerald C.J. stated in the same case (in a dissenting judgment):

*“Article 44 of the Constitution, which deals with religion and religious institutions, was recently amended by referendum. It confers no special status on any religion; every citizen is entitled to profess the religion of his choice, or no religion.”*⁶

13. Also relevant is Article 44.2.3° which provides:

“The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.”

14. Article 44.2.3° prohibits discrimination as between religious persons and non-religious persons. In *Mulloy v Minister for Education*⁷, a scheme devised by the Minister for Education governing incremental salary benefits for teachers provided that *certain* teaching experience abroad may be counted as teaching service for the purpose of reckoning salary increments. However, the scheme recognised only teaching abroad by lay teachers. The plaintiff was a priest who taught in missions in Nigeria. The plaintiff successfully argued that his exclusion from the scheme was contrary to Article 44.2.3° in discriminating against him on the grounds of religious status. As appears from the text of Article 44.2.3°, it prohibits discrimination based on “*religious profession, belief or status.*” The Supreme Court analysed the scheme by reference to the question of *status*, in that the plaintiff had a religious status *qua* a priest. In dealing with the issue of status, Walsh J. stated in the Supreme Court:

“The present case concerns the disposition of public funds on a basis which, if sustainable, enables a person who is not a religious to obtain greater financial reward than a person who is a religious and is otherwise doing the same work and is of equal status and of length of service, or recognised service in the case of a teacher. If that were constitutionally possible it would enable the State to prefer religious to lay people, or vice-versa, in a matter which is in no way concerned with the safeguarding or maintenance of the constitutional right to free practice of religion or freedom of conscience or of profession of religion. In my view, the State is not permitted by the Constitution to do this. The reference to religious status, in both the Irish text and the English text of the Constitution, relates clearly to the position or rank of a person in terms of religion in relation to others either of the same religion or of another religion or to those of no religion at all. Thus it ensures that, no matter what is one's religious profession or belief or status, the

⁵ *McGee*, p 316.

⁶ *McGee*, pp 302 and 303.

⁷ [1975] IR 88.

State shall not impose any disabilities upon or make any discrimination between persons because one happens to be a clergyman or a nun or a brother or a person holding rank or position in some religion which distinguishes him from other persons whether or not they hold corresponding ranks in other religions or whether or not they profess any religion or have any religious belief, save where it is necessary to do so to implement the guarantee of freedom of religion and conscience already mentioned.”⁸

15. As Article 44.2.3° protects persons who are of no religious belief from discrimination on status grounds (as per *Mulloy*), it must equally protect those same persons from discrimination on the grounds of profession or belief.
16. The above passage also makes reference to a principle established in earlier case law that religious discrimination is in fact permissible where it is concerned with the safeguarding or maintenance of the constitutional right to free practice of religion or freedom of conscience.⁹ Owing to this rule, and other constitutional principles, it would be totally unfounded to rely on Article 44.2.3° to suggest that denominational schools must cease all religious instruction. The concerns raised in my instructions are simply that the constitutional rights of children and parents who do not profess any religion are respected and accommodated.
17. Moreover, Barrington J. stated in the Supreme Court in *Corway v Independent Newspapers*¹⁰ that:

“The Constitution also introduced (in Article 40.1) a specific guarantee of equality before the law to all citizens as human persons. The effect of these various guarantees is that the State acknowledges that the homage of public worship is due to Almighty God. It promises to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be they Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists. But Article 44 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality.”¹¹

18. Therefore, both the right to freedom of conscience and the prohibition on discrimination on the grounds of religious profession, belief or status, can be relied upon by persons who do not hold religious beliefs.
19. Also relevant to the present analysis are the education provisions in Article 42. First, Article 42.1 and 42.2. deal with the role of the family in education:

“1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to

⁸ *Mulloy* at pp 96 and 97.

⁹ See *Quinn’s Supermarket v Attorney General* [1972] 1 IR 1, at p 24.

¹⁰ [1999] 4 IR 484.

¹¹ *Corway*, pp 500 and 501.

provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2 Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.”

20. Article 42.1 establishes the family as the primary educator. Article 42.2 allows parents to “provide” their child’s education in *inter alia* schools recognised or established by the State. Thus, the Constitution envisages that parents may educate their children by sending their children to schools funded by the State. Where parents elect to do so, the schools act *in loco parentis*.

21. Article 42.3 is also relevant in providing:

“1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.”

22. Article 42.4 provides:

“The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.”

23. The manner in which Article 42 operates was considered in *O’Shiel v Minister for Education*¹² in which a group of parents wished to have their children educated in accordance with Steiner principles and established Cooleenbridge school for that purpose. The school was initially funded directly by the parents and by fund raising. Subsequently, the parents applied to the Minister for Education for recognition of the school which would entitle the school to State funding. The State withheld recognition as some teachers at the school did not meet all requirements of the primary school rules, including rules pertaining to teachers’ qualifications and the teaching of Irish. Consequently, the school did not qualify for State funding. The parents argued that they were entitled, under the Constitution, to choose to have their children educated in accordance with Steiner principles. They argued that the discrimination arising from the State’s funding of certain recognised primary schools, but not Cooleenbridge, was unjustified and failed to give equal weight to equally valid constitutional choices. They argued that this encroached on the right to the provision for free primary education. The State argued that it discharged its obligations as it had provided (i.e. funded) 15 denominational schools within a 12 mile radius of the Cooleenbridge school. While the Court held that it was legitimate for the State to require, as a precondition to

¹² [1999] 2 IR 321.

recognition and funding, that teachers hold certain qualifications and to have fluency in the Irish language,¹³ it provided a useful description of the manner in which Article 42 works. Laffoy J. stated:

“When one adopts a global approach to the interpretation of Article 42 the values enshrined in it become obvious. It is concerned with education in a broad sense - religious and moral, intellectual, physical and social. In its entirety it is imbued with the concept of parental freedom of choice. While parents do not have the choice not to educate their children, it recognises that all parents do not have the same financial capacity to educate their children. It is in this overall context that the obligation is imposed on the State to ‘provide for free primary education’. In my view it would pervert the clear intent of the Constitution to interpret that obligation as merely obliging the State to fund a single system of primary education which is on offer to parents on a ‘take it or leave it’ basis. In the case of parents of limited or modest means unable to afford, or to afford without hardship, fees charged by private schools, it would render worthless the guarantee of freedom of parental choice, which is the fundamental precept of the Constitution. If the Defendants’ stance - that it has discharged its constitutional obligations to the Plaintiffs by providing financial aid for 15 denominational schools within a 12 mile radius of Cooleenbridge School - was tenable, it would render meaningless the guarantee of parental freedom of choice in the case of the Parent Plaintiffs. It is not tenable.”¹⁴

24. In addition to interpreting Article 42 in a “global manner,”¹⁵ Laffoy J. stated that *“Article 42 is a complex provision and embodies a number of interlocking elements.”*¹⁶ While the Court in *O’Shiel* was not dealing with any issue of religion, it seems clear that Article 44.2.4^o must also “interlock” with Article 42.
25. *O’Shiel* illustrates the intention behind Article 42: parents have choice in the manner in which their children shall be educated and they may exercise that choice by enrolling children in State funded schools. In circumstances where parents elect to send their children to State funded schools, parental freedom of choice must be respected.
26. Specifically, with regard to the question of religion in education, the primacy of the role of parents was confirmed by Barrington J. in *Campaign to Separate Church and State v Minister for Education*.¹⁸

“Article 42 of the Constitution acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of the parents to provide for the religious and moral, intellectual, physical and social education of their children. Article 42.2 prescribes that the parents shall be free to provide ‘this education’ (i.e. religious, moral, intellectual, physical and social education) in their homes or in private schools or ‘in schools

¹³ *O’Shiel* pp 356 and 361.

¹⁴ *O’Shiel* pp 346 - 347.

¹⁵ *Ibid.*

¹⁶ *O’Shiel* p345.

¹⁸ [1998] 3 IR 321.

recognised or established by the State'. In other words the Constitution contemplates children receiving religious education in schools recognised or established by the State but in accordance with the wishes of the parents."¹⁹

Present arrangements in schools

27. The State funds various denominational, interdenominational and multi denominational schools.²⁰ While the State recognises a number of special schools which do not have any explicit ethos, it appears that there are no recognised non-denominational schools funded by the State (it appears to be the case that Educate Together schools are considered multid denominational).²¹
28. The school curricula is set by the Minister for Education,²² with advice from the National Council for Curriculum and Assessment ("NCCA").²³
29. Section 30(2)(e) of the Education Act 1998 provides that the Minister shall not "... require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student."
30. Additionally section 30(4) of the Education Act 1998 provides:

"A school may, subject to the requirement that the curriculum as determined by the Minister is taught in that school, provide courses of instruction in such other subjects as the board considers appropriate."
31. With respect to the issue of religion in primary schools, it is the Department of Education's position that "[r]eligious or ethical education is the responsibility of the different school patron bodies."²⁵ With respect to junior cycle and senior cycle in post primary schools, the NCCA has developed non-mandatory religion courses.²⁶
32. The Department of Education has published two circulars concerning religion in schools, namely circulars 0013/2018 and 0062/2018.²⁷ While circulars do not have

¹⁹ *Campaign to Separate Church and State* at p 357.

²⁰ These are the respective terms recorded by the Department as evidenced by the statistics section of its website. Instructions indicate that the schools are registered under these categories by the patron of the schools.

²¹ See "*The Report on Patronage and Pluralism in the Primary Sector - Report of the Forum's Advisory Group*," dated April 2012, which states at page 51: "Ireland has no secular or non-denominational schools."

²² Section 30 of the Education Act 1998.

²³ Section 41 of the Education Act 1998.

²⁵ See: <https://www.curriculumonline.ie/Primary/Curriculum/>

²⁶ See: <https://ncca.ie/en/junior-cycle/subjects-in-development/religious-education>

²⁷ See: https://www.education.ie/en/Circulars-and-Forms/Active-Circulars/cl0013_2018.pdf

any legal effect,²⁸ they assist with understanding the present arrangements between the Department of Education and schools.

33. Circular 0013/2018 applies to community and ETB post primary schools. It provides that those who wish to not attend religious instruction should be timetabled for alternative tuition, rather than supervised study.²⁹ The Circular also refers to the NCCA devised Religious Education curriculum and states that it:

“... serves to meet the religious instruction requirements of the Catholic Church and schools can continue this arrangement for pupils whose parents elect for Catholic religious instruction or other parents who wish to follow the NCCA curriculum, and where that is the case it is important in the information provided to parents that they are made fully aware that the curriculum is not necessarily confined to learning about religions.”³⁰

34. Thereafter, the Department issued circular 0062/2018 which purports to clarify aspects of circular 0013/2018. It states:

“The NCCA-developed Religious Education Junior and Senior Cycle syllabuses, and the Religious Education specification for Junior Cycle, to be introduced in 2019, are intended for students of all faith backgrounds and none. The content prescribed in the syllabuses is intended to ensure that students are exposed to a broad range of religious traditions and to the non-religious interpretation of life. They do not provide religious instruction in any particular religious or faith tradition.”³¹

35. There is clearly some considerable conflict as between the two foregoing passages. On the one hand, it is suggested that the NCCA syllabus meets Catholic Church religious instruction requirements, yet, on the other hand, it is suggested that syllabus is intended for students of all faith backgrounds or none. The Department has not withdrawn circular 0013/2018, but rather purported to “clarify” its contents by circular 0062/2018, and states that the two circulars must be read in conjunction with each other.³² It is not entirely clear to me whether the Department remains of the view that the religious education syllabus developed by the NCCA “serves to meet the religious instruction requirements of the Catholic Church” and that the syllabus is “not necessarily confined to learning about religions.” Whether this syllabus does meet the instruction requirements of the Catholic

²⁸ See *O'Callaghan v Meath Vocational Education Committee* (unreported) High Court 20th November 1990, per Costello J: “It is a remarkable feature of the Irish system of education that its administration by the Department of Education is largely uncontrolled by statute or statutory instruments and that many hundreds, perhaps thousands, of rules and regulations, memoranda, circulars and decisions are issued and made by the Department and the Minister (dealing sometimes with the most important aspects of educational policy) not under any statutory power but merely as administrative measures. These measures are not, of course, illegal. But they have no statutory force, and the sanction which ensures compliance with them is not a legal one but the undeclared understanding that the Department will withhold financial assistance in the event of non-compliance.”

²⁹ Circular 0013/2018 at page 3.

³⁰ Circular 0013/2018 at page 4.

³¹ Circular 0062/2018 at page 2.

³² Circular 0062/2018 at page 1.

Church and whether it is confined to learning about religions are important in determining whether the NCCA courses are in fact religious instruction (thereby invoking rights under Article 44.2.4°) or religious education (thereby possibly outside the scope of Article 44.2.4°).

36. Later circular 0062/2018 states:

“The Department does not require schools to include the NCCA-developed Religious Education syllabuses at Junior or Senior Cycle as mandatory subjects on their curriculum. Accordingly schools have discretion to determine if they provide the subject at all or if it is to be mandatory or optional in any particular class group or year. Religious Education, where it is offered by a school, must be delivered in the timetabled class periods without any religious instruction or worship of any religion forming any part of class activity. This means that any practice or material that would introduce religious instruction or worship cannot be used in the future. Religious Education will be subject to inspection including its delivery according to this circular.

This clear separation of religious instruction from the NCCA Religious Education syllabus has the effect of ensuring that withdrawal does not arise for students studying the NCCA Religious Education syllabus where the school provides the subject as part of its normal range of subjects.

Where a school decides to offer religious instruction in line with the requirements of any particular individual religious denomination, it must not be associated with or integrated to any degree with the NCCA-developed Religion Education syllabus being provided in timetabled class periods. Such religious instruction must be provided as a discrete separate subject which will be external to the Department-approved NCCA Religious Education syllabus. Where the school is providing religious instruction having regard to the legal instruments created when the school was recognised, the school may provide the teaching resources from within the school’s overall teacher allocation and the delivery must be in full class periods devoted exclusively to religious instruction.”

37. The point made in my instructions that the circulars appear to proceed on the basis that courses developed by patrons may constitute religious instruction, whereas the NCCA courses are religious education, may be a correct reflection of the position taken by the Department, but there is a doubt given the inconsistency in the two circulars.

Does the right include not attending any type of religious teaching, regardless of what that teaching is called, or regardless of whether it is developed by a Patron body or the State, or whether it is a module of a wider course on ethical or moral education?

38. Where the teaching is religious instruction, yes.

39. There are three scenarios which are relevant to the question posed. First, there are courses developed by Patrons. Second, there are three NCCA religion courses at

post primary level. Third, there is a reference in the question referred to a “module” within a wider course.

40. With respect to each of these three scenarios, the right to opt out is engaged where the course is, in substance, religious instruction.
41. Article 44.2.4° refers to the right not to attend “religious instruction.” The Courts have stated that there is a difference between religious instruction and education, with Article 44.2.4° only encapsulating the former.
42. In the *Campaign* case, the Supreme Court considered the difference between the two concepts. Barrington J. stated:

“The Constitution therefore distinguishes between religious ‘education’ and religious ‘instruction’ - the former being the much wider term. 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.

The Community and the Comprehensive Schools are an attempt to make post-primary education available to all the children of Ireland irrespective of their means. They involve a vast increase in the number of children receiving post-primary education and a corresponding increase in the number of post-primary teachers most of whom are laypeople. In Community Schools it is no longer practicable to combine religious and academic education in the way that a religious order might have done in the past. Nevertheless parents have the same right to have religious education provided in the schools which their children attend. They are not obliged to settle merely for religious ‘instruction’. The role of the Chaplain is to help to provide this extra dimension to the religious education of the children. The evidence establishes that, besides looking after the pastoral needs of the children, the Chaplain helps them with counsel and advice about their day to day problems.”³³

43. Accordingly, religious instruction is narrower than the concept of religious education. Religious education may be associated with the ethos and general atmosphere of the school. It was envisaged in *Campaign* that one of the roles of the Chaplain is to help to provide religious education through *inter alia* pastoral care. It is also clear that Article 44.2.4° does not require a school to shun its own religious ethos.
44. Glendenning suggests that religious instruction comprises “*religious instruction, doctrine and worship pertaining to one religion*”, while religious education is “*the broad comparative religion programme about religions generally and the history of religions.*”³⁴ These descriptions do not accord precisely with the decision by

³³ *Campaign*, pp 357 and 358.

³⁴ Glendenning, D. Education and the law at para 6.55.

Barrington J. in *Campaign*. Therefore, it appears to me, that they are simply factual descriptions of the manner in which religious instruction and education are typically delivered. They do not appear to be an attempt to provide a legal definition of each term.

45. The suggestion that religious teaching is religious instruction only when that teaching relates to one religion arises above and also as the Department appears to be of the view that religious instruction arises (thereby triggering an opt out right) only where the teaching in question relates to *one* religion.³⁵
46. For a number of reasons, it is my view that an argument that a course is not religious instruction by dint of the fact that the course refers to more than one specific religion is not necessarily correct.
47. First, Article 44.2.4° simply refers to “religious instruction.” Accordingly, if a course is religious instruction, the right is engaged. Article 44.2.4° says nothing whatsoever about religious instruction relating to one religion only. No such qualification is found within Article 44.2.4°. In the context of a family of an atheist perspective, it appears that it would be impermissible to refuse an opt out by arguing that the course in question relates to more than one religion. If one takes an extreme example whereby a publicly funded school offered a course which relentlessly pressed theistic beliefs and sought expressly to reject atheist views with the aim to convert atheist students to persons of theistic beliefs, it is almost certain in my view that such a course would engage the opt out right. The fact that such a course related to multiple theistic religions would not remove the right to opt out.
48. Second, there is no great difference in principle between a person of one faith who wishes to opt out of religious instruction in another particular faith and a person of no faith who wishes to opt out of religious instruction in a number of faiths. It would appear to me that drawing a distinction between these persons would fly in the face of the freedom of conscience which is expressly protected by Article 44.2.1° and which extends to protect persons of no belief. Further, it is inconsistent with the prohibition on discrimination on the grounds of religious profession, belief or status, protected under Article 44.2.3°. As the Constitution is generally to be construed in a manner which does not place constitutional articles on a collision course with each other³⁶, it appears to me to be incorrect to interpret Article 44.2.4° as confined to an opt out from teaching relating to one religion only. The sole question is whether the course is religious instruction in substance.
49. In my view, it is at least probable, if not likely, that any course which through its cumulative impression has the effect of invalidating atheist perspectives through promoting theistic views, comprises religious instruction to which an opt out must be available. This applies in my view whether the teaching in question relates to one religion only or more than one.

³⁵ Circular 0013/2018 at p 3.

³⁶ See also *Tormey v Ireland* [1985] IR 285 per Henchy J. at p 296: “... where there are two provisions in apparent conflict with one another, there should be adopted, if possible, an interpretation which will give due weight and harmonious effect to both provisions.”

50. Moreover, the name assigned to a particular course will not be determinative of the question whether the subject is religious instruction or religious education. Were it otherwise, it would be permissible to simply teach religious instruction without offering an opt out by simply calling the subject “religious education.” This would clearly frustrate the right to not attend religious instruction.
51. In a similar manner, the question whether a course is religious instruction or education, does not turn on the question who is providing the course. If a course constitutes religious instruction, which is a question going to the substance of the course, the right to opt out will be engaged.
52. While there is little case law to further illuminate the distinction between the two concepts beyond the comments of Barrington J. in the *Campaign* case, I would expect that courses which contain more in the way of neutral content are more likely to not comprise religious instruction. For example, courses which speak about various religions from a neutral, non-persuasive perspective. Conversely, courses which contain more substantive, doctrinal, subjective or faith-based material are more likely to represent religious instruction. It is impossible to draw a bright line on that spectrum to divide courses clearly between religious instruction and education. In the context of the present instructions, it is my view that the question whether a subject gives rise to the right to opt out will be turn on the question whether the subjects leave reasonable room for the parent and child’s non-belief. If parents apprehend reasonably that the content of the course, or the manner in which it is taught, is fundamentally inconsistent with the child’s atheist views, or that the course may cause an unwanted change in the child’s atheist views, there is a good prospect that the course will give rise to the right to opt out. In this regard, and owing to the interlocking nature of the constitutional provisions mentioned earlier, I think that the right to opt out of religious instruction should be interpreted in consonance with the freedom of conscience guaranteed to the citizen, which embraces the right to not believe in or profess any religious views.
53. The question whether a particular course is religious instruction is a legal question, which can only be determined conclusively, in the event of a dispute, by a court having regard to *inter alia* the content of the course and the beliefs of a plaintiff.
54. As noted earlier, the NCCA has developed a number of courses on “religious education” for post primary education. In that regard, at junior cycle there are two existing courses. First, there is the “Junior Certificate RE syllabus (2000)” which may be taken by students who commenced first year prior to September 2018. Second, the “Junior Cycle Religious Education” is applicable to students entering first year in or after September 2019. Additionally, a “religious education” syllabus is provided in senior cycle. (As noted earlier, religious education in primary schools is left to the Patron.)
55. Two concerns with the NCCA courses have been raised in my instructions. First, whether there is a right to opt out of the NCCA courses. Again, the right to opt out will arise if the NCCA courses are religious instruction, which is a question of the substance of the courses. Second, whether the right to not attend arises where schools teach religious instruction during times allocated for the NCCA course.

Specifically, my instruction indicate that a number of schools are teaching Catholic faith formation during times allotted for the NCCA courses.

56. Clearly, if the NCCA courses are neither religious instruction nor are any elements of religious instruction taught during times allocated for the NCCA courses, then the right to opt out does not arise.
57. In relation to the first question, it is difficult to advise whether the NCCA course might be considered religious instruction or education as there is no clear line between the concepts of religious instruction and education.
58. It is clear that the Department does not require attendance at the NCCA courses. However, both departmental circulars and instructions indicate that some *schools* may require attendance at this course, presumably owing to timetabling issues or upholding the essential ethos of the school. Clearly, where the NCCA courses are offered as optional subjects and students are permitted to select an alternative subject, the right to not attend is not under attack. The more difficult question arises where the *school* itself provides that attendance at an NCCA course is mandatory.
59. Instructions indicate that “*the State is now arguing, with regard to the NCCA course in religious education, it is suitable for students of all faiths and none, and therefore the right to opt out does not arise, either on the grounds of it not being religious instruction, or on the grounds of conscience.*”
60. A similar position is taken by the JMB/AMCSS Secretariat.³⁹
61. My instructions convey a number of concerns which center around a belief that the NCCA courses are formational. Instructions acknowledge that there may be elements of teaching about different religions and beliefs, but that the course goes further and contains a formational aspect.⁴⁰

³⁹ See “Guidelines on the Inclusion of Students of Different Beliefs in Catholic Secondary Schools”, 2nd ed., JMB/AMCSS Secretariat which state *inter alia* at page 15 “... it needs to be clearly stated that Catholic schools teaching the NCCA curricula are not offering religious instruction.”

⁴⁰ One of the expressed bases for this concern is found in the NCCA “Background Paper and Brief for the Review of the Junior Cycle Religious Education” (October 2017) which states “*As a state syllabus aiming to be open to all students the course sought to avoid alignment with any one particular religion or denomination. It provided a framework for students of all religions and none, ‘for encountering and engaging with the variety of religious traditions in Ireland and elsewhere’ (Syllabus p.4). On the other hand, the syllabus moved beyond a phenomenological approach to religious education (which presents religions as an objective phenomenon to be examined or observed by students from a safe distance, without engagement or commitment). It made clear that ‘The students’ own experience of religion and their commitment to a particular tradition, and/or to a continuing search for meaning, will therefore be encouraged and supported’ (Syllabus p.4). As such, the syllabus sought to facilitate teaching and learning about religion and from religion so that students could learn from religion for their lives as well as about religion as an academic subject. Religious Education as part of a state curriculum can be summarised as: educating ‘about’ and ‘from’ religion in the school context as a timetabled subject in which the curriculum is defined by a State agency (either alone or in partnership with communities of faith and/or communities of conviction), forms the basis of a ‘common programme’ taught at the same time to all pupils (of all religious faiths and none) as part of the school day, which is inspected by the relevant State authority, which uses the traditions of more than one faith community as learning*”

62. The aim of the “Junior Cycle Religious Education” (i.e. the course introduced in 2019) is expressed as follows:

“Religious Education aims to develop knowledge, understanding, skills, attitudes and values to enable young people to come to an understanding of religion and its relevance to life, relationships, society and the wider world. It aims to develop the students’ ability to examine questions of meaning, purpose and relationships, to help students understand, respect and appreciate people’s expression of beliefs, and to facilitate dialogue and reflection on the diversity of beliefs and values that inform responsible decision-making and ways of living.”⁴¹

63. My instructions raised a concern that the purpose of the course is to develop values in students, including students from atheist families, to enable them to see the relevance of religion to their lives.
64. A concern is also raised that the NCCA courses attempt to make students “*aware of different understandings of the Divine, and examine other interpretations of life.*”⁴² Since atheist families do not believe in such an entity, the concern raised is that this is beyond merely talking about religions from the neutral perspective and that engendering an understanding of the Divine is inconsistent with the wishes of atheist parents.
65. Instructions also indicate that the NCCA courses “*still retain important religiously-inspired elements*” of the previous NCCA courses. It is understood the previous version of the NCCA syllabus was subject to input from religious bodies.
66. In the event that a parent or child seeks to exercise the right to not attend an NCCA course, but a dispute arises as to whether the course in question is religious instruction, the issue can only be definitively resolved by a Court. In assessing whether the right to opt out would arise, and whether the course constituted religious education or instruction, a Court would hear evidence as to the specific aspects of the course which were contrary to that person’s beliefs.

resources, and which, while seeking to be respectful of all faiths does not seek to promote any single faith. The approach advocated in the NCCA Guidelines for Teachers reinforces the principle that religious education is not just focused on learning about religions, it is also about critical engagement leading to the development of skills, attitudes and dispositions needed for living as a thoughtful, respectful and reflective citizen in a pluralist society. As such, religious education is informative and formative.” The relevant footnotes read: 11: “*The phenomenological approach to religious education emerged in the late 20th century in non-confessional contexts in the UK. It emphasises a so-called objective, descriptive and non-evaluative study of observable expressions of a religion.*” 12: “*Within faith-based schools, Guidelines were developed to enable teachers to teach for religion and so continue to engage in faith formation, alongside teaching the State syllabus. See for example, Irish Bishops Conference, Guidelines for the Faith Formation and Development of Catholic Students: Junior Certificate Religious Education Syllabus (Dublin, Veritas, 1999).*”

⁴¹ See NCCA Junior Cycle Religious Education Specification at page 7.

⁴² See <https://ncca.ie/media/3785/junior-cycle-religious-education-specification.pdf> at page 6.

67. As mentioned earlier, the fact that the NCCA courses relate to more than one particular religion is not determinative of the question whether these courses might constitute religious instruction.
68. The second issue which arises concerning the NCCA courses is that instructions indicate that Catholic faith formation is in fact delivered alongside the NCCA religious course in some schools.
69. My instructions indicate that schools “*can teach Catholic faith formation to Catholic students alongside a religion course that is supposed to be for all religions and none.*” It is felt, according to my instructions, that “*it is difficult to understand how a child from a minority background would not be influenced by the Catholic faith formation taking place in the class.*”
70. While the *Campaign* case clearly states that children are not protected under the Constitution “*from being influenced, to some degree, by the religious ‘ethos’ of the school*” it is clear that their right to not attend religious instruction is protected. So, once more, the question comes back to whether the teaching which is delivered supplemental to, or alongside the, NCCA courses, is religious instruction.
71. A briefing note entitled “*Religious Education in the Junior Certificate — Briefing Note in relation to likely concerns of Episcopal Conference*” was obtained by Atheist Ireland. It is dated in manuscript “January 1999” and accordingly, by inference, appears to refer to the development of the Junior Certificate RE syllabus (2000).
72. The briefing note states that there were 32 meetings of the course committee and the representative of Episcopal Conference attended almost all those meetings. It also notes that two phases on consultation took place which included a number of regional meetings to which diocesan advisers were invited. It is clear that the development of this course is marked by considerable consultation with religious bodies.
73. The briefing note also states:
- “The aims of the syllabuses make it clear that they are not designed to meet the ‘faith formation’ or ‘catechetical’ requirements of any religious denomination. However, many schools intend using them as a support for such work in school, particularly at junior certificate level. The syllabus for Junior Certificate has been designed to offer this flexibility. The Episcopal Conference has commissioned work on guidelines in this regard and the NCCA education officer has briefed the working group and met with the author on a number of occasions.”*
74. Instructions indicate that the guidelines referred to in the preceding paragraph are the “*Guidelines for the Faith Formation and Development of Catholic students.*”⁴³ One of the stated purposes of those Guidelines is:

⁴³ In relation to junior certificate, see: <https://www.elphindiocese.ie/wp-content/uploads/delightful-downloads/2016/10/ICBC-Guidelines-JC-1999.pdf> In relation to leaving certificate, see:

“To provide opportunities for the Faith Formation and Development of students following the Junior Certificate religious education syllabus, who are being presented for state examination and certification.”⁴⁴

75. In addition, a second edition of Guidelines issued by the JMB/AMCSS Secretariat entitled: *“Guidelines on the Inclusion of Students of Different Beliefs in Catholic Secondary Schools”*, dated September 2019, which appear to relate to the “Junior Cycle Religious Education” (i.e. the syllabus offered from September 2019 onwards) contain a number of relevant passages.

“The NCCA curricula for Religious Education seek to offer this opportunity and textbooks for Catholic schools will support and inform the Catholic faith of students from Catholic backgrounds as well as providing content relevant to students from different beliefs.”

“Religious Education, therefore, always has a formational aspect. Catholic schools hold at the heart of their enterprise the nurturing of the faith and/or spirituality of all their students. As commitment to faith can no longer be presumed, Catholic schools are called to meet their students where they are in their faith or belief journey and to provide space, not only for healthy dialogue between students, but also for reflection and opportunities for the faith development of students who are aligned, however tenuously, with the Catholic faith. This is always invitational and students from other faith backgrounds are also encouraged to grow in knowledge of their own tradition and religious practice.”

“However, the nature of religious instruction has changed dramatically in the last twenty years. The advent of the NCCA curricula for Religious Education (2000; 2004; 2018) and the assessment of the subject has moved away from the formation of students into a faith (catechesis) and more towards a broader Religious Education that reflects the growing diversity of belief of a once relatively homogenous Ireland. Religious Education is now the preferred term and approach taken in schools today. However, Religious Education in Catholic schools should never be content to study religions as a phenomenon in society, comparing one religion with another without any regard for the lived expression of faith or life stance of students. Share the Good News (2010) states that RE should always acknowledge the faith experience of students and help them to delve deeper into religious commitment in their lives.”

“It should always be made clear to parents that students will be experiencing the values and ethos of the school in the day-to-day running of the school, not just in RE class. If they are concerned about their child learning about different religious beliefs or the Catholic content of the curriculum, they can be encouraged to see it as part of their civic education to seek to understand the history and heritage of Ireland, as well as an opportunity to enter into respectful dialogue about their

belief. Religious Education never seeks to convert their son or daughter to Catholicism.”

76. The above material suggests that the NCCA religion course for junior certificate was molded with input from religious bodies who in turn designed guidelines for the supplementation of the NCCA junior certificate course with Catholic faith formation and development. It is impossible in those circumstances to see any justification whatsoever for withholding the right of a student to opt out of such a course. The intricate architecture comprising the NCCA syllabus layered with guidelines and various assertions cannot overcome the fundamental principle that a child must be permitted to not attend religious instruction in State funded schools. Teaching Catholic instruction during the State religion syllabus, without offering a supervised opt out, represents an unlawful, systematic and stark attack on the right to not attend religious instruction in State funded schools.
77. A student must as a matter of law be permitted by the school to opt out of Catholic instructions at school.
78. The Department has gone some length to address this issue in the context of community and ETB schools through issuing circulars instructing schools not to provide religious instruction during the time scheduled for NCCA religion courses. However my instructions indicate that some schools are not compliant with these circulars.
79. In order to draw these strands together, the following appears to be the position.
80. It is very clear that where a school provides a course, such as a patron or church developed course, which is in substance, a course in religious instruction, the right not to attend that class is engaged. Where schools teach religious instruction or indoctrination supplemental to the NCCA religion courses and during the time scheduled for the NCCA religion courses, the student has a right to not attend.
81. Where schools do not require attendance at the NCCA religion courses, the right to not attend those courses is obviously not attacked.
82. Where schools require mandatory attendance at the NCCA religious education course, the right not to attend that course may arise but only if that course is, in substance, a course in religious instruction. It is unclear whether the NCCA religion courses are religious education or instruction.
83. It is very clear that requiring students to attend religious instruction, without facilitating opt out, whether that is a patron-developed course or whether it is taught by schools supplemental to religious education is absolutely contrary to the child's rights.
84. The question whether a course is religious instruction or not will be determined by reference to the substance of the course, not its name and, in the event of a dispute, can only be determined conclusively by a Court. Religious instruction is likely to arise where the teaching is of religious doctrine, creed or worship, or

undermines the child's right to non-belief. Religious instruction is unlikely to apply to more neutral and non-persuasive teaching about religions.

85. These conclusions apply equally to the question of a right to opt out of modules contained within wider courses.

A further question was posed in instructions, namely whether the right referred to in Article 44.2.4° is “stronger” than the right under section 30(2)(e) of the Education Act 1998, which provides that the Minister “*shall not require any student to attend instruction in any subject which is contrary to the conscience of the parent of the student or in the case of a student who has reached the age of 18 years, the student.*”

86. Clearly rights of a constitutional pedigree enjoy greater protection than statutory rights and, in that way, they may be considered stronger. In addition, section 30(2)(e) is directed only to the Minister for Education and therefore appears to be narrower in its focus than the constitutional right. Therefore, it is my view that the right to opt out protected by the Constitution is “stronger” than the statutory right in section 30(2)(e).

87. Additionally, instructions that section 5 of the Intermediate Education Act Ireland 1878 have been repealed are not determinative, in my view, of the question whether the courses subsequently developed by the NCCA are religious instruction. Such a question is likely to be answered based on an analysis of the curriculum developed in its present form.

Are schools obliged to use their existing State funding to facilitate that right without demanding extra State funding?

88. Yes.

89. To come to any other conclusion would render the enjoyment of the right to not attend religious instruction contingent on the level of funding. Yet, this would fly in the face of the plain text of Article 44.2.4°.

90. It is worth reiterating at this point my view that the right to opt out is not a right exercisable solely in the context of the adequacy of the level of funding to a school. Provided the school is a public school receiving *some* State funding, the right must be respected, whether or not the funding is adequate.

91. It is clearly established that private entities (i.e. entities other than State bodies) may be held liable for breaches of constitutional rights.⁴⁵ Therefore, schools are required to observe the constitutional rights of enrolled children.

92. There is a separate and express duty on the State to ensure that legislation is such as will not prejudicially effect that right. However, provided a school receives

⁴⁵ See Supreme Court decision in *Meskeil v CIE* [1973] IR 121 at p 133.

some funding, the right is not contingent on the level of that funding and must be vindicated by the school.

What is the effect of the phrase “to affect prejudicially”? Does this mean that children who opt out of religious teaching must be treated the same as children who choose not to take any other optional subject? For example, if you choose not to do French or biology, you are given another subject and not made to sit at the back of the French or biology class.

93. The words “affect prejudicially” in Article 44.2.4° likely mean simply that the right must not be violated and must be respected. Given that the right appears in my view to subsist generally in the constitution and is not confined to the specific context of Article 44.2.4, it is in my view unnecessary to attempt to divine a forensic definition of this term.
94. Conceptually, there appears to me to be three possibilities as to what precisely the right protects and requires.
95. The first is that a student simply has a right to attend a public school and simply not part take in religious instruction. On one interpretation, this right may be vindicated where the child is simply left in the classroom while religious instruction is taught and the child is simply permitted to do his or her own work. Or, perhaps in a rather more unusual situation, the student may be entitled to leave the school, returning home for example and returning to school when the religious instruction is over.⁴⁶
96. The second is that the student is allowed to leave the classroom and to be supervised in another classroom in the school.
97. Three, the student is entitled to be schooled in another subject while religious instruction is taking place.
98. Because Article 44.2.4° refers to the right not to attend religious instruction in the context of an article on *funding*, it seems to me that something more than the first of these three options is protected under the Constitution. Put another way, if the right was simply to leave the school or sit at the back of the class room, that would never cause any additional funding requirements for schools. If that were so, the issue of funding would never “prejudicially effect” the right to attend a school receiving public money while not attending religious instruction at that school. Thus, this interpretation of the Constitution seems invalid.

⁴⁶ See for example Guidelines by JMB/AMCSS which state: “While it is a parent’s right to withdraw their son or daughter from RE class, the supervision of the student can present the school with considerable logistical and supervision dilemmas. In cases such as this, a school should make it clear that they may not have capacity for the individual supervision of the student outside of the RE classroom due to the limitations of the Department of Education and Skill’s staff allocation to the school. Students who opt out of Religious Education may often have to remain in the classroom while not participating. If it is feasible and the school has a local solution for supervision, such as the library or other supervised area, students could be invited to go there during RE class.”

99. A further reason why it seems that the right protects something other than the first of these three scenarios is that Article 44.2.4^o refers to the right to not *attend* religious instruction. The ordinary meaning of “attend” is to be present at, and accordingly, it seems that in order to vindicate that right, a student must not be forced *to be present at* religious instruction classes. This militates against leaving a student in the classroom while the subject is taught and requires either removal and supervision or the teaching of another subject altogether.
100. Accordingly, from a constitutional perspective, it is my view, that the right protects more than sitting at the back of a religion class or even leaving the school while it is being taught. It seems to me that the right encompasses, at the very least, the right to leave the classroom during religious instruction while remaining supervised or to be taught another subject. As between these two possibilities, there is a decent argument that schools should not give more teaching time to some students over others on the basis that the latter has opted out as to do so is to discriminate against the student on religious grounds.
101. Section 62(7)(n) of the Education Act 1998 now provides that a School shall:
- “... provide details of the school’s arrangements in respect of any student, where the parent of that student, or in the case of a student who has reached the age of 18 years, the student, has requested that the student attend the school without attending religious instruction at the school (which arrangements shall not result in a reduction in the school day in respect of the student concerned).*
102. This provision is very clear in relation to classes which comprise instruction. It requires that there is no reduction in the school day.
103. The position is less clear with respect to the NCCA courses. While the NCCA courses are not a mandatory part of the State curriculum, they may be mandatory in certain schools. In this context, the right to opt out of a NCCA course on religious education may arise, but only if it is religious instruction.
104. It appears to me that the circulars referred to earlier may be narrower in scope in that they provide (with emphasis added):
- “... those who do not want instruction in line with the requirements of any particular religion should be timetabled for alternative tuition throughout the school year rather than supervised study or other activities.”⁴⁷*
105. The use of the words “any particular religion” might be said to be narrower than the Constitutional and statutory right (found in section 62(7)(n) of the Education Act 1998) to not attend religious instruction. However, the circulars most certainly cannot delimit express statutory and Constitutional rights and children and parents are entitled to rely directly on their Constitutional and statutory rights, which plainly allows children to not attend religious instruction.

⁴⁷ Circular 0013/2018.

If Article 44.2.4 covers the right to not attend any type of course of religious teaching or module of religious teaching and if the right must not be affected prejudicially, does that mean that schools must now put the detailed arrangements for those not attending in their Admission Policies as per Section 62(7)(n) Education Act 1998?

106. Yes, where a school is providing religious instruction.
107. As noted earlier, it does not appear that the right applies to courses which are not religious instruction.
108. Section 62(7)(n) of the Education Act 1998 provides that where a school is providing religious instruction the school is required, in its admissions policy, to:
- “... provide details of the school’s arrangements in respect of any student, where the parent of that student, or in the case of a student who has reached the age of 18 years, the student, has requested that the student attend the school without attending religious instruction at the school (which arrangements shall not result in a reduction in the school day in respect of the student concerned).”*
109. The provision commenced on 1st February 2020 and plainly requires schools to (i) put in place arrangements for students wishing to not attend religious instruction, (ii) to ensure that those arrangements do not result in a reduction of the school day, and (iii) that such arrangements are documented.

James Kane BL
31st July 2020.