Re: The Education Bill 2011 and schools/academies with a religious character

ADVICE TO THE EHRC

Introduction

1. You want my opinion on the issues raised in correspondence from the National Secular Society (NSS) which relate (1) to the protection from religious discrimination of staff in Academies (including the impact of provisions in the Education Bill 2011 which is currently before Parliament) and (2) to the question of whether provisions which protect such discrimination in "voluntary aided" schools are compatible with the requirements of EU law.
2. In particular, you want to know about:
    a. The power set out in the proposed new section 124AA(2) of the School Standards and Framework Act 1998 (as proposed by clause 58 of the Education Bill 2011) which would allow the Secretary of State by order to (in effect) change the employment position in an Academy which had formerly been a foundation or voluntary controlled school into the equivalent in a former voluntary aided school;
    b. The potential loss of the protections given by section 59(2)-(4) of the 1998 Act where an existing school to which they apply becomes an Academy;
    c. The concern that section 60(5) of the 1998 Act may be incompatible with the requirements of Directive 2000/78/EC.
    d. The suggestion that such changes (which reduce the protection for non-religious teachers) are in any event prevented by the Directive on the grounds that they were not "national practices existing at the date of adoption of this Directive".

Legal Context

3. We are here concerned with two types of school:
    a. "Maintained schools" (i.e. schools maintained by local authorities); and
    b. "Academies"
4. The former fall into the following categories (see thus Schools Standards and Framework Act 1998 section 20):
    a. community schools;
    b. foundation schools;

c. voluntary schools, comprising—
    i. voluntary aided schools, and
    ii. voluntary controlled schools;
d. community special schools; and
e. foundation special schools.

5. Foundation and voluntary schools can (as below) be designated (pursuant to section 69(3) of the 1998 Act) as having a religious character.
6. There leads to the distinction (which is at the heart of the issues here) as between foundation and voluntary controlled schools on the one hand (where the local authority remains the owner of the premises and the employer of staff and sets the admissions arrangements), and voluntary aided schools (where the church takes those roles). As below that difference has led to key differences in the protections against religious discrimination for staff in each of those different groups of school.
7. Academies are not "maintained schools". They are "independent schools" which (as considered further below) are funded and controlled by the Secretary of State through contracts, known as a Funding Agreements (or Academy Agreements), with each Academy proprietor.
8. The overarching domestic legal position when it comes to equality protection is set out in the Equality Act 2010 which (among other things) makes religion or belief a "protected characteristic" in relation to which discrimination (including in employment) is unlawful.
9. However, sections 58-60 of the School Standards and Framework Act 1998 apply to the various categories of **maintained school** (as above) to overlay specific provisions on to the general position arising from the 2010 Act. In summary, they:
    a. Essentially proscribe discrimination on grounds of religion or belief in **maintained schools** in relation to <u>non-teaching</u> staff;
    b. In **foundation or voluntary controlled schools designated as having a religious character**, up to 20% of the <u>teaching</u> posts may be "reserved" and preference can be given in the appointment, pay, and promotion of people holding those posts to persons whose religious opinions accord with those of the school or who attend religious worship or who are willing to give religious education; and the holders of reserved posts can be dismissed by reference to conduct incompatible with the religion of the school.
    c. In **voluntary aided schools** the position described for reserved posts above applies to all <u>teaching</u> staff.

10. Section 124A of the 1998 Act makes parallel provision for teachers at **independent schools which have a religious character**. It allows for preference to be given in appointment, promotion or remuneration of teachers at such schools to those whose religious opinions are in accordance with the tenets of the religion in question, or who attend religious worship in accordance with its tenets, or who are willing to give religious education in accordance with those tenets; and it allows teachers at such schools to be dismissed by reference to conduct incompatible with the religion.

11. Given that, as above, Academies are independent schools, section 124A would, subject to the transitional protections mentioned below, currently apply to those of them designated as having a religious character.

12. In particular, Article 5 of the Academies Act 2010 (Commencement and Transitional Provisions Order) 2010 created specific transitional protections for existing "non-reserved" teachers and other for staff at foundation or **voluntary controlled schools with designated religious characters** which became Academies. By that provision, existing staff at such schools have continued to enjoy the protections of sections 59(2)-(4) of the 1998 Act (which, as considered further below) gave them specific wide-ranging protections from religious discrimination (which they would not otherwise have had because their schools would have fallen into the section 124A regime which, as above, offers no such protections). I will return below further to consider the position of those transitional arrangements.

13. Those domestic provisions must also comply with Council Directive 2000/78/EC. Article 2 of the Directive proscribes direct discrimination on the grounds of (among other things) religion or belief. Articles 4(1) and 4(2) then allow for limited and focussed derogation from that overarching principle. You have provided me with a copy of an Advice prepared by Paul Epstein QC and Carla Revere (24 June 2009) which analyses those provisions and explains the basis on which the domestic provisions (and most particularly sections 58-60 of the 1998 Act) must comply with them. I will return to the relevant detail further below.

14. The question then is what happens when a school which is presently covered by the requirements of sections 58-60 of the 1998 Act becomes an Academy. I assume you are also concerned with the position where a new school is created as an Academy (i.e. not a conversion of a maintained school). The same position would apply to what are called "free schools" by the Government – they are, in law, Academies.

15. The previous Government created 203 Academies, some of which were formerly maintained schools, some of which were new. The Coalition Government has introduced the Academies Act 2010. I am not here concerned with the detail of that Act other than to note that all Academies (old

and new, converted from maintained schools or created from scratch) all now take effect under that Act. That Act imposes no restrictions on such Academies relevant to the issues here. As above, section 124A of the 1998 Act applies. And additional requirements could be applied through the provisions of their Funding Agreements – I have no information on whether this has happened in fact, or is to happen.

The Education Bill 2011

16. Clause 58 of the Education Bill 2011 is currently before parliament. As above, you are concerned with its impact on the protections from religious discrimination in Academies.

17. Clause 58(2) would amend section 124A of the 1998 Act (which as above applies to independent schools and thus also to Academies) so as to disapply it from Academies to which the new section 124AA of the 1998 would apply, as below.

18. Accordingly, the position in Academies not within the new section 124AA would be governed by the existing section 124A which, as above, only applies to an independent school which has a religious character as designated under section 69(3) of the 1998 Act (as it is applied to independent schools by section 124B of the 1998 Act).

19. Accordingly, there would be (at least in theory) 3 kinds of Academy:

    a. Those within the new section 124AA (to which its particular provisions apply as below),

    b. Those not within section 124AA but nonetheless, by virtue of being designated (as above) as having a religious character, falling within section 124A,

    c. Those not within either because they are not designated as having a religious character (such that there is no derogation from the ordinary Equality Act 2010 prohibitions on discrimination by reference to religion or belief) albeit that, as below, arguments still arise about whether there is parity with the position in non-religious maintained schools.

20. I note, at this stage, that the section 124AA regime applies only to Academies which have come about through the making of an Academy order – i.e. those created pursuant to the Academies Act 2010. It would not (as currently framed) appear either to apply to Academies with those same characteristics but created by the previous Government (if there were any with such characteristics) or to Academies which are newly created from scratch (i.e. being a brand new school rather than a conversion of an existing maintained school). I will return to that further below.

21. In any event, the proposed section 124AA (as contemplated by clause 58(3) of the Bill as currently framed) would say this:

"(1) This section applies if—

(a) an Academy order has been made in respect of a foundation or voluntary controlled school which is designated by order under section 69(3) as a school having a religious character,

(b) the school has been converted into an Academy (see section 4(3) of the Academies Act 2010), and

(c) the Secretary of State has not made an order in respect of the school under subsection (2).

(2) The Secretary of State may by order provide that this section does not apply to a school specified in the order.

(3) Where there are more than two teachers at the Academy, the teachers must include persons who—

(a) are selected for their fitness and competence to give religious education in accordance with the tenets of the religion or the religious denomination specified in relation to the Academy in the order under section 69(3) (as applied by section 6(8) of the Academies Act 2010), and

(b)) are specifically appointed to do so.

`A teacher employed or engaged at the Academy in pursuance of this subsection is a "reserved teacher", and any other teacher at the Academy is a "non-reserved teacher".

(4) The number of reserved teachers in the Academy must not exceed one-fifth of the total number of teachers, including the principal (and for this purpose, where the total number of teachers is not a multiple of five, it is to be treated as if it were the next higher multiple of five).

(5) In connection with the appointment of a person to be the principal of the Academy, in a case where the principal is not to be a reserved teacher, regard may be had to that person's ability and fitness to preserve and develop the religious character of the Academy.

(6) Preference may be given, in connection with the appointment, promotion or remuneration of reserved teachers at the Academy, to persons—

(a) whose religious opinions are in accordance with the tenets of the religion or the religious denomination specified in relation to the Academy in the order under section 69(3) (as applied by section 6(8) of the Academies Act 2010), or

(b) who attend religious worship in accordance with those tenets, or

(c) who give, or are willing to give, religious education at the Academy in accordance with those tenets.

(7) Regard may be had, in connection with the termination of employment or engagement of any reserved teacher at the Academy, to any conduct on the part of the teacher which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination specified in the order under section 69(3) (as applied by section 6(8) of the Academies Act 2010).

(8) No person, other than a reserved teacher, is to be disqualified by reason of their religious opinions, or of their attending or omitting to attend religious worship—

(a) from being a teacher at the Academy, or

(b) from being employed or engaged for the purposes of the Academy otherwise than as a teacher.

(9) A non-reserved teacher must not be required to give religious education.

(10) A non-reserved teacher must not receive any less remuneration than any other non-reserved teacher, or be deprived of, or disqualified for, any promotion or other advantage available to other non-reserved teachers—

(a) for the reason that the teacher gives, or does not give, religious education, or

(b) for reasons related to the teacher's religious opinions or to the teacher's attending or omitting to attend religious worship."

22. Overall, therefore, section 124AA if enacted in those terms would (subject to the making of an order, as below) apply to an Academy which had been

created from the conversion of a **foundation or voluntary controlled school with a designated religious character**. But:

a. where the predecessor maintained school had been a voluntary aided school, the Academy (assuming it was now designated as an independent school with a religious character, as above) would have the wider freedoms to discriminate allowed by section 124A, as above; or

b. where the predecessor had not had any designation the ordinary Equality Act 2010 prohibitions would be in play in full.

23. But section 124AA(2) would allow the Secretary of State to make an order disapplying the effects of section 124AA in relation to a school to which it would otherwise apply. In other words, the Secretary of State could order that an Academy which had been created from a **foundation or voluntary Controlled School with a designated religious character** could, in effect, fall back within the terms of section 124A and thus (assuming it was now designated as an independent school with a religious character, as above) have the wider freedoms of a former voluntary aided school.

24. The freedoms then to be given to former voluntary aided schools with a designation as religious in character and to which no disapplication order had been made are set out in the proposed sections 124AA(3)-(10). They essentially track the position as it applied in the former school – i.e. (in broad terms) up to 20% of teaching posts can be reserved, and there can be discrimination on grounds of religion or belief in relation to those reserved posts.

25. I referred above to the effect of Article 5 of the Academies Act 2010 (Commencement and Transitional Provisions Order) 2010 which created specific transitional protections for existing "non-reserved" teachers and other for staff at foundation or voluntary controlled schools with designated religious characters which became Academies. I note for completeness that those transitional arrangements would no longer be needed if the new section 124AA came into effect because (subject to the making of a section 124AA(2) order, as above) all such staff would now benefit from the proposed protections under the new sections 124AA(8)-(10) which essentially track the provisions of section 59(2)-(4).

<u>The particular issues raised here</u>

26. As above, you want to know about:

a. The proposed section 124AA(2) power;

b. The potential loss of the protections given by section 59(2)-(4) of the 1998 Act where an existing school to which they apply becomes an Academy;

c. The concern that section 60(5) of the 1998 Act may be incompatible with the requirements of Directive 2000/78/EC.

d. The suggestion that such changes (which reduce the protection for non-religious teachers) are in any event prevented by the Directive on the grounds that they were not "national practices existing at the date of adoption of this Directive".

27. I will consider those in turn.

Orders under section 124AA(2) as proposed

28. As framed, the proposed new section 124AA(2) of the School Standards and Framework Act 1998 (as proposed by clause 58 of the Education Bill 2011) which would allow the Secretary of State by order to (in effect) change the employment position in an Academy which had formerly been a foundation or voluntary controlled school into the equivalent in a former voluntary aided school.

29. The point of concern here is that the power to make such an order is currently completely openly-framed. In particular, there are no constraints on the Secretary of State making such an order, nor are any procedural requirements imposed.

30. The Explanatory Notes to the Bill say that:

> "The Secretary of State intends to use this power if he has agreed changes to the Academy's governance arrangements such that the religious body has majority control over the Academy in the same way that it does over a voluntary aided school governing body."

31. But that explanation simply begs the question as to the circumstances in which, and process by which, the Secretary of State would agree to the governance changes he describes.

32. Those governance changes would involve changes to the Academy's Funding Agreement. However, that is essentially a private contract and there are no public formalities specifically related to the process of amendment (although both the Academy and the Secretary of State would have obligations under the new public sector equality duty (Equality Act 2010, section 149) when in force).

33. That, of course, is in stark contrast to the statutory processes and formalities expressly involved in the conversion of a voluntary controlled school to a voluntary aided school (which is the process being tracked in the making of a section 124AA(2) order). That process includes, among other things, publicity and consultation obligations.

34. The effect of that would be that, at least in theory, staff at an Academy could find themselves newly exposed to the freedoms to discriminate granted by section 124A of the 1998 Act without having proper procedural protections.

35. The answer from the Department for Education (in its public response to the NSS's concern) is that:

> "Just as [the process of going from VC to VA] requires consultation in the maintained sector, we would expect any Academy wishing to make such a change to set out their business case fully and ensure a wide and thorough consultation was carried out. The Secretary of State would only approve an amendment to the Funding Agreement or the Memorandum and Articles if he was satisfied that sufficient consultation had taken place in the case of such a change and that responses to consultation showed that such a change was supported. ...."

36. Plainly that goes some way to meeting the concerns about lack of process in the process of conversion (and thus in the making of a section 124AA(2) order) but for the fact that what is described would (unless changes were made to the Bill) be an entirely non-statutory and largely unenforceable requirement.

37. You may well thus consider it appropriate to propose the inclusion of an amendment which ensures that a process of the kind being described there is made a statutory requirement. That could be done by, say, adding to the words of section 124AA(2) as contemplated by clause 58 of the Bill something like:

> "but he shall not make such an order unless there has been consultation with such persons as he considers appropriate on the question of whether an order should be made and having regard to the responses given in that consultation."

<u>The loss of section 59(2)-(4) protections</u>

38. Where a community school or a foundation special school or a foundation or voluntary school which does not have a designated religious character becomes an Academy, the staff lose the protections they previously enjoyed under sections 59(2)-(4) of the 1998 Act.

39. As above, staff at a voluntary controlled school with a designated religious character are currently protected by the Academies Act transitional order.

They would, in future be protected by the terms of section 124AA itself (which tracks the section 59(2)-(4) protections). But those at non-religious maintained schools which become Academies (overwhelmingly the largest group) would lose statutory protections which they currently enjoy.

40. That, of course, has been the position from the inception of Academies. Neither the Academies Act nor the Education Bill change that.

41. The Government's response on the point came in an answer from Lord Hill (the Minister) to a question from Lord Avebury, thus:

> "To the extent that section 59SSFA provides protection for staff on the grounds of their religion or belief, the Equality Act 2010 will do the same. This means that no teacher in an academy without a religious ethos can lawfully suffer less favourable treatment because of their religion or belief and this is what is required by the framework directive. It is not considered necessary to replicate the wording of section 59 of the SSFA for academies without a religious ethos."

42. I agree with the second sentence of that: the Equality Act 2010 does provide protection from less favourable treatment because of religion or belief. But I do not agree that it does "the same" as section 59 of the 1998 Act. The most obvious example of that is in the fact that section 59(3) provides that "No teacher at the school shall be required to give religious education." Although I can see that, depending on the nature of the religious education in question (which in an academy would be a matter for the academy itself), there might be an argument that requiring (say) an atheist teacher to teach religious education was indirect discrimination contrary to the provisions of the Equality Act 2010 (recalling that the 2010 Act also prohibits discrimination by lack of lack of religion or belief), that argument is somewhat more diffuse and fact specific than the specific and blanket statutory protection given by section 59(3).

43. Accordingly, I agree with NSS that there is a difference between the protections afforded by section 59 to teachers in non-religious maintained schools to their counterparts in non-religious academies. I also agree (with NSS) that the inclusion of words such as "an Academy that is not religiously designated" into section 59(1)(b) would (in a simple and elegant way) extend the section 59 protections to academy staff, albeit going further than is strictly necessary because, as above, much of what section 59 protects is already protected by the Equality Act.

<u>Section 60(5) of the 1998 Act</u>

44. NSS suggests that section 60(5) of the 1998 Act may be incompatible with the requirements of Directive 2000/78/EC.

45. Section 60(5) (which I set out in full below) applies in voluntary aided school. It allows for preference to be given in the appointment, remuneration or promotion of teachers to persons whose religious opinions are in accordance with the tenets of the designated religion, or who attend religious worship in accordance with those tenets or who give, or are willing to give, religious education at the school in accordance with those tenets; and for conduct incompatible with the precepts or the upholding of the tenets of the religion to be taken into account in connection with termination of employment.

46. Section 124A(2)-(3) of the 1998 make equivalent provision for independent schools with a designated religious characteristic. As above, if section 124AA is added as contemplated by the Education Bill, then those provisions will apply in Academies that were formerly foundation or voluntary controlled schools with a designated religious character (and those to which a section 124AA order has been made).

47. Article 2 of the Directive creates the "principle of equal treatment" which means that indirect and direct discrimination on grounds of religion or belief, disability, age or sexual orientation is proscribed in the field of employment.

48. Articles 4(1) and 4(2) then provide a partial derogation from that. I agree with Paul Epstein and Carla Revere that such a derogation must be construed narrowly. Those provisions say that:

> "1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
>
> 2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and

principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos." [my underlining]

49. Accordingly, Article 4(1) applies where the context or activity is such that any one of the identified protected characteristics is "*a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate*". Accordingly, there is a tight focus on the link between the characteristic and the job in question: it must be a genuine and determining occupational requirement; and the extent of the derogation must be no more than needed and for a proper reason: *the objective is legitimate and the requirement is proportionate*.

50. That may be the position for "reserved posts" in the present context, but – in my opinion - not beyond that.

51. On the other hand, Article 4(2) applies only to "*churches and other public or private organisations the ethos of which is based on religion or belief*" (which I consider would include both a voluntary aided school and an independent school within section 124A).

52. It applies where, "*by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos*".

53. As for Article 4(2), it applies in relation to activities and context. But it only applies by reference to the religion or belief of the person being given preference; and that religion or belief must be merely a *"legitimate and justified occupational requirement"*, rather than, for Article 4(1) *"a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate"*. So the requirement is merely legitimacy and justification in a more general sense rather than it being determinative; and without the requirement of proportionality.

54. However, the true nature and effect of the distinction is far from clear.

55. My overall comment on Article 4(2) is that its operation and application is far from straightforward. Indeed, I would go as far as to say that it is not *acte clair* such that, if its terms were the subject of dispute (as below) a reference to the ECJ may well be required.

56. In any event, on balance, I do consider that (compared to what is required for Article 4(1)), Article 4(2) can be engaged even where there is a rather weaker linkage between the particular job (here of course focussed on the job of teacher) and the ethos of the school. In particular, Article 4(2) is much more directed to the organisational context whereas Article 4(1) is directed much more to the particular job.

57. The other important element in that first paragraph of Article 4(2) is that it cannot be used to *"justify discrimination on another ground"*. That is very important in that it means that (say) selecting candidates by reference to their religion or belief cannot be used to (say) justify discriminating against gay or lesbian candidates.

58. The second paragraph of Article 4(2) then provides that "*Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos*." [my underlining].

59. In my view the opening proviso and the use of the word "thus" make clear that the second paragraph of Article 4(2) is simply explaining the scope and effect of those earlier provisions (as an interpretative aid) and is not some further expansion of, or addition to, them.

60. The second paragraph of Article 4(2) is thus making clear that *one aspect of* discriminating by reference to religion or belief in the organisation in question can be a requirement that employees act "*in good faith and with loyalty to the organisation's ethos*". It follows, in my view, that it would be permissible to have regard to the compatibility of their conduct with the religion's ethos in making relevant decisions. But, as above, the conduct in question could not be condemned on that basis as a way of justifying discrimination on grounds other than religion or belief and thus on (say) sexuality because (as above), the second paragraph of Article 4(2) is subordinate to the first which, in turn, contains that important limitation.

61. Turning then to section 60(5):

> "If the school is a voluntary aided school—
>
> (a) preference may be given, in connection with the appointment, remuneration or promotion of teachers at the school, to persons—
>
> (i) whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school under section 69(4), or
>
> (ii) who attend religious worship in accordance with those tenets, or

(iii) who give, or are willing to give, religious education at the school in accordance with those tenets; and

(b) regard may be had, in connection with the termination of the employment or engagement of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified.

62. In my opinion (subject to two overarching points considered below):

a. the provisions in section 60(5)(a)(i) (but not (ii) or (iii)) *could* be said to be compatible with Article 4(2). In particular, section 60(5)(a)(i) allows for discrimination by reference to religion or belief which is what Article 4(2) potentially permits.

b. Similarly, section 60(5)(b) *could* be compatible with the requirements of the Directive and Article 4(2) but again subject to the fact that it would be impermissible for it to be used to justify, say, discrimination on grounds of sexuality and again on the (potentially flawed) assumption that all voluntary aided schools fall within Article 4(2) for all relevant purposes.

63. As for the overarching points:

a. What is entirely missing in section 60(5) is any recognition of the requirement of Article 4(2) that "*This difference of treatment .... should not justify discrimination on another ground*." In particular, section 60(5)(a)(i) might, as framed, be thought to carve out from the Equality Act 2010 a mechanism which would allow religious schools to justify discrimination on grounds of (say) sexuality. In my opinion, that would be inconsistent with Article 4(2) and is thus impermissible.

b. It also cannot be assumed (as section 60(5) by implication does) that the ethos/justification requirements of Article 4(2) are met in <u>all</u> voluntary aided schools with a religious designation, let alone for all purposes – I will return to that further below.

64. Turning then to why I consider that there is a real problem with sections 60(5)(a)(ii) and(iii): The three limbs of section 60(5)(a) are put as alternatives. Thus section 60(5) allows for preference to be given to (i) persons whose religions opinions accord with the relevant tenets, <u>or</u> (ii) persons who attend relevant worship <u>or</u> (iii) persons willing to give relevant religious instruction, albeit allowing for someone to fall within multiple limbs (thus someone in limb i may well also fall within limb ii and limb iii).

65. But that begs the question of what happens where someone falls within limbs ii and/or iii but not limb i. In particular, it follows from the statutory structure that where the second and third limb is being relied on as the route into

section 60(5), that is because they are persons whose religious opinions are not in accordance with the tenets of the religion (because, if they were in accordance then they would fall within the first limb and the other limbs would not be needed). In other words the second and third limb seek to extend the ambit of the preferential treatment persons may not be believers.

66. That goes beyond what Article 4(2) permits. That is because, as above, Article 4(2) allows for derogation from the principle of equal treatment by reference to, and only by reference to, a person's "religion or belief". That does not allow for preference to be given to people whose religious opinions are not in accordance with the tenets but who either nonetheless attend worship (for whatever other reason) or who are nonetheless prepared to teach religious education.

67. It follows that I agree with Paul Epstein and Carla Revere that section 60(5) (and by parity also section 124A) falls foul of the Directive, but not in the same way and not for the same reasons, as follows.

68. Firstly, they treat the second paragraph of Article 4(2) as providing an additional means of getting within the ambit of the protection of – see thus their paragraph 57(i) when they suggest that preference for those willing to teach religious education can be justified by reference to "*loyalty to the organisation's ethos*", i.e. as if that was a separate and additional route into Article 4(2) which, as above, I do not consider it to be.

69. Secondly, in paragraph 57(ii), they suggest that attendance at worship (limb (ii) above) can be a proxy for sharing the organisation's beliefs and thus within the ambit of Article 4(2). In the abstract, I might agree with that. But, as above, the fact that "religious opinions" (limb (i) is treated separately from attendance at worship (limb (ii)) in section 60(5)(a) makes that impermissible here.

70. Thirdly, they suggest (paragraph 57(iii)) that the "*any conduct*" catchall in section 60(5)(b) would need to be "read down" (and would need to be read down to secure compliance with the Directive) so as only to refer to conduct which affects the person's post at the school. I am not clear that there is such a restriction in the Directive. In particular, Article 4(2) simply refers to the right to "*require individuals working for them to act in good faith and with loyalty to the organisation's ethos*". That is not expressly limited to conduct which affects the person's particular post. That said, the derogation is to be construed narrowly and the argument made for a narrow reading of it in this context cannot be lightly dismissed.

71. Finally they suggest (paragraph 57(iv)) that section 60(5)(a)(i) – which allows for preference by reference to beliefs, as above - is incompatible with Article 4(2) because (so they say) of the fact that Article 4(2) only allows for such discrimination to the extent that such belief can be said to be a genuine,

legitimate and justified occupational requirement. I am not clear why they say that and I think it goes too far. I note in that context what they say in their paragraph 18 namely that:

> "The important difference between this permissible derogation [in Article 4(2)], and the derogation permitted by Article 4(1) is that this genuine occupational requirement need not be a determining requirement of the employment or occupation. The derogation is permissible where it is simply a requirement of the employment occupation.

72. As above, I agree with their focus in that paragraph on that difference. Indeed I would go further and repeat that, in an Article 4(2) case, the requirement need only be "genuine, legitimate and justified, having regard to the organisation's threshold", which does not call for the same intensity, objective analysis and linkage as does the Article 4(1) requirement that the characteristic be a "determining occupational requirement" which is "legitimate and proportionate". (For completeness I also do not agree with them –their para 18- that the requirement for proportionality can necessarily simply be implied into Article 4(2).)

73. But my concern is that having identified that difference between Article 4(1) and 4(2) in paragraph 18, they have then –in their 57(iv)- completely collapsed it again and saying that the same degree of connectivity between the particular job and the religious opinions being looked for to justify discrimination is required in both cases.

74. That said, I do think there is a strong argument that section 60(5) goes too far in giving (on the face of it) a blanket consent to discrimination (cast in very wide terms) on grounds of religion in employment in all **voluntary aided schools**. That is problematic in at least two ways:

    a. It assumes that, in <u>all</u> such schools, a person's religion or belief is a genuine, legitimate and justified occupational requirement having regard to the organisation's ethos for all teachers. That may or may not be the case in any particular school, even within the voluntary aided sector. And without further information which showed that, in all voluntary aided schools, that threshold was inevitably crossed, I would say that section 60(5) simply goes too far. Schools which, in fact, only employed teachers who were believers in the religion in question would find it easier to cross that threshold. But a school which, although it gave preference to such persons in recruitment in fact ended up (perhaps because it did not attract enough recruits who were believers) with many teachers who were not, would struggle to say that being a believer was a genuine, justified and legitimate occupational requirement.

b. It also proceeds on the basis that all acts of religious discrimination are lawful for a school falling within its terms including thus, for example, discrimination in salaries. Thus, for example, it would seem to allow two teachers in such a school who were materially identical other than in their degree of commitment to the religion in question to be paid differently because one was a strong believer and the other not. That might (and I only say might) be within the ambit of Article 4(2) in a school where the ethos was such that the linkage with religious opinions was strong. But to say that it is such for all **voluntary aided schools** *as a class* risks being (in my opinion) too much of a blanket carve out from the basic requirements of the Directive without that being justified.

75. Overall, it follows that, in my view the problems with section 60(5) (and by parity of reasoning with section 124A) are:

    a. the inclusion of section 60(5)(a)(ii) and (iii);

    b. the lack of any limitation on the exercise of the section 60(5) powers to prevent them being used in a way which would amount to discrimination on other proscribed grounds; and

    c. the fact that all voluntary aided schools are treated as meeting the requirements of Article 4(2) for all purposes without that blanket approach being necessarily being justified (something which would need more investigation before it could be precisely pinned down).

76. As for how that could all be expressed as amendments to section 60(5), I would suggest:

    a. The repeal of section 60(5)(a)(ii) and (iii) (and likewise section 124A(2)(b) and (c));

    b. The addition of a proviso at the end of section 60(5) saying something like:

        > "Provided that nothing in this section shall be taken to permit discrimination which would be prohibited by the Equality Act 2010 other than in relation to religion or belief."

        and

    c. (Unless evidence shows that, in fact, all voluntary aided schools do *in fact* cross the requisite Article 4(2) threshold) the inclusion of a limitation at the end of section 60(5)(a) along the following lines:

        > "but only to the extent that the treatment in question can be justified on the basis that the religion or belief of a teacher in the school constitutes a genuine, legitimate and justified

occupational requirement having regard to the school's religious ethos."

77. That would leave section 60(5) reading like this:

> "(a) If the school is a voluntary aided school preference may be given, in connection with the appointment, remuneration or promotion of teachers at the school, to persons whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school under section 69(4) but only to the extent that the treatment in question can be justified on the basis that the religion or belief of a teacher in the school constitutes a genuine, legitimate and justified occupational requirement having regard to the school's religious ethos.
>
> (b) regard may be had, in connection with the termination of the employment or engagement of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified.
>
> Provided that nothing in this section shall be taken to permit discrimination which would be prohibited by the Equality Act 2010 other than in relation to religion or belief."

78. Finally, although you have not specifically asked me about those provisions of section 124A which (as above) track those in section 60(5), I have – as above – considered them as well and - as above – made the point that they raise essentially the same problems. But, I can also see that they may well raise even greater problems depending on quite what level of religious underpinning is required before an independent school can be designated as having a religious character (and thus come under the ambit of section 124A). That matters because, although I have been prepared to accept (as above) that voluntary aided schools (and by extension Academies which were voluntary aided schools) may fall under Article 4(2), that may well not be the case for all independent schools designated as having a religious character. Thus, there may well be schools currently under section 124A which (akin to voluntary controlled schools) would not have the requisite intensity of religious involvement to gain the protection of Article 4(2). But that would need further investigation before any firm conclusions could be drawn (unless the limitation which I have suggested for inclusion in section 60(5) were also included in section 124A.

79. Overall, however, I re-emphasise that, as above, interpretation and application of Article 4(2) is far from easy. Indeed, my disagreement with Paul Epstein and Carla Revere is perhaps illustrative of that. A reference to the ECJ may well be needed.

Regression

80. NSS is concerned that the changes (which, as above, reduce the protection for non-religious teachers) are in any event prevented by the Directive on the grounds that they were not "national practices existing at the date of adoption of this Directive".

81. As noted above, Article 4(2) is specifically only available in order to

> "...maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive..."

82. In other words it could not be relied on to protect new instances of discrimination by churches and other religious bodies.

83. Article 8(2) also specifically says that:

> "The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive."

84. NSS has expressed concern that:

    a. The making of a section 124AA(2) order without proper process could lead to a breach of the above aspect of Article 4(2); and

    b. The failure to give the equivalent of section 59 protections in academies is also a breach of Article 8(2).

85. I can see how, if there were no proper process involved in the making of a section 124AA(2) order, that could be problematic in this regard. But, as above, the DFE has said there will be an open process and I have suggested that such a process could and should be made statutory. The requirements of Article 4(2) as above provide a further argument as to why that should be done.

86. Likewise, I can see problems with the fact that the shift to Academies, and thus the loss of section 59 protections for many teachers leads (as above) to a loss of protections for those teachers. But I am less clear that that can be said to fall foul of Article 8(2) since it is not a consequence of the measures to implement the Directive: see thus Article 8(2) "the implementation of this Directive shall under no circumstances constitute grounds for...."

Finally

87. As mentioned above, the provisions of section 124AA of the 1998 Act as contemplated by the Education Bill are essentially forward looking (applying, as they do, only to Academies created following the Academies Act 2010). I am not aware of the extent to which the issues in play here would have arisen in the context of earlier Academies but not then covered by the transitional protections above. That would need to be investigated if it is of concern to you.

88. Secondly, the trigger for considerations above arises from the proposals in clause 58 of the Education Bill. They are directed to protecting the position in voluntary controlled schools when they become Academies. But that does not deal with the situation in Academies which are created from scratch (what the Academies Act 2010 calls "additional schools"); and that, in turn, includes what the Government calls "free schools". Any brand new Academies/free schools which are designated as having a religious character will (assuming the new section 124AA as proposed the Government) come under the section 124A regime which, as above, allows for the maximum religious discrimination. And that will be the case regardless of the extent of any linkage for Article 4(2) purposes. Thus, even if it were acceptable to (as above) deem all voluntary aided (and ex voluntary aided now academies) schools to have the requisite qualities to allow them to benefit from Article 4(2) – which as above I do not take as a given – it would be a wholly greater step to say that of <u>all</u> new academies/free schools having a designated religious character.

89. Indeed, the point could go wider still in that it would also apply to all (non-Academy) independent schools: specifically raising the question of whether all such schools which are designated as having a religious character can for all purposes benefit from the provisions of Article 4(2) – as section 124A of the 1998 Act provides. That would require further investigation. In particular, it would require consideration of precisely what requirements must be satisfied before the Secretary of State designates a school (and an independent school in particular) as having an religious character. If those requirements would allow for such designation even if the school in question did not would meet the requirements of Article 4(2), then the problem discussed above is far greater than even the NSS has contemplated so far. In particular, it would mean that schools which did not meet the Article 4(2) requirements would nonetheless be gaining a right to discriminate which Article 4(2) does not permit.

90. Finally, although you have not asked me about the Human Right Act implications of the above matters, I would note that there may be significant Article 14 and Article 9 issues particularly when it comes to the position in voluntary aided schools (in relation to section 60(5)) and in Academies falling within section 124A (after the introduction of section 124AA, namely the ex voluntary aided schools) which are all clearly public authorities. On the one hand, it would no doubt be said that they would need to exercise the section 60(5) and section 124A powers considered above compatibly with Convention rights. On the other hand the broad framing of section 60(5) and 124A might be thought problematic in being likely to lead the relevant schools wrongly to think they can behave in ways which might exceed the permitted limits of the ECHR. Thus, for example, there may be real Article 14/Article 9 issues arising from (say) paying teachers in materially identical jobs in the same school different salaries depending on the religious beliefs. All of that may, however, be beyond what you want to consider at the moment.

David Wolfe
MATRIX
24 March 2011