

From: [Redacted]
Learning: Curriculum Unit
14 September 2016

Deputy First Minister and Cabinet Secretary for Education and Skills

**RELIGIOUS OBSERVANCE - HUMANIST SOCIETY SCOTLAND V MINISTERS -
PETITION FOR JUDICIAL REVIEW**

Purpose

1. For the Deputy First Minister to note that Scottish Ministers have today been served with a Petition for judicial review on behalf of the Humanist Society Scotland.

Priority

2. Immediate.

Background

3. The Deputy First Minister will be aware that the Humanist Society Scotland issued a press release on Monday 12 September advising their intention to seek a Judicial Review of a decision by the Scottish Government not to allow young people to opt-out of religious observance.

4. The Petition has been served today - attached separately - and it challenges the decision of Ministers not to amend section 9 of the 1980 Act and/or the guidance on the withdrawal of school pupils from religious instruction and religious observance.

5. We have 21 days from today to decide whether we want to lodge Answers to put forward arguments why permission should not be granted for the petition to proceed. If we are going to participate in the permission stage it will be necessary to lodge Answers by 5 October 2016. It is a matter for the Court to decide whether permission should be granted and it will take into account representations from any of the parties.

6. We will be meeting with colleagues in the Directorate for Legal Services and will provide further advice, including policy advice, to Ministers shortly.

Recommendation

7. For the Deputy First Minister to note that Scottish Ministers have today been served with a Petition for judicial review on behalf of the Humanist Society Scotland.

[Redacted]

Learning: Curriculum, Qualifications and Gaelic



14 September 2016

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister					X
Minister for Childcare and Early Years					X
Minister for Further Education, Higher Education and Science					X

DG Learning and Justice
[Redacted]

Form 14.7

Form of citation in petition

CITATION

Date: 14 September 2016

To: The Scottish Ministers, Victoria Quay, Edinburgh EH6 6QQ

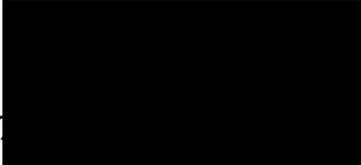
IN HER MAJESTY'S NAME AND AUTHORITY, and in the name and authority of Lord Pentland, I Colin Hamilton, Solicitor for Humanist Society Scotland serve the attached petition and interlocutor of the court on you.

The interlocutor requires you, if so advised, to lodge answers to the petition.

If you intend to lodge answers to the petition you must lodge them at the Office of Court, Court of Session, 2 Parliament Square, Edinburgh, EH1 1RQ within 21 days after the date of service on you of the petition. The date of service is the date stated at the top of this citation unless service has been by post in which case the date of service is the day after that date.

IF YOU ARE UNCERTAIN ABOUT THE EFFECT OF THIS CITATION, you should consult a solicitor, Citizens Advice Bureau or other local advice agency or adviser immediately.

(Signed)



Gillespie Macandrew LLP
5 Atholl Crescent
Edinburgh
EH3 8EJ
Agents for the Petitioners
Ref: CH3/L.11934.1

P862/16 Pet: Humanist Society Scotland for J/R

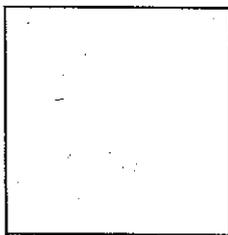
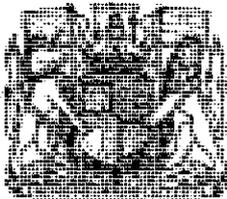
Gillespie Macandrew LLP

13 September 2016

Lord Pentland

The Lord Ordinary appoints the Petition to be intimated on the Walls in common form and to be served as craved, together with a copy of this interlocutor, upon the party named and designed in the Schedule for Service annexed to the Petition within 7 days from this date; appoints any respondent or interested party who intends to participate in the decision whether permission should be granted to lodge Answers thereto and any relevant documents, if so advised, within 21 days after such intimation and service; appoints any respondent or interested party who only intends to contest the Petition if permission is granted to lodge notice of that intention, if so advised, within 21 days after such intimation and service, appoints the petitioner to lodge the execution copy of the Petition within 7 days of service.


Depute Clerk of Session



UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION

THE PETITION OF

HUMANIST SOCIETY SCOTLAND, a Company Limited by Guarantee and having its Registered Office at Playfair House, 6, Broughton Street Lane, Edinburgh EH1 3LY,

PETITIONERS

2

for

Judicial Review of a decision of the Scottish Ministers not to amend the terms of Section 9 of the Education (Scotland) Act 1980 and / or the extra – statutory Guidance issued by the Scottish Government in relation to withdrawal of School Pupils from Religious Instruction and Religious Observance.

HUMBLY SHEWETH:-

1. That the Petitioners are as designed in the instance. The Respondents are designed in Part 1 of the Schedule for Service. The Petitioners have standing. It is a Company Limited by Guarantee with its Registered Office in Scotland. They have been accorded Charitable Status by the Office of the Scottish Charities Commission (Registered Charity No. SC26570). Amongst the Objects of the Petitioners is the "[promotion] of secular education in Scotland".
2. That the date on which the grounds giving rise to the Petition first arose was 13th June 2016.
3. That the date on which the Respondents made the decision under consideration was 13th June 2016, in the form of a letter addressed to the Petitioners.
4. That the Petitioners seek:-

Notes:-

1. This space will contain the cause reference number assigned to the petition on being lodged.

2. Insert name, designation and address of petitioner(s).

Thereafter insert the words "HUMBLY SHEWETH:-" and then set out in numbered paragraphs the facts and circumstances which form the grounds of the petition. Then insert the words "MAY IT THEREFORE please your Lordships to" and then insert prayer.

Finally, insert the words "According to Justice, etc." before signature.

- (a) Declarator that Section 9 of the Education (Scotland) Act 1980 is incompatible with the Convention Rights of School Pupils who wish to exercise a right on their own behalf to withdraw from provision of Religious Instruction and/or Religious Observance at any "public school" which they attend.
- (b) Declarator that the Respondents have acted *ultra vires* by their failure in a letter dated 13th June 2016 to propose any amendment to Section 9 of the Education (Scotland) Act 1980 so as to grant a right to School Pupils who wish to exercise a right on their own behalf to withdraw from provision of Religious Instruction and/or Religious

Observance at any "public school" which they attend which is compatible with their Convention Rights.

- (c) Declarator that by their failure in a letter dated 13th June 2016 to propose any amendment to Section 9 of the Education (Scotland) Act 1980 so as to grant a right to School Pupils who wish to exercise a right on their own behalf to withdraw from provision of Religious Instruction and/or Religious Observance at any "public school" which they attend which is compatible with their Convention Rights, the Respondents have failed to implement their statutory obligations under Section 1 of the Children and Young People (Scotland) Act 2014.
- (d) Declarator that the Respondents have acted unreasonably by failing to amend the terms of Paragraphs 14 – 16 of the Guidance "Curriculum for Excellence – Provision of Religious Observance in Schools" issued by the Respondents on 22nd February 2011, so as to make the advice stated there compatible with the policy stated in their letter of 13th June 2016 to the Petitioners.

The Petitioners crave the Court to pronounce such further Orders (including an Order for Expenses) as may seem to the Court to be reasonable in all the circumstances of the case.

5. That the Petitioners challenge the decision on the following grounds:-

- (a) The principal Statute governing the provision of School Education in Scotland is the Education (Scotland) Act 1980 ("the 1980 Act"). Amongst areas comprised within the 1980 Act are provisions relating to the giving of Religious Instruction to School Pupils. Section 8 (1) of the 1980 Act states that:-

"Whereas it has been the custom in the public schools of Scotland for religious observance to be practised and for instruction in religion to be given to pupils whose parents did not object to such observance or instruction, but with liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not take part in such observance or receive such instruction, be it enacted that education authorities.....shall be at liberty to continue the said custom, subject to the provisions of section 9 of this Act.

Section 9 of the 1980 Act further states that:-

"Every public school..shall be open to pupils of all denominations, and any pupil may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; and no pupil

shall in any such school be placed at any disadvantage with respect to the secular instruction given therein by reason of the denomination to which such pupil or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects."

The Respondents have issued extra – statutory Guidance on the operation of Religious Observance in Schools in the form of a Circular entitled Provision of Religious Observance in Scottish Schools (Circular 1/2005) ("the Circular"). The Respondents also issued further Guidance in a letter to Headteachers dated 22nd February 2011 entitled Curriculum for Excellence – Provision of Religious Observance in Schools ("the Guidance") The Circular and the Guidance are both referred to for their terms. In Paragraphs 13 – 15 of the Circular, reference is made to the Parental Right to withdraw a child from Religious Observance, but no Guidance is provided as to the situation of a Pupil who wishes to make a similar request. In the Guidance, Paragraphs 14 – 16 are worded in identical terms with regard to the Parental Right to withdraw a child from Religious Observance. Again to reference is made to any right of a pupil to make such a choice. The policy of the Respondents has not been formally reviewed for a period of more than 10 years.

As worded, the right to withdraw a pupil from Religious Instruction and / or Religious Observance rests solely with the parent of a pupil receiving School Education – irrespective of the age of the pupil – and such pupil has no separate or independent right to make such a request on their own behalf. In the course of the aforementioned discussions, the Petitioners specifically requested that consideration should be given to changing the terms of Section 9 of the 1980 Act in order to allow School Pupils the same right to request their withdrawal from Religious Instruction.

- (b) During 2016, the Petitioners held discussions with Officials of the Respondents on various matters regarding the law pertaining to Religious Instruction and Religious Observance in Schools in Scotland. Specifically, they requested that consideration be given to amendment of the law relating to withdrawal of a School Pupil from Religious Instruction and/or Religious Observance so as to extend the right to withdraw to School Pupils. By letter dated, 13th June 2016, which is referred to for its terms, the Respondents stated that they considered themselves to be acting in a manner compliant with their legal obligations, and particularly those arising under Articles 9 and Protocol 1, Article 2 of the European Convention on Human Rights ("the Convention"). Further, the Respondents acknowledged that there was no statutory right equivalent to withdraw from Religious Observance afforded to children and young people. The Respondents further stated in the letter of 13th June 2016 that:-

“... many schools will find it helpful and sensible to include young people in discussions about opting out, ensuring their wishes are aired. This seems especially relevant as young people become older and take more responsibility for their own learning”

Reference was also made to the duties laid upon the Respondents by virtue of the Children and Young People (Scotland) Act 2014 in relation to the United Nations Convention on the Rights of the Child (“UNCRC”). This matter is concerned with the decision of the Respondents not to seek to amend Section 9 of the 1980 Act, or the terms of the relevant parts of the Circular or Guidance so as to grant School Pupils the right as an individual to request to be withdrawn from Religious Instruction or Religious Observance.

The Petitioners had become involved in discussions with the Respondents regarding the amendment or repeal of Section 9 of the 1980 Act subsequent to the decision of the High Court in England in *R (Fox and Ors) v Secretary of State for Education* [2015] EWHC 3404 (Admin). The objects of the Petitioner include promotion of the provision of secular Education in Scotland. In the present case, the Petitioners do not seek the repeal of Section 9 of the 1980 Act, but consider that as presently worded, its provisions are incompatible with the law, absent a right for a School Pupil of sufficient age and capacity to request to withdraw from Religious Instruction and/ or Religious Observance, and to have that request complied with, in the same manner as may a parent of that School Pupil.

- (c) In recent years, the law both at common law and in statute has provided significant support for and extension of the right of a child of sufficient age and / or capacity to exercise various civic and private rights. This is reflected both in domestic and in International law. Reference is made to the decision of the House of Lords in *Gillick v West Norfolk and Wisbech AHA* [1986] 1 AC 112. The ability of children over the age of 16 to enter into a range of transactions was enacted by means of the Age of Legal Capacity (Scotland) Act 1991 (“the 1991 Act”) (1991 Act, s.2 (1)). Children under the age of 16 may consent on their own behalf to matters such as “any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment”. (1991 Act, s.2 (4)). During the Independence Referendum of 2014, children over the age of 16 were eligible to cast a vote (Scottish Independence Referendum (Franchise) Act 2014, s.2 (1) (a)). In the field of Education Law in Scotland, Education Authorities are required by statute:-

“In carrying out their duty [to provide school education]..[to] have due regard, as far as is reasonably practicable, to the views (if there is a wish to express

them) of the child or young person in decisions that significantly affect that child or young person, taking account of the child or young person's age and maturity"

(Standards in Scotland's Schools Act 2000, s.2 (2)).

In relation to publicly – maintained Schools in England and Wales, there is statutory provision to the effect that:-

"If a sixth – form pupil requests that he may be wholly or partly excused from attendance at religious worship at a community, foundation or voluntary school, the pupil shall be so excused".

(Schools Standards and Framework Act 1998, s.71 (1B), as inserted by the Education and Inspections Act 2006, s.55)

- (d) The Respondents are a "public authority" for the purposes of the Scotland Act 1998 and the Human Rights Act 1998. As such, they are obliged to act in compliance with Convention Rights specified under the European Convention on Human Rights ("the Convention"), the terms of which are held to be incorporated herewith *brevitatis causa*, and specifically to Articles 6, 8 and 14 and also Protocol 1 Article 2 ("A1P2") of the Convention. Article 9 of the Convention provides that:-

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

The right created under Article 9 includes the right not to hold any form of religious conviction or belief (*Kokkinakis v Greece (1993) 17 EHRR 397*). Protocol 1, Article 2 of the Convention 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 first sentence of Protocol 1, Article 2, when read in the light of Article 9 and the second sentence of Protocol 1, Article 2 guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe (*Lautsi v Italy [2012] EHRR 3*).

Article 8 of the Convention provides that:-

"Everyone has the right to respect for his private and family life, his home and his correspondence."

The absence of a legal right for a School Pupil to request on their own behalf to withdraw from Religious Instruction and Religious Observance represents an interference with their Convention Right to respect for their private life. Measures taken in the field of education may affect the right to respect for private and family life or derogate from it (*Belgian Linguistic Case (No.2) (1968) EHRR 254*). In Scotland, it is compulsory for the parents of a child between the age of 5 and 16 to secure the provision of efficient education by securing their attendance at a public school or by other means (Education (Scotland) Act 1980, ss.30 & 31). Accordingly, a School Pupil may be of sufficient *Gillick* competence to decide whether to request to withdraw from Religious Instruction and/or Religious Observance, but required to participate in such activities in the absence of a request by a parent for such withdrawal. In the case of pupils over the age of 16 who continue to attend School, Section 9 of the 1980 Act does not afford them any right to request to withdraw from Religious Observance on their own behalf.

Seperatim, Article 14 of the Convention provides that:-

"the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The freedom of thought, conscience and religion enshrined in Article 9 of the Convention entails freedom to hold or not to hold religious beliefs and to practice or not to practice a religion (*Kokkanis: Grezelak v Poland (Application no. 7710/02, 15th June 2010)*). As currently worded, Section 9 of the 1980 Act excludes a right for School Pupils of sufficient *Gillick* competence to exercise fully on their behalf their Convention Right under Article 9. Accordingly, they are subject to discrimination in comparison to School Pupils who wish to participate in Religious Instruction and/ or Religious Observance in the exercise of the Article 9 Right.

For all of the aforementioned reasons, Section 9 of the 1980 Act is not compatible with the Convention Rights of School Pupils of sufficient *Gillick* competence who wish to exercise on their own behalf a right of withdrawal from Religious Instruction and/ or Religious Observance.

- (e) *Seperatim*, reference is made to the United Nations Charter of the Rights of the Child ("UNCRC"), which was adopted by the United Nations on 20th November 1989, and ratified by the United Kingdom on 16th December 1991. The Scottish Parliament has enacted the Children and Young People (Scotland) Act 2014 ("the 2014 Act"), Section 1 of which provides that, *inter alia*:-

- "(1) The Scottish Ministers must—
- (a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and
 - (b) if they consider it appropriate to do so, take any of the steps identified by that consideration.
- (2) In complying with their duty under subsection (1)(a), the Scottish Ministers must take such account as they consider appropriate of any relevant views of children of which the Scottish Ministers are aware.
- (3) The Scottish Ministers must promote public awareness and understanding (including appropriate awareness and understanding among children) of the rights of children....."

The "UNCRC requirements" are defined in the 2014 Act to mean:-

"the rights and obligations set out in—

- (a) Part 1 of the UNCRC,
- (b) Articles 1 to 6(1), 6(3) and 7 of the first optional protocol, and
- (c) Articles 1 to 10 of the second optional protocol."

(2014 Act, s.4 (1))

"Rights of children" are defined in the 2014 Act to include:-

"the rights and obligations set out in—

- (a) the UNCRC,
- (b) the first optional protocol to the UNCRC, and

(c) the second optional protocol to the UNCRC"

(2014 Act, s.4 (1))

Section 1 of the 2014 Act was brought into effect on 15th June 2015 (Children and Young People (Scotland) Act 2015 (Commencement No.7) Order 2015).

The UNCRC states *inter alia* that:-

"12.1 [The State] shall assure to the child who is capable of forming his or her own views the right to express these views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child..."

29.1 [The State] agrees that the education of the child shall be directed to:-

(a) the development of the child's personality, talents and mental and physical abilities to their fullest potential..."

In making the decision under consideration, the Respondents have failed to give proper weight to their obligations in terms of the 2014 Act and the UNCRC. As the law presently stands, no School Pupil in Scotland has the right to request on their own behalf to be withdrawn from Religious Instruction and/or Religious Observance. Specifically, no consideration has been given to provision of such a right to School Pupils of an appropriate age and maturity. The Respondents have failed in their duties to identify or implement measures in this area of law which would allow such Pupils to exercise a choice in a matter affecting them. By so doing, the Respondents have acted in a manner no reasonable public authority would have done.

6. That *seperatim*, by the terms of their letter of 13th June 2016 and failure to amend the terms of the Guidance, the Respondents have rendered the applicable law uncertain. As presently worded, the Guidance makes no reference to consultation with School Pupils in relation to requests by their parents to withdraw them from Religious Instruction and / or Religious Observance. The letter of 13th June 2016 expresses a change to the policy set out in the Guidance which has not been published by the Respondents, and which it is apprehended may not be known to Schools dealing with such requests. Further, as the Guidance stands, no advice is given with regard to assessment of the age and maturity of a pupil who is eligible to be consulted. No advice is given with regard to dealing with any conflict in the expressed wishes of a School Pupil and their parent(s) in the event of a withdrawal request being made. By so doing, the Respondents have allowed the Guidance to remain in force in an erroneous form. The Court may intervene where a Government Department, in a field of administration

where it exercises responsibility, promulgates in a public document, even if of a non – statutory nature, erroneous advice (*Gillick; R (Fox and Ors)*). *Seperatim*, as presently worded, the Guidance takes no account of any obligations upon the Respondents arising from any rights School Pupils may have arising from the Convention and/or the UNCRC.

7. That in these circumstances:-

- (a) In its current terms, Section 9 of the 1980 Act is incompatible with the Convention Rights described. Accordingly, the Petitioners seek Declarator to that effect.
- (b) *Seperatim*, the failure of the Respondents to propose an amendment to Section 9 of the 1980 Act is, for the reasons described previously, a decision made contrary to the Convention Rights of School Pupils who wish to exercise on their own behalf a right to withdraw from Religious Instruction and/or Religious Observance, insofar as the current terms of Section 9 of the 1980 Act prevents them from so doing, is erroneous in law, and is an "act" of the Respondents contrary to such Convention Rights, and as such, is *ultra vires* of the Respondents. Accordingly, the Petitioners seek Declarator to that effect.
- (c) *Seperatim*, the Respondents have failed in fulfilling their statutory duties under the 2014 Act with regard to giving effect to the provisions of the UNCRC by their decision not to propose any amendment to Section 9 of the 1980, as aforementioned. Accordingly, the Petitioners seek Declarator to that effect.
- (d) The Respondents have acted unreasonably and contrary to law by their failure to amend or replace Paragraphs 14 - 16 of the Guidance to reflect the statement made in their letter of 13th June 2016 regarding the involvement of School Pupils in any request made by their Parent(s) for them to be withdrawn from Religious Instruction and / or Religious Observance, insofar as Paragraphs 14 – 16 of the Circular provide guidance on the operation of Section 9 of the 1980 which conflicts with or is materially different to the terms of the letter of 13th June 2016.

8. That the Petitioners satisfy Section 27B (2) of the Court of Session Act 1988. The subject – matter of the Petition is a decision of the Respondents relating to the manner in which Religious Instruction and Religious Observance are provided in Schools in Scotland. The Petition is concerned with a matter affecting a section of the public which the Petitioners represent, and in which the Petitioners seek to act in the public interest. The specific legislation under consideration is anomalous in terms of the extent of decision – making rights provided in other areas to children and young people of sufficient capacity, whether at common law, under domestic legislation, or under Treaty obligations such as the Convention and the UNCRC. An argument exists primarily that Article 9 and Protocol 1, Article 2 of the

Convention are now being interpreted by the Strasbourg Court in a way which is more reflective of the rights of children and young people in the issue of receiving or not receiving Religious Education. The effect of the implementation of Section 1 of the Children and Young People (Scotland) Act 2014 appears not to have been explored by the Courts, but the UNCRC is considered to be influencing interpretation of the Convention to some extent, and is considered to involve a shift in emphasis from parents to children. (*Scott, Education Law in Scotland (2nd Edition), paras.3.20 – 22*). The anomalous nature of Section 9 of the 1980 Act – creating as it does, an area of decision – making where a parent retains control over the issue throughout the whole period of School attendance - appears to raise a sharp conflict with such developments, and further questions whether the Respondents can properly claim to be acting in a manner compliant with their various obligations. A further matter arises from the apparent difference between non – statutory Guidance previously issued by the Respondents, which simply adopts Section 9 of the 1980 Act as its template, and the privately – provided advice that Schools would be expected to involve their Pupils in decisions of the kind under consideration, which is not generally available, the law may be left in an unclear situation, whereby some Schools and pupils may benefit from the change in position, while others cannot. Standing the interpretation given to the expression "real prospect of success", the facts and arguments as set out in the Petition appear to meet that requirement.

PLEAS-in-LAW

1. The terms of Section 9 of the Education (Scotland) Act 1980 being incompatible with the Convention Rights of School Pupils who wish to elect to withdraw from Religious Instruction and/or Religious Observance at a public school, Declarator should be granted as craved.
2. The Respondents having acted *ultra vires* by their failure to propose any amendment to Section 9 of the Education (Scotland) Act 1980 in order to render such legislation compatible with the Convention Rights of School Pupils who wish to elect to withdraw from Religious Instruction and/or Religious Observance at a public school, Declarator should be granted as craved.
3. The Respondents having failed to fulfil their statutory obligations in terms of Section 1 of the Children and Young People (Scotland) Act 2014, by their failure to propose any amendment to Section 9 of the Education (Scotland) Act 1980 in order to render such legislation compatible with the Convention Rights of School Pupils who wish to elect to withdraw from Religious Instruction and/or Religious Observance at a public school, Declarator should be granted as craved.
4. The Respondents having erred in law by their failure to amend the terms of Paragraphs 14 – 16 of the Guidance Curriculum for Excellence – Provision of Religious Observance in Schools

dated 22nd February 2011 in order to render its terms compatible with terms of the Respondents' letter of 13th June 2016, Declarator should be granted as craved.

According to Justice etc.

SCHEDULE FOR SERVICE

Respondent upon whom service is sought in common form:

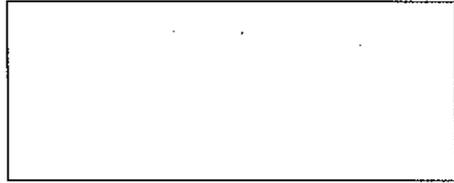
1. The Scottish Ministers, Victoria Quay, Edinburgh EH6 6QQ

PERIOD OF NOTICE

The petitioner submits that a period of notice of 21 days would be appropriate

SCHEDULE OF DOCUMENTS

1. Letter from the Scottish Government to the Humanist Society Scotland, dated 13th June 2016.
2. Scottish Government Circular 1/2005, Provision of Religious Observance in Scottish Schools.
3. Letter from Scottish Government to Headteachers dated 22nd February 2011 entitled Curriculum for Excellence – Provision of Religious Observance in Schools.



IN THE COURT OF SESSION

PETITION

OF

HUMANIST SOCIETY SCOTLAND

PETITIONERS

for

Judicial Review of a decision of the Scottish Ministers not to amend the terms of Section 9 of the Education (Scotland) Act 1980 and / or the extra – statutory Guidance issued by the Scottish Government in relation to withdrawal of School Pupils from Religious Instruction and Religious Observance.

2016

Ref: LB/L.11934.1

**GILLESPIE MACANDREW LLP
5 ATHOLL CRESCENT
EDINBURGH, EH3 8EJ
AGENTS FOR THE PETITIONERS**

INVENTORY of PRODUCTIONS

for the PETITIONERS

In the Petition of

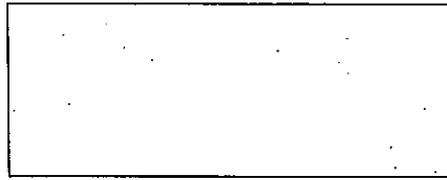
HUMANIST SOCIETY SCOTLAND, a Company Limited by Guarantee and having its Registered Office at Playfair House, 6, Broughton Street Lane, Edinburgh EH1 3LY

PETITIONERS

for

Judicial Review of a decision of the Scottish Ministers not to amend the terms of Section 9 of the Education (Scotland) Act 1980 and / or the extra – statutory Guidance issued by the Scottish Government in relation to withdrawal of School Pupils from Religious Instruction and Religious Observance.

1. Letter from the Scottish Government to the Humanist Society Scotland, dated 13th June 2016.
2. Scottish Government Circular 1/2005, Provision of Religious Observance in Scottish Schools.
3. Letter from Scottish Government to Head Teachers dated 22nd February 2011 entitled Curriculum for Excellence - Provision of Religious Observance in Schools.



IN THE COURT OF SESSION

**INVENTORY of PRODUCTIONS
for the Petitioners**

in the Petition of

HUMANIST SOCIETY SCOTLAND

PETITIONERS

for

Judicial Review of a decision of the Scottish Ministers not to amend the terms of Section 9 of the Education (Scotland) Act 1980 and / or the extra – statutory Guidance issued by the Scottish Government in relation to withdrawal of School Pupils from Religious Instruction and Religious Observance.

2016

**GILLESPIE MACANDREW LLP
5 ATHOLL CRESCENT
EDINBURGH
AGENTS FOR THE PETITIONERS**

Buidheann-Stiùiridh an Ionnsachaidh
Learning Directorate
Curriculum Unit

F/T: 0131-244 0081 F: 0131-244 0834
E: sue.langlands@scotland.gsi.gov.uk

Gary McLelland
Head of Communications and Public Affairs
Humanist Society Scotland
Hayweight House
23 Lauriston Street
EDINBURGH
EH3 9DQ



13 June 2016

Dear Gary

Thank you for your letter of 10 March asking for the Scottish Government response to the recent decision by Mr Justice Warby. I hope you found our meeting on 2 March useful, we are keen to keep an open dialogue with you and the Humanist Society Scotland. Please accept my apologies for the delay in replying.

The Scottish Government notes the judgement of Mr Justice Warby and the summary of the ECHR jurisprudence that it contains.

The Scottish Government is conscious of its obligations under the ECHR as developed by the Strasbourg Court and considers that it is in compliance with these obligations, including in relation to its policy on religious observance as set out in the guidance issued on 21 February 2011 to reflect the implementation of Curriculum for Excellence. This guidance is intended to assist local authorities and schools when curriculum planning and makes it clear that the guidance and Curriculum for Excellence operate alongside statutory duties on local authorities to provide religious instruction and religious observance under section 8 of the 1980 Act.

The Scottish Government considers that this existing legislative framework, Curriculum for Excellence and Scottish Government guidance about religious and moral education and religious observance ensure compliance with Article 9 of, and Article 2 of the First Protocol to, the ECHR.

Scottish Government guidance on both religious and moral education and religious observance as well as Curriculum for Excellence makes it clear that, in Scottish schools, learning and teaching must take place in a pluralistic manner that accords respect to both religious and non-religious beliefs. The 'principles and practice' and 'experiences and outcomes' documents under Curriculum for Excellence for both Religious and Moral Education and Religious Education in Roman Catholic Schools also refer expressly to the value of covering non-religious beliefs.

Cidhe Bhictòria, Dùn Èideann, EH6 6QQ
Victoria Quay, Edinburgh EH6 6QQ
www.scotland.gov.uk



As such, the Scottish Government does not consider it necessary to update its guidance in the form of a new circular to Headteachers, at this time.

In relation to the parental right to withdraw, Section 9 of the Education (Scotland) Act 1980 gives parents a right to withdraw their child from religious and moral education and religious observance in local authority schools and grant-aided schools.

As stated in the guidance issued in 2011 in relation to both religious and moral education and religious observance, schools should provide parents with sufficient information on which to base a decision about whether or not to exercise this right. In doing so, schools must ensure that parents are aware of the content of the religious and moral education and religious observance that the school wishes to undertake since, without this aspect of their education, learners will not enjoy the full benefits of Curriculum for Excellence. Making parents aware of the content of the religious and moral education that the school provides will involve highlighting its pluralistic nature.

There is no equivalent statutory right to withdraw afforded to children and young people. However many schools will find it helpful and sensible to include young people in any discussions about opting out, ensuring their wishes are aired. This seems especially relevant as young people become older and take more responsibility for their own learning.

The Scottish Government is conscious of its international obligations under the UNCRC and its duties under section 1 of the Children and Young People (Scotland) Act 2014 and will keep under consideration whether there are any steps Ministers could take – such as publishing revised guidance – which might secure better or further effect to the UNCRC in Scotland in this context, with particular reference to Article 12.

Yours sincerely



SUE LANGLANDS

¹ Religious and Moral Education is referred to as Religious Instruction in the Education (Scotland) Act 1980.



SCOTTISH EXECUTIVE

Education Department
Qualifications, Assessment and Curriculum Division

Directors of Education

Gill Robinson
Room 2-A 75
Victoria Quay
Edinburgh EH6 6QQ

Telephone: [REDACTED]
Fax: 0131-244 7001
Gill.robinson@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>

Your ref:
Our ref:

25 February 2005

Circular 1/2005

PROVISION OF RELIGIOUS OBSERVANCE IN SCOTTISH SCHOOLS

Dear Colleague

Introduction

1. This circular describes and explains the Scottish Executive's policy on the provision of religious observance in Scottish schools and sets out action for local authorities in planning the provision of religious observance. The Circular replaces the arrangements for religious observance set out in Circular 6/91 and applies to all primary and secondary schools, including special schools. The policy on religious education set out in Circular 6/91 remains in force meantime.
2. Scotland is a society with a longstanding Christian tradition. The most recent census showed that Christianity remains the main religious influence in Scotland. 67% of the Scottish population reported having a religion. 65% reported being members of the Church of Scotland, Roman Catholic Church or other Christian churches. However, Scotland has for many generations also had other faith and belief traditions, never more so than at present as Scotland increasingly becomes a place for many cultures and beliefs. This trend is set to continue as Scotland sets out to attract people from other communities as part of Scottish Executive policy. We can expect Scotland to become increasingly diverse in the range of faith and belief traditions represented. Religious observance needs to be developed in a way which reflects and understands this diversity. It should be sensitive to our traditions and origins and should seek to reflect these but it must equally be sensitive to individual spiritual needs and beliefs, whether these come from a faith or non-faith perspective.
3. The 2004 report of the Religious Observance Review Group made a number of recommendations about development of religious observance in schools (the full report is available at www.scotland.gov.uk/library5/education/rorg-00.asp). This circular responds to

the recommendation that the Scottish Executive Education Department should review the circular on religious observance. In preparing this guidance, account has been taken of the current legislation as contained in the Education (Scotland) Act 1980 and the special note contained in the HMIE report *Standards and Quality in Secondary Schools: Religious and Moral Education 1995-2000*.

Religious Education

4. Scottish Executive policy on religious education, as set out in Circular 6/91, is supported by the 5-14 National Guidelines on religious and moral education. The guidelines will be assessed against the principles and purposes of *A Curriculum for Excellence* during the second stage of the curriculum review. The importance of religious education for all school children will be emphasised in the review. When the review of the existing guidelines has been completed, we will update the religious education element of Circular 6/91 and the national guidelines.

Response to the Religious Observance Review Group Report

5. The recommendations of the Religious Observance Review Group outline sensitive and tactful solutions which will allow schools to provide religious observance which is an inclusive, valuable and meaningful experience for all. Scottish Ministers see religious observance as an important educational experience for children and young people at all stages of primary and secondary school. In accepting the Group's recommendations, Ministers believe that future actions can build on Scotland's strong Christian traditions without compromising them, and also promote the understanding and acceptance of other faiths and beliefs.

Definition of religious observance

6. Ministers accept the definition of and aims of religious observance proposed by the Religious Observance Review Group:

- *community acts which aim to promote the spiritual development of all members of the school community and express and celebrate the shared values of the school community.*

Approach

7. Each individual within a school community should be enabled to develop as a successful learner, confident individual, responsible citizen and effective contributor. Religious observance should have an important part to play in this development. It should also provide opportunities for the school community to reflect on, and develop, a deeper understanding of the dignity and worth of each individual and their contribution to the school and wider communities.

8. In recognition of Scotland's Christian heritage, schools are encouraged to use the rich resources of this tradition when planning religious observance. Many school communities contain pupils and staff from faiths other than Christianity or with no faith commitment. This should be taken fully into account in supporting spiritual development. It is of central importance that all pupils and staff can participate with integrity in forms of religious observance without compromise to their personal faith stances.

9. At present school assemblies are the most common vehicle for delivering religious observance. There should be a clear distinction between assemblies devised for the purpose of religious observance and assemblies for other purposes such as celebrating success. The precise form of religious observance will be determined by each school's policy within the local authority's framework, but these might include opportunities for class, year, stage or whole school observance as well as involvement by pupils and others, including school chaplains, in planning and presentation.

10. Materials and training events will be provided to support schools and authorities.

Frequency of religious observance

11. Religious observance needs to take place sufficiently frequently to have an impact on the spiritual development of the school community. It is, however, the quality of such occasions which is of greatest importance.

12. The Review Group acknowledged the need to balance the frequency which would make a positive impact on young people with the need to ensure that the experiences are valuable and inclusive. This will require careful planning by schools. The group concluded that every school should provide opportunities for religious observance at least six times in a school year, in addition to traditional celebrations central to the life of the school community, and preferably with greater frequency. We recognise that many primary schools value weekly religious observance as part of their regular assembly programme and will wish to continue with this. The school community should be involved in making decisions about frequency.

Parental Right to withdraw

13. There is a statutory provision for parents to withdraw children from participation in religious observance. This right should always be made known to parents and their wishes respected. Parents should be provided with sufficient information on which to base a decision.

14. Scottish Ministers consider that religious observance complements religious education and is an important contribution to pupils' development. It should also have a role in promoting the ethos of a school by bringing pupils together and creating a sense of community. Schools are therefore encouraged to inform parents of this without applying pressure to change their minds.

15. Where a child is withdrawn from religious observance, schools should make suitable arrangements for the child to participate in a worthwhile alternative activity. In no circumstances should a child be disadvantaged as a result of withdrawing from religious observance.

Chaplains

16. Scottish Ministers value the important and varied contributions that chaplains and other faith group leaders make to the life of the school, for example in their involvement in religious observance, acts of worship, religious and moral education and a broader pastoral role. Headteachers are encouraged to engage in full discussion with chaplains in planning and implementation of religious observance. In supporting religious observance, chaplains'

own religious stances should be respected and they should not be asked, or expected, to compromise their religious beliefs.

Worship in schools

17. The Religious Observance Review Group considered the relationship between organised acts of worship and religious observance. They concluded with the following statement:

Where the school, whether denominational or non-denominational, is continuous with a faith community, that community's faith in the "focus of worship", may be assumed and worship may be considered to be appropriate as part of the formal activity of the school. Where, as in most non-denominational schools, there is a diversity of beliefs and practices, the review group believes that the appropriate context for an organised act of worship is within the informal curriculum as part of the range of activities offered for example by religions, groups, chaplains and other religious leaders.

Ministers endorse this approach as complementary to schools' policy on religious observance and would ask schools to consider this statement when planning for religious observance.

18. Members of the school community, including pupils, parents and representatives of faith groups and communities, may wish to have opportunities for organised acts of worship within the informal curriculum of the school. Ministers would encourage headteachers to consider these requests positively and make suitable arrangements if appropriate personnel and accommodation can be provided.

Facilities

19. Consideration should be given to providing appropriate facilities in schools for acts of religious observance and worship. Locations need to be considered in the light of the size and diversity of participating groups. Locations for religious observance and worship should be considered in the planning and design of new and refurbished school buildings, to provide facilities which meet school and community needs.

Support

20. We recognise that schools will need support to enable them to action these revised arrangements. The Scottish Executive Education Department has therefore commissioned Learning and Teaching Scotland to develop, in collaboration with faith groups, the following support materials and resources for schools:

- guidance and exemplar materials to support schools in developing high quality activities for religious observance;
- guidance and exemplar materials on the role of chaplaincy teams; and
- self-evaluation tools for schools to assist them in evaluating the quality of religious observance provided for pupils.

Training events will be organised by Learning and Teaching Scotland to provide support on the use of these materials.

Conclusion

21. Local authorities and schools are invited to:

- work with the school community to plan the content, frequency, and location of religious observance, in line with this Circular and the Review Group report;
- review their policies on religious observance, and develop practice in line with this Circular and the Review Group report; and
- introduce necessary changes into planning processes as soon as possible.

22. Please send a copy of this circular to the Headteacher of each school in your area.



DR GILL ROBINSON
Qualifications, Assessment and Curriculum Division

Learning Directorate
Curriculum Division



T: [Redacted]
E: [Redacted]@scotland.gsi.gov.uk

Directors of Education
Headteachers of all schools

Our ref:

22 February 2011

CURRICULUM FOR EXCELLENCE – PROVISION OF RELIGIOUS OBSERVANCE IN SCHOOLS

Dear Colleague

Introduction

1. The Education (Scotland) Act 1980 continues to impose a statutory duty on local authorities to provide religious observance in Scottish schools. This letter replaces guidance previously contained within Circular 1/2005 and reflects the implementation of Curriculum for Excellence across all of Scotland's schools.
2. This letter clarifies the current position regarding the provision of religious observance in Scottish schools and sets out action for local authorities in planning the provision of religious observance. The Circular has been updated to reflect the adoption of Curriculum for Excellence and applies to all primary and secondary schools, including special schools. It is intended to assist local authorities and schools in the delivery of religious observance and sets out the continuing statutory requirements regarding its provision.
3. The policy on religious and moral education in non-denominational schools and religious education in Roman Catholic schools is covered in a separate letter which will be issued in conjunction with this

Background

4. Scotland is a society with a longstanding Christian tradition. However, Scotland has for many generations also been home to many who have other faith and belief traditions, never more so than at present. This trend is likely to continue as Scotland remains a country where people from other communities are welcomed and we can expect Scotland to become increasingly diverse in the range of faith and belief traditions represented. Religious observance needs to be developed in a way which reflects and understands this diversity. It should be sensitive to our traditions and origins and should seek to reflect these but it must equally be sensitive to individual spiritual needs and beliefs, whether these come from a faith or non-faith perspective.

The Religious Observance Review Group Report (2004)

5. The recommendations of the Religious Observance Review Group outlined sensitive and tactful solutions which will allow schools to provide religious observance which is an inclusive, valuable and meaningful experience for all. Scottish Government Ministers consider religious observance to be an important educational experience for children and young people at all stages of primary and secondary school. In accepting the Group's recommendations, Ministers believe that learning and teaching can build on Scotland's strong Christian traditions without compromising them, while also promoting the understanding of, and respect for other faiths and beliefs.
6. However, Scottish Government Ministers also recognise that whilst the Education (Scotland) Act uses the term religious observance, and as a consequence both Scottish Government and its partners (LTS and HMIE for example) use the same terminology, schools may feel a different name for the events that meet their religious observance requirements will be more appropriate to their context and culture. This is to be encouraged but needs careful thought and if possible some external reference point. For example, in a non-denominational school, the use of the title Time for Reflection might be appropriate because it is a clear description of the activity. This term is also used in other contexts, such as the Scottish Parliament.
7. Scottish Government Ministers also accept the definition and aims of religious observance proposed by the Review Group as being:
"community acts which aim to promote the spiritual development of all members of the school's community and express and celebrate the shared values of the school community".

Approach

8. Religious observance has an important part to play in the development of the learner's four capacities: a successful learner, confident individual, responsible citizen and effective contributor. It should also provide opportunities for the school community to reflect upon and develop a deeper understanding of the dignity and worth of each individual and their contribution to the school and wider communities.
9. Scottish Government Ministers welcome the tradition that, in Roman Catholic denominational schools, Catholic Liturgy will largely shape the nature and frequency of religious observance activities in the classroom and in the wider school community. So, at times, children and young people will be invited to participate in, and sometimes to lead, prayer and reflection in classrooms and at assemblies. At other times, to honour particular occasions or feasts, chaplains will lead school communities in the celebration of Mass and other forms of liturgical celebration.
10. In recognition of Scotland's Christian heritage, non-denominational schools are also encouraged to draw upon the rich resources of this tradition when planning religious observance. However, many school communities contain pupils and staff from faiths other than Christianity or with no faith commitment, and this must be taken fully into account in supporting spiritual development. It is of central importance that all pupils and staff can participate with integrity in forms of religious observance without compromise to their personal faith.
11. At present in non-denominational schools, assemblies are the most common vehicle for delivering religious observance. There should be a clear distinction between assemblies devised for the purpose of religious observance and assemblies for other purposes such as celebrating success. The precise form of religious observance will be determined by each school's policy within the local authority's framework, but these might include opportunities for class, year, stage or whole school observance as well as involvement by pupils and others, including school chaplains and other faith leaders, in planning and presentation.

Frequency of Religious Observance

12. Religious observance needs to take place sufficiently frequently to have an impact on the spiritual development of the school community. It is, however, the quality of such occasions which is of greatest importance.
13. There is a need to balance the frequency which would make a positive impact on children and young people with the need to ensure that the experiences are valuable and inclusive. This will require careful planning by schools. Every school should provide opportunities for religious observance at least six times in a school year, in addition to traditional celebrations central to the life of the school community, and preferably with greater frequency. We recognise that many primary schools value weekly religious observance as part of their regular assembly programme and will wish to continue with this. The school community should be involved in making decisions about frequency.

Parental Right to Withdraw

14. There is a statutory provision for parents to withdraw children from participation in religious observance. This right should always be made known to parents and their wishes respected. Parents should be provided with sufficient information on which to base a decision.
15. Scottish Government Ministers consider that religious observance complements religious education and is an important contribution to pupils' development. It should also have a role in promoting the ethos of a school by bringing pupils together and creating a sense of community. Schools are therefore encouraged to inform parents of this without applying pressure to change their minds.
16. Where a child is withdrawn from religious observance, schools should make suitable arrangements for the child to participate in a worthwhile alternative activity. In no circumstances should a child be disadvantaged as a result of withdrawing from religious observance.
17. Where a parent chooses a denominational school for their child's education, they choose to opt in to the school's ethos and practice which is imbued with religious faith and religious observance. In denominational schools, it is therefore more difficult to extricate a pupil from all experiences which are influenced by the school's faith character.

Chaplains and Other Faith Group Leaders

18. Scottish Government Ministers value the important and varied contributions that chaplains and other faith group leaders make to the life of the school, for example in their involvement in religious observance, acts of worship, religious and moral education and a broader pastoral role. Headteachers are encouraged to engage in full discussion with chaplains and other faith group leaders in the planning and the implementation of religious observance. In supporting religious observance, their own religious beliefs should be respected and they should not be asked, or expected, to compromise them.

Religious Observance and Worship in schools

19. The Religious Observance Review Group considered the relationship between organised acts of worship and religious observance. They concluded with the following statement:

"Where the school community, whether denominational or non-denominational, is continuous with a faith community, that community's faith in the focus of worship, may be assumed and worship may be considered to be appropriate as part of the formal activity of the school. Where, as in most non-denominational schools, there is a diversity of beliefs and practices, the Review Group believes that the appropriate context for an organised act of worship is within the informal curriculum as part of the range of activities offered for example by religions, non-religious groups, chaplains and other faith leaders."
20. Ministers endorse this approach as complementary to schools' policy on religious observance and would ask schools to consider this statement when planning for religious observance.

- 21. Members of the school community, including pupils, parents and representatives of faith groups and communities, may wish to have opportunities for organised acts of worship within the informal curriculum of the school. Ministers would encourage headteachers to consider these requests positively and make suitable arrangements if appropriate support arrangements can be provided.

Facilities

- 22. Consideration should be given to providing appropriate facilities in schools for acts of religious observance and worship. Locations need to be considered in the light of the size and diversity of participating groups. Locations for religious observance and worship should be considered in the planning and design of new and refurbished school buildings, to provide facilities which meet school and community needs.

Support

- 23. Glasgow University, Scripture Union Scotland and the Church of Scotland have created a learning opportunity to assist school staff, chaplains and other faith group leaders in the delivery of religious observance. www.gla.ac.uk/departments/religiouseducation
- 24. Learning and Teaching Scotland website offers guidance and exemplar materials to support schools in developing high quality activities for education about faith and belief, and for religious observance. www.LTScotland.org.uk/religiousobservance
- 25. The Scottish Catholic Education Service offers guidance and exemplar materials to support denominational schools on aspects of religious observance and School Chaplaincy. www.sces.uk.com

Conclusion

- 26. Local authorities and schools are invited to:
 - work with the school community to plan the content, frequency and location of religious observance, in line with this Circular and the Review Group report;
 - review their policies on religious observance, and develop practice in line with this Circular, the Review Group report and Curriculum for Excellence; and
 - introduce necessary changes into planning processes as soon as possible.

Yours faithfully



Laura Stewart

From: [Redacted]
To: [Deputy First Minister and Cabinet Secretary for Education and Skills](#)
Cc: [Redacted]
Subject: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review - info to DFM on previous involvement with HSS - september 2016
Date: 30 September 2016 15:01:09
Attachments: [S20150042528.pdf](#)
[RE Urgent line to clear by 4pm - Inverness Courier - Humanists call for an end to religious influence in schools.msg](#)
[Redacted]

[Redac
tad1

1) HSS wrote to Ms Constance in December 2015 asking SG to engage in discussions about religious observance, especially on the back of new reports published by the Arts and Humanities Research Council (AHRC)- *Collective Worship and Religious Observance in Schools: An evaluation of Law and Policy in the UK* And by the independent Commission on Religion and Belief in British Public Life (CORAB) - *Living with Difference: Community, Diversity and the Common Good*

HSS in particular wanted to meet SG to discuss these two reports and SG's reaction to them, and to offer their suggestions and support for what action SG could take.

2) We replied later in December and offered a meeting with officials to discuss. That meeting took place in March 2016 and was very useful. Various aspects of RME and RO were discussed, with Education Scotland present alongside Learning Directorate. The thrust of the discussion was that while SG was very interested in supporting strong, high quality practice, we were not at the present time convinced of a need for reform of guidance or legislation.

3) There were also 2 PQs lodged by Alison McInnes (NES, Lib Dem) asking about SG's response to two reports highlighted by HSS. Our replies explained the current position.

4) Press reports on HSS in February 2016, covering the publication of their report Religion in Scots Law

<http://www.bbc.co.uk/news/uk-scotland-35674059>

Report: <https://www.humanism.scot/what-we-do/research/religion-in-scots-law/>

We responded to requests for comment as follows: "The Scottish Government supports the involvement of a broad range of interests from the wider community, including religious representations, in education and recognises the contribution this can make to positive learning experiences in schools."

5) HSS wrote on 10 March 2016 to myself in Learning Directorate. This was the letter to which we responded at official level on 13 June and which now forms the basis of their Judicial review. Our letter of 13 June defended our policy and guidance as they currently stand.

6) HSS chief Exec Gordon Macrae wrote to DFM on 19 May congratulating him on his appointment and asking to meet to discuss “policy proposals and campaign ideas”. We completed a PS minute which mentioned HSS’s ongoing interest in matters around RO: HSS have criticised the SG for ‘rejecting calls to give school pupils the legal right to opt-out of RO in schools and are calling on the Scottish Government to ultimately amend legislation (the Education (Scotland) Act 1980) to allow children to have the right to withdraw for RO and by default RME and replace RO ‘.....with a more inclusive alternative such as Philosophy for Children’.

DFM’s office replied on 20 July to say DFM unfortunately unable to meet at this time, but aware of their important work and encouraging them to keep dialogue open.

7) News reports on 12 September that HSS would seek a judicial review.

<http://stv.tv/news/politics/1366760-humanist-society-seeks-review-over-religious-observance/>

[Redacted]

[Redacted]

[Redacted]

From: [Redacted] **On Behalf Of** Deputy First Minister and Cabinet Secretary for Education and Skills
Sent: 30 September 2016 11:07
To: [Redacted]
Cc: [Redacted] Deputy First Minister and Cabinet Secretary for Education and Skills
Subject: RE: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review

Hi [Redacted]

As discussed, grateful if you could advise the DFM on what requests have been made by HSS for us to change policy here in the last 12 months. I’d be grateful if we could have this by 16.00 today.

Kind regards,

[Redacted]

[Redacted]

From: [Redacted]

Sent: 22 September 2016 17:34

To: First Minister; Deputy First Minister and Cabinet Secretary for Education and Skills

Cc: Lord Advocate; Minister for Childcare and Early Years; Minister for Further Education, Higher Education and Science; Solicitor General; [Redacted]

Subject: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review

PS/First Minister

PS/Deputy First Minister

Further to my previous note dated 14 September and subsequent responses from the First Minister and Deputy First Minister (attached for reference), please see a further submission attached.

Kind regards,

[Redacted]

Submission (4 pages)

<< File: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review - Final Version - 22 September 2016.docx >>

<< Message: RE: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review >> << Message: RE: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review >>

[Redacted]

Learning Directorate

Scottish Government

[Redacted]

From: [Redacted]
Sent: 08 December 2015 15:20:02
To: Ministerial Correspondence Unit
Cc: Cabinet Secretary for Education and Lifelong Learning
Subject: FW: Letter to Cabinet Sec. for Education Two high-level reports call for a review of Religious Observance ***IHM***

Attachments: LettertoCabSecELLMcL081115.pdf

Good afternoon,

Can this be added to MACCS for an MR please?

Many thanks,

[Redacted]

Correspondence Secretary ? Cabinet Secretary for Education & Lifelong Learning

[Redacted]

From: [Redacted]
Sent: 08 December 2015 14:34
To: Cabinet Secretary for Education and Lifelong Learning
Subject: Letter to Cabinet Sec. for Education Two high-level reports call for a review of Religious Observance

FAO Cabinet Secretary for Education and Lifelong Learning, CC: Joe Walker, Education Scotland/

Please find letter attached, to save paper I don't plan to post it, however I can if needs be.

Thanks

Look forward to hearing from you.

[Redacted]

[Redacted]

Humanist Society Scotland

(Usual days of work Monday - Thursday)

[Redacted]

Hayweight House, Lauriston Street, Edinburgh, EH3 9DQ.

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Angela Constance MSP
Cabinet Secretary for Education and and LifeLong Learning
St. Andrew's House,
Regent Road
Edinburgh
EH1 3DG

Tuesday 8 December 2015

Dear Cabinet Secretary,

Two high-level reports call for a review of Religious Observance

I am writing to draw your attention to, and request a meeting to discuss, two new high-level reports which both call on the Scottish Government to review current requirements for Religious Observance.

On Friday 13th November The Arts and Humanities Research Council (AHRC) on Collective Worship published a report titled *Collective Worship and Religious Observance in Schools: An evaluation of Law and Policy in the UK*¹. As well as making some general UK-wide suggestions, the report (which benefited from the expertise of Dr Claire Cassidy, University of Strathclyde and Dr Frankie McCarthy, University of Strathclyde) made three Scotland-specific recommendations:

- 1. It is recommended that Education Scotland provide clear guidance as to what constitutes religious observance and where worship is situated within that.*
- 2. It is recommended, in line with Section 6 of the Standards in Scotland's Schools etc. Act 2000, that children are consulted on the day to day running of the school as set out in the school's Development Plan and that this should include consultation relating to religious observance.*
- 3. It is recommended that the term 'Religious Observance' be formally changed to 'Time for Reflection' in order to be more inclusive.*

Less than one month later, on Monday 7th December, the independent Commission on Religion and Belief in British Public Life (CORAB) (which we helped to organise

1

<https://www.humanism.scot/wp-content/uploads/2015/11/Collective-Worship-Religious-Observance-26-October-2015-REPORT-FINAL.pdf>



an evidence hearing for at the University of Glasgow on April 12 2015²) published its report titled *Living with Difference: Community, Diversity and the Common Good* ³.

The report highlighted some positive developments here in Scotland, such as the joint statement we issued with the Church of Scotland in January 2014 calling on the Scottish Government to replace Religious Observance with an inclusive 'Time for Reflection'⁴.

One of the CORAB report's main recommendations was:

'Governments should repeal requirements for schools to hold acts of collective worship or religious observance and issue new guidelines building on current best practice for inclusive assemblies and times for reflection'

We would really value an opportunity to meet with you to discuss these two reports, and the Scottish Government's reaction to them, and offer our suggestions and support for what action the Scottish Government could take.

Thank you,

[Redacted]

Head of Communications and Public Affairs

CC: [Redacted]

<https://www.humanism.scot/what-we-do/news/commission-on-religion-and-belief-in-public-life-takes-evidence-at-a-hearing-in-university/>

³ <https://www.humanism.scot/wp-content/uploads/2015/12/Living-with-Difference-CORAB-Report.pdf>

⁴ <http://www.freezeage.com/1390866841BWJJITVXTU>

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From: [Redacted] on behalf of [[Minister for Learning, Science and Scotland's Languages 2011 to 2016](#)
To: [Redacted] [[Minister for Learning, Science and Scotland's Languages 2011 to 2016](#)
Cc: [[Minister for Local Government and Community Empowerment 2014 to 2016](#); [zzzMinister for Children and Young People 2011 to 2016](#); [Redacted]

Subject: RE: Urgent line to clear by 4pm - Inverness Courier - Humanists call for an end to religious influence in schools

Date: 10 March 2016 15:15:20

[Redacted]
[Redacted]

Dr Allan is content to clear, as drafted.

Thanks,
[Redacted]
[Redacted]

[Redacted]

From: [Redacted]

Sent: 10 March 2016 15:10

To: Minister for Learning, Science and Scotland's Languages

Cc: Minister for Local Government and Community Empowerment; Minister for Children and Young People; Cabinet Secretary for Education and Lifelong Learning; DG Learning & Justice; [Redacted]

Subject: Urgent line to clear by 4pm - Inverness Courier - Humanists call for an end to religious influence in schools

[Redacted]
[Redacted]

The Inverness Courier has asked for a response to a story from last month on humanists calling for an end to religious influence in schools.

<http://www.bbc.co.uk/news/uk-scotland-35674059>

Updated line which has been agreed with spads and policy copied below.

“The Scottish Government supports the involvement of a broad range of interests from the wider community, including religious representations, in education and recognises the contribution this can make to positive learning experiences in schools.”

Background

Religious representation on local government education committees is a requirement under the Local Government (Scotland) Act. The GTCS council has 37 members in total (19 elected, 11 nominated and 7 lay members). The 11

nominated members include one member from Church of Scotland and one from the Roman Catholic Church.

Grateful for the Minister's clearance by 4pm if possible.

[Redacted]

[Redacted]

[Redacted]
Curriculum Unit
Scottish Government
Commercial Street
Victoria Quay
Edinburgh
EH6 6QQ

10 March 2016

Dear [Redacted]

Scottish Government response to a recent decision by Mr Justice Warby

As discussed at our meeting on 2 March 2016, I would like to seek a response from the Scottish Government about a recent judgement of the High Court.

J. Fox & ors Vs Secretary of State for Education

In a recent judgement from the High Court¹, Mr Justice Warby reaffirmed the following points of human rights jurisprudence:

“39. In carrying out its educational functions the state owes parents a positive duty to respect their religious and philosophical convictions; the state has considerable latitude in deciding exactly how that duty should be performed, having regard among other things to available resources, local conditions and, in particular, the preponderance in its society of particular religious views, and their place in the tradition of the country; thus, the state may legitimately give priority to imparting knowledge of one religion above all others, where that religion is practised or adhered to by a majority in society; but the state has a duty to take care information or knowledge included in the curriculum is conveyed in a pluralistic manner; subject to certain threshold requirements, immaterial here, the state must accord equal respect to different religious convictions, and to non-religious beliefs; it is not entitled to discriminate between religions and beliefs on a qualitative basis; its duties must be performed from a standpoint of neutrality and impartiality as regards the quality and validity of parents’ convictions.”

The judgement also addressed the issue of a statutory right to withdraw/opt-out, which exists in England and Wales, and in Scotland:

“79. ...an opt-out is not an adequate substitute for the provision of an educational programme which accords the Parents their right to respect for their convictions. The need to withdraw a Child would be a manifestation of the lack of pluralism in question.”

¹J Fox and others vs Secretary of State for Education, CO/2167/2015

As you will be aware, as this case deals with the Human Rights Act 1988, the jurisprudence is applicable to Scotland².

Current Scottish Government policy on Religious Observance

In the Scottish Government's 2011 circular³, s7 makes reference to the 'parental right to withdraw'. However it does not make reference to any rights that pupils may themselves have to make a decision to opt-out.

Under the United Nations Convention on the Rights of the Child⁴, children have a right to have their voice heard in decisions which may affect them.

At our meeting on 2 March 2016 you suggested that if children had asked to opt-out themselves, that this should be accommodated by teachers.

Specific questions

1. Does the Scottish Government believe that the human rights jurisprudence advanced by Mr Justice Warby in his judgement (CO/2167/2015) have any effect on its current policy on Religious Observance (as set out in the 2011 circular)?
 - a. If so, will the Scottish Government undertake to published revised guidance in the form of a new circular for Head Teachers?
2. Bearing in mind Mr Justice Warby's judgement, and the Scottish Government's obligations under Art.12 of the UNCRC, does the Scottish Government consider all or some young people to have the right to opt-out from Religious Observance or Religious and Moral Education (or RERC)?
 - a. If so, does this right apply to all young people, or young people of a certain age and maturity?
 - b. If so, will the Scottish Government undertake to published revised guidance in the form of a new circular for Head Teachers?

We would be happy to discuss this with you further.

I look forward to hearing from you.

Thanks,

[Redacted]

Head of Communications and Public Affairs
Humanist Society Scotland

² Also applicable through the Scotland Act 1998, as amended.

³ http://www.educationscotland.gov.uk/Images/rmererclletter_tcm4-650439.pdf

⁴ http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf

ADVICE FOR: JOHN SWINNEY

MACCS Case Number:	2016/0018597	Respond by: 7 July 2016	
Correspondent/Organisation:	Gordon MacRae, HSS Chief Executive		
Date and time of Event:	Anytime – to be confirmed with PO		
Location of Event:	N/A		
Overview of invitation and audience profile:	Gordon MacRae is introducing the Cabinet Secretary to the Humanist Society Scotland and sending congratulations on Mr Swinney's appointment. However, we feel that this would be an ideal opportunity to meet with the HSS given recent media attention around the UNCRC and the right of children to make the decision to withdraw from religious and moral education and religious observance.		
Has the Minister been asked to attend on behalf of FM?	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Don't Know <input type="checkbox"/>
RECOMMENDATION:	Accept		
	<p>Comments: For many years the Cabinet Secretary for Education has met with key faith groups yearly to discuss how they can contribute to education policies. We consider HSS to be a key stakeholder in helping schools to deliver inclusive Religious and Moral Education and Religious Observance.</p> <p>HSS have criticised the SG for 'rejecting calls to give school pupils the legal right to opt-out of RO in schools and are calling on the Scottish Government to ultimately amend legislation (the Education (Scotland) Act 1980) to allow children to have the right to withdraw for RO and by default RME and replace RO '.....with a more inclusive alternative such as Philosophy for Children'.</p> <p>Learning Directorate, Curriculum Unit and Education Scotland have an open dialogue with HSS on developing resources to support delivery instead off previously where they would only issue 'right to withdraw' templates. The Scottish Government has come a long way in developing an active dialogue with HSS.</p>		
	If recommendation is to accept, has this advice been agreed with your Head of Division? Yes <input type="checkbox"/> No <input type="checkbox"/>		
Has another Minister been asked to attend:	No.		

Main theme that the event supports:	Religious and Moral Education and Religious Observance is about the inclusivity.	
Main purpose of attending: <i>(Tick as many as apply)</i>	<ul style="list-style-type: none"> • Explain new policy or a major policy shift <input type="checkbox"/> • Reinforce or illustrate existing policy <input checked="" type="checkbox"/> • Improve relations with stakeholders <input checked="" type="checkbox"/> • Encourage participation in consultation <input type="checkbox"/> • Recognise contribution to policy implementation <input checked="" type="checkbox"/> • Announce funding <input type="checkbox"/> • Other (please specify): 	
Main message to communicate:	Religious and Moral Education in the 21 st century aims to enable children and young people to explore the world's major religions and views independently of religious belief and to consider the challenges posed by these beliefs and values.	
Most appropriate type of Ministerial input:	Meeting.	
Private Office view:	Date to be confirmed	
	Private Office contact:	Insert Name
Communications Office view:	Comments:	Comms should always provide a view on external events
	Communications Office contact:	Insert Name and Ext
Action Officer:	[Redacted]	1 July 2016

First Minister
Deputy First Minister and Cabinet Secretary for Education and Skills

RELIGIOUS OBSERVANCE - HUMANIST SOCIETY SCOTLAND V MINISTERS - PETITION FOR JUDICIAL REVIEW

Purpose

1. To:

- respond to the First Minister and Deputy First Minister's questions,
- provide initial advice on possible policy options and next steps,
- seek agreement to lodge a notice with the Court confirming our intention to defend the Petition, and
- seek agreement to engage with the Humanist Society Scotland on the particular issues that they have raised.

Priority

2. Urgent.

Background

3. The Humanist Society Scotland (HSS) served a Petition on 14 September seeking Judicial Review of a decision by the Scottish Government not to allow young people to opt-out of Religious Instruction and Religious Observance. The Petition challenges the decision of Ministers not to amend section 9 of the Education (Scotland) Act 1980 and/or the guidance on the withdrawal of school pupils from religious instruction and religious observance.

4. The First Minister has asked about previous Ministerial input on this issue. There have been various instances in the past few years where religious observance in particular has been the subject of correspondence, enquiries and also public petition in the Parliament. Mr Russell, Ms Constance and Dr Allan were aware of the sensitivities around policy and practice and issued responses on specific matters. However, current Ministers have not been consulted on any potential changes to policy and, subsequently, legislation. The recent correspondence at an official level with HSS explained our existing position in relation to the legislation and guidance covering how religious observance is implemented in schools.

5. The four specific areas on which the HSS seeks response are that:

- Section 9 is incompatible with the Convention rights of school pupils who wish to exercise their right to withdraw from provision of religious instruction and/or religious observance.
- Ministers have acted ultra vires by failing to propose any amendment to section 9 to grant a right to school pupils to withdraw.

- Ministers have failed to implement their statutory obligations under section 1 of the Children and Young People (S) Act 2014 by failing to propose such an amendment to section 9.
- Ministers have acted unreasonably by failing to amend paras 14-16 of the guidance to make that advice compatible with the policy set out in their letter of 13 June 2016.

Policy Position

6. The First Minister and Deputy First Minister have asked about the policy position on the issue. There is an important distinction to be drawn between Religious Instruction (now commonly known as Religious and Moral Education (RME)) and Religious Observance. RME is one of the eight areas of Curriculum for Excellence, where understanding of beliefs, practices and philosophies is taught as a class subject. While the RME curriculum reflects the role Christianity has played in shaping the history and traditions of Scotland, teaching and learning through RME also allows young people to explore and understand wider beliefs and values. Religious Observance is a whole school activity usually conducted as part of school assemblies, defined in 2011 guidance as *“community acts which aim to promote the spiritual development of all members of the school’s community and express and celebrate the shared values of the school community”*.

7. Whilst the Petition refers to both Religious Instruction and Religious Observance, we understand from our previous engagement with HSS that it generally respects and understands the role of RME as a valid part of the curriculum; its concerns tend to centre on Religious Observance.

8. We will provide more detailed advice in early October which will include a background paper by Education Scotland setting out what is known about the current practice of RME and Religious Observance, and the distinction between practice in denominational and non-denominational schools. This will also set out the range of views and issues across stakeholders with an interest that will be relevant in any debate about revising policy, legislation and/or guidance.

9. Prior to the judicial review being received, advice was already being prepared requesting Ministers’ views on updating the guidance and the potential for a full review of policy and legislation. [Redacted]

[Redacted]

10. [Redacted]

Judicial process

11. SGLD litigation team has confirmed that [Redacted] – our first standing junior – has been instructed in this case and has the petition and initial papers. Both Ministers and the Lord Advocate have been provided with the petition and initial papers.

12. There is a deadline of **5 October to lodge a notice that we intend to defend the petition or, if we decide to oppose the grant of permission, for the case to proceed to lodge Answers.** [Redacted]

13. [Redacted]

15. It may be helpful to enter in to dialogue with the petitioner to seek mutual agreement on ways forward to avoid litigation. If Ministers agree, this dialogue could take place between Counsel for the petitioner and our own Counsel in the first instance, and potentially between SG officials and HSS officials, with a view to seeking mutual agreement.

Conclusion

16. You are invited to:

- a) Agree that a note of intention to defend the petition be lodged by 5 October,
- b) Note that further detailed advice on the emerging policy options will be provided in early October, and

- c) Agree that direct contact with the HSS should be pursued, with a view to establishing a way forward that may address their concerns.

[Redacted]

Learning: Curriculum, Qualifications and Gaelic
x47573

22 September 2016

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Lord Advocate					X
Minister for Childcare and Early Years					X
Minister for Further Education, Higher Education and Science					X
Solicitor General					X

[Redacted]

From: [Redacted]
To: [First Minister; Deputy First Minister and Cabinet Secretary for Education and Skills](#)
Cc: [Lord Advocate; Minister for Childcare and Early Years; Minister for Further Education, Higher Education and Science; Solicitor General](#); [Redacted]
.
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Subject: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review - outcome notification to FM and DFM - 14 october 2016
Date: 14 October 2016 16:28:23
Attachments: [Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review - Update minute 13 October.docx](#)
[Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review .msg](#)

First Minister

Deputy First Minister and Cabinet Secretary for Education and Skills

HUMANIST SOCIETY SCOTLAND V MINISTERS

JUDICIAL REVIEW OF THE RIGHT TO WITHDRAW FROM RELIGIOUS OBSERVANCE

Purpose

1. To update the First Minister and the Deputy First Minister on the outcome of the hearing on permission for the judicial review challenge to proceed which took place before Lord Armstrong this morning.

Timing

2. **Routine- for information only.**

Background

3. This note provides an update on matters discussed in the previous submission below dated 13 October 2016.

Hearing on permission

4. As previously advised, Answers were lodged on behalf of Ministers to contest permission. Lord Armstrong had indicated in a note issued prior to the hearing that he would be minded to allow the petition to proceed but with a much narrower scope. He fixed a hearing to allow parties to address him personally before reaching a final decision. Douglas Ross QC appeared for Ministers and David Cobb, Advocate, represented HSS.
5. Lord Armstrong stated in his note that in relation to the first and second pleas-in-law (that section 9 of the Education (Scotland) Act 1980 is incompatible with the Convention rights of schools pupils who wish to withdraw from religious instruction and/or religious observance at a public school and that Ministers have

acted *ultra vires* by failing to amend the provision to make it compatible), as the Petitioners cannot claim victim status in terms of Article 34 of the European Convention on Human Rights they have no standing to challenge the compatibility of legislation, or acts or omissions of Ministers, with Convention rights. Lord Armstrong considered that in relation to the third plea-in-law (that Ministers had failed in their statutory duties in terms of section 1 of the Children and Young People (Scotland) Act 2014 by not proposing any amendment to section 9 of the 1980 Act), on the basis of the facts set out in the letter sent by the Scottish Government to the Petitioners dated 13 June 2016, it is plain that Ministers had complied with their statutory obligations under the 2014 Act in reaching their decision and therefore that challenge had no real prospects of success.

6. The Petitioners' Counsel confirmed prior to the hearing that it would not be disputing Lord Armstrong's conclusions on their first to third pleas-in-law. The only point remaining was whether the petition should continue in relation to the fourth plea-in-law, which is the challenge relating to the failure of Ministers to amend the guidance on the provision of religious observance in schools to render it compatible with the terms of the letter sent to HSS dated 13 June 2016. They argued that although the letter dated 13 June 2016 provided that many schools would find it helpful to include young people in any discussions about opting out, whilst acknowledging that there is no statutory right to withdraw afforded to children, the relevant policy is silent on the involvement of the child in this process. Our Counsel, Douglas Ross QC, argued that permission should be refused in relation to the fourth plea-in-law with the result that the entire petition would not proceed as the issue identified by the Petitioners does not raise a sharply defined point of law and therefore they do not have a real prospect of success. The Petitioners had not put forward any averments in support of their claim that the failure to amend the guidance amounts to an error in law. Counsel for the Petitioners conceded that strictly speaking it may not be correct to describe the guidance as erroneous but argued that what is set out in the guidance and the letter is significantly different. The test of a real prospect of success was a low hurdle and on that basis permission should be granted for the remainder of their challenge to continue.

7. Lord Armstrong concluded that permission should be granted for the petition to proceed but in relation to the fourth plea-in-law only. The Court has issued a timetable for further procedure and decided to reserve the expenses of today's hearing. Answers require to be lodged by 27 October, adjustments and Notes of Argument have to be prepared by 10 November, a procedural hearing has been fixed for 24 November and the hearing on the petition is scheduled for 11 January 2017. Our Counsel has already advised Counsel for the Petitioners that we are willing to discuss the issues raised in the petition following the hearing today. [Redacted]

The Deputy First Minister has advised that he would like to discuss the case with officials, and full advice on the issues presented by the case and possible options will be provided for that meeting.

8. Notwithstanding the Court's decision on permission in this case, it is

possible that a case could arise in the future where a petitioner has a specific grievance, for example, a pupil wishes to withdraw from religious observance contrary to the wishes of their parent. [Redacted]

9. Ministers will be aware of the press coverage and most recent letter from HSS requesting a meeting with the Deputy First Minister in relation to the senior school pupils who were given detention at Taylor High, Motherwell. The local authority position as we understand it is that these cases have been dealt with as truancy in accordance with school rules. However, it has been reported in the press in the context of the lack of right of withdrawal for pupils, over 16, who wish to withdraw from religious observance. The event which the pupils truanted from was a memorial service and catholic mass arranged by a denominational school as a religious observance. [Redacted]

Recommendation

10. You are invited to note that the Court has decided to grant permission for the judicial review petition to proceed but on a much narrower scope. Further detailed advice on the emerging policy options to inform our discussions with HSS will be provided shortly.

Kind Regards

[Redacted]

[Redacted]

[Redacted]

From: [Redacted]

Sent: 13 October 2016 16:03

To: First Minister; Deputy First Minister and Cabinet Secretary for Education and Skills

Cc: Lord Advocate; Minister for Childcare and Early Years; Minister for Further Education, Higher Education and Science; Solicitor General; [Redacted]

Subject: Religious Observance - Humanist Society Scotland v Ministers - Petition for judicial review

PS/First Minister

PS/Deputy First Minister

Further to **[Redacted]** previous note dated 22 September (attached for reference), please see a further submission attached.

Kind regards,

[Redacted]

[Redacted]

[Redacted]