

**IN THE MATTER OF SECTIONS 58-60 OF THE SCHOOLS  
STANDARDS AND FRAMEWORK ACT**

**AND IN THE MATTER OF COUNCIL DIRECTIVE 2000/78/EC**

**AND IN THE MATTER OF THE EQUALITY BILL**

**AND IN THE MATTER OF THE NATIONAL SECULAR SOCIETY**

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**A D V I C E**

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**Introduction**

1. We are asked to advise the National Secular Society (“the Society”) as to whether Sections 58-60 of the Schools Standards and Framework Act 1998 (“SSFA”) are compatible with the rights to equal treatment contained in Council Directive 2000/78/EC (“the Framework Directive”), and if they are not, what steps are open to the Society in order to seek compliance. The Society has been in correspondence with the DCSF, which is strongly of the view that there is no incompatibility.
2. As for the facts, as recorded in our Instructions the Society has been contacted by teachers who complain that they either find it hard to obtain jobs, especially in rural areas where the majority of schools can be faith schools, or that they are denied the opportunity of being promoted since they cannot satisfy the very

strict criteria required to meet the reserved teacher status. The Society has also had reports of gay and lesbian teachers having to keep their home lives a secret from their colleagues for fear of being dismissed on grounds of conduct incompatible with the ethos of the school. Such teachers are understandably reluctant to litigate or have their names made public.

3. In very broad terms, we have structured this Advice by analysing the meaning of the Framework Directive and the meaning of the SSFA, followed by an analysis of whether the two are compatible.

### **Framework Directive**

4. The Framework Directive was adopted by the Council pursuant to Article 13 EC Treaty, as inserted by the Treaty of Amsterdam.
5. That provides that *“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”*
6. Three Directives have been passed under Article 13, Council Directive 2000/43/EC (“the Race Directive”), the Framework Directive, and Council Directive 2004/113/EC (equal treatment between men and women as regards goods and services.)

7. Paragraph 1 of the preamble to the Framework Directive provides that: *“(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”*
8. Paragraph 4 of the preamble provides that: *“The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No.111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation”.*
9. Paragraph 23 of the preamble provides that: *“In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate...”*
10. Paragraph 24 of the preamble provides that: *“The European Union in its Declaration No.11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the*

*status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.”*

11. Article 1 of the Framework Directive sets out its purpose, as follows: *“The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”*
12. Article 2 of the Framework Directive, identifying the concept of discrimination, provides as follows: *“1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.....5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”*
13. For present purposes, the key article of the Framework Directive is Article 4, which provides for derogations from the prohibition on discrimination, in the case of occupational requirements. Article 4(1) provides that: *“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.”*

14. Article 4(2) first paragraph provides that: *“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.”*
15. The second paragraph of Article 4(2) provides further 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.”*
16. Therefore, by reason of Article 2 of the Framework Directive, direct discrimination on grounds of religion or belief must be prohibited by Member

States subject to the derogations contained within Article 4, which may be used to permit what would otherwise be unlawful discrimination.

17. As can be seen, there are important differences between paragraphs (1) and (2) of Article 4. Article 4(1) may be used to derogate from the prohibition on discrimination in any employment or occupation, whatever the employer, and in relation to any of the prohibited grounds of discrimination, provided always that the difference in treatment is a genuine occupational requirement, that occupational requirement is determining, and the requirement is proportionate. Although the words “the objective is legitimate” are contained within that paragraph, they do not add anything to “genuine and determining occupational requirement”, which in any event will require the aim to be legitimate.
18. As for the first paragraph of Article 4(2), it applies explicitly to churches and other public or private organisations with a religious ethos. As regards employment or occupation with such a body, the derogation permissible is where a person’s religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. The important difference between this permissible derogation, 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 or occupation. The derogation does not expressly refer to a test of proportionality, but we are in no doubt that it is implicitly included within the paragraph. In our view the wording in the first paragraph of Article 4(2) (*“should not justify discrimination on another ground”*), although unusually for UK legislation using the word *“should”* instead of *“shall”* or *“may”*, means that Member States must prohibit discrimination on other grounds, including on grounds of sexual orientation.

This interpretation is supported by the wording of the authentic text in other languages, such as French (*saurait justifier une discrimination fondée sur un autre motif*), German (*rechtfertigt keine Diskriminierung aus einem anderen Grund*) and Italian (*non può giustificare una discriminazione basata su altri motivi*). A further aspect of this first paragraph of Article 4(2) is that a Member State may permit a derogation with such a genuine occupational requirement where either it was contained within national legislation in force at the date of the adoption of the Framework Directive, namely 27<sup>th</sup> November 2000, or it may provide for future legislation incorporating a national practice to such an effect.

19. An important point to note is that since these occupational requirements within Article 4(1) and Article 4(2) are derogations from the general prohibition on discrimination, in accordance with the consistent case law of the European Court of Justice (“ECJ”), they will be interpreted strictly (see for example **Johnston v. Chief Constable of the Royal Ulster Constabulary [1986] IRLR 263 [36]**), as is moreover indicated by paragraph 23 of the preamble which refers to the “very limited circumstances” where a genuine occupational requirement may be permitted.
20. Before turning to the difficult question of the meaning of the second paragraph of Article 4(2) and its relationship to the first paragraph, it is necessary to set out some of the legislative history of the Framework Directive.
21. The original texts of the Article 13 EC proposals were published by the Commission on 25<sup>th</sup> November 1999, including the draft Framework Directive. In its then form Article 4(2) provided that for organisations which “*pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to*

*education, information and the expression of opinions, and for the particular occupational activities within these organisations which are directly and essentially related to this aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination, where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.”*

22. That wording as recognised by the House of Lords Select Committee on European Union, 1999-2000 Session, Ninth Report, was convoluted and likely to limit the ability of religious organisations to apply the principle of genuine occupational qualification. The Commission witness who gave evidence to the Committee herself described it as *“an awful provision which is impossible to read....”*
  
23. The Commission published a further text of the Framework Directive on 16<sup>th</sup> October 2000. Tessa Jowell, Minister of State at the DfEE, described that text as *“largely irrelevant”*. The reason for that view was that this draft prepared by the Commission did not take account of the progress made by Member States in negotiations regarding the original draft Framework Directive. These negotiations were carried out in a Council Working Group, chaired by the Presidency, consisting of officials from the Member States and representatives of the Commission, and took place in private, over working documents largely in French. The Presidency in due course decided to aim for political agreement on 17<sup>th</sup> October 2000. The UK Government received the English language version of the text prepared by the Committee of Permanent Representatives (“COREPER”) to which the Working Group reported, only the day before the Council meeting. Final negotiations based on the text prepared by COREPER



took place within the Council itself on 17<sup>th</sup> October and continued for six hours into the night.

24. Several significant amendments were made during the Council meeting, including an exemption for measures undertaken to protect public security, order or health (Article 2(5)), an exemption from provisions on age and disability for the Armed Forces (Article 3(4)); the strengthening of the protection given to religious organisations (Article 4(2)); a reinforced exemption from age provisions for entitlement to pensions (Article 3(3) and 6(2)); an extension of the implementation period for provisions on age and disability from three years to six (Article 18).
  
25. Mrs Jowell informed the House of Lords Select Committee, as recorded in its Fourth Report dated 19<sup>th</sup> December 2000, that despite having “*secured a number of significant amendments to the text*” in the course of earlier negotiations, the UK had gone to the Council with a number of outstanding concerns, and had there “*secured our negotiating objectives ultimately on all grounds*”.
  
26. As recorded in paragraph 14 of that Fourth Report, the implication of that was that with a Presidency desperate for unanimous agreement, as was required, any of the 15 then Member States could effectively force the Council to accept their demands, the Council capitulated in the direction of minority delegations, and the UK was able to secure alterations to Article 4(2).

27. To go back slightly in time, the Government's position on the retention of Sections 58-60 of the SSFA is set out in its response to the House of Lords Select Committee, 1999-2000, Thirteenth Report, at paragraph 65, regarding the Committee's view that the wording of the then Article 4(2) ought to be clarified: *"The Government agreed with the Committee's comments about Article 4.2 of the Employment Directive. We intend to press for it to be simplified to ensure that it will not prejudice the general principles set out in paragraph 1 of the Article. We would also wish to see paragraph 2 broadened to ensure that the legitimate interests of religious organisations are safeguarded. In particular, we would be strongly disinclined to accept any provision which would make it necessary to amend Section 60 of the School Standards and Framework Act 1998 – vis-à-vis schools with religious character. This will not constitute an excuse for religious organisations to discriminate unfairly but will ensure that the status quo will be maintained."*
28. It is against this background that the content of the letter dated 3<sup>rd</sup> June 2009 to Mr Wood at the Society, from Mr Balloch of the Equality and Diversity Legislation Team at the DCSF, can be understood: *"During the negotiations for the Directive, Ministers were clear, and stated publicly, that the maintenance of Sections 58 to 60 of the SSFA was a requirement for the UK's agreement to the Directive. This position helped inform the drafting of Article 4(2)."*
29. The House of Lords Select Committee invited Mrs Jowell to provide a clear summary of the meaning of the agreed text of Article 4(2), the final words of the first paragraph of Article 4(2) (that a difference of treatment on grounds of religion and belief *"should not justify discrimination on another ground"*) and how they related to the second paragraph. Her explanation is summarised in paragraph 47

of the Fourth Report. In particular, the report summarises her oral evidence as follows: *“The first paragraph dealt with “identity” – religious organisations could not refuse to employ somebody simply because of their sexual orientation. The second paragraph would come into play if that person’s “behaviour” was at variants with “the values and beliefs of the organisation...but that would be a question of conduct rather than a question of identity”. She accepted that the scope of the derogation was unclear. The question of whether it would cover, for instance, the Christian practice of doctors was “an issue that we will need to return to in implementing legislation and we will obviously want to consult very extensively about this when that time comes”. She concluded by asserting that “the original text was considerably less clear than the text that we succeeded in negotiating”.*”

30. The meaning of Article 4(2) is at the very heart of the issue on which we have been asked to advise, and in particular, whether it permits Member States a margin of discretion to permit discrimination in relation to conduct even where there is no genuine and legitimate occupational requirement as concerns a particular teaching post. What the UK Government believes it to mean does not determine its actual meaning, which must be established by considering its wording. In our view, it is plain that the derogation in the second paragraph, to which the UK Government secured agreement in discussions on 17<sup>th</sup> October, in principle permits a conduct exception to the prohibition on discrimination, and that this permissible derogation must be different from the belief derogation in the first paragraph. This formulation asks more questions than it answers, such as how precisely this differs from permitted belief discrimination, and the extent of the conduct which is permissible by way of derogation.

## Sections 58-60 SSFA

31. Although this section of our advice is concerned principally with the SSFA, it is necessary to refer first to certain other legislation.
32. The prohibitions contained within the Framework Directive on discrimination on grounds of religion or belief, and on grounds of sexual orientation, were implemented within the UK respectively by the Employment Equality (Religion or Belief) Regulations 2003 (“the RB Regulations”) and the Employment Equality (Sexual Orientation) Regulations 2003 (“the SO Regulations”).
33. So far as material for present purposes, the derogations from discrimination on grounds of religion or belief within the Framework Directive are contained within Regulation 7 of the RB Regulations, entitled “Exceptions for Genuine Occupational Requirement”.
34. Regulation 7(2) provides that: *“This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out – (a) being of a particular religion or belief is a genuine and determining occupational requirement; (b) it is proportionate to apply that requirement in the particular case; and (c) either – (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it, and this paragraph applies whether or not the employer has an ethos based on religion or belief.”*
35. Regulation 7(3) provides that: *“This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment*

*or the context in which it is carried out – (a) being of a particular religion or belief is a genuine occupational requirement for the job; (b) it is proportionate to apply that requirement in the particular case; and (c) either – (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.”*

36. It can be seen from Regulations 7(2) and (3) of the RB Regulations that they are concerned respectively with an employer without a religious ethos and one with a religious ethos, and in the former case, the genuine occupational requirement exemption applies only where it is a “determining” occupational requirement. In the latter case, namely an employer with a religious ethos, it need only be a genuine and proportionate occupational requirement. We note that the proportionality test has been explicitly, and in our view correctly, included within Regulation 7(2) although not explicitly appearing in Article 4(2).
37. In our view, Regulations 7(2) and (3), so far as discrimination on grounds of religion or belief is concerned, correctly implement the derogations contained within Articles 4(1) and (2) of the Framework Directive. This may be readily seen by a comparison between their wording and that of the Articles 4(1) and (2). To a significant extent they copy out the words of the Article, and where there are additional words, they have been approved as compatible by the **Amicus** case referred to below, albeit in the different context of the SO Regulations.
38. The derogations within the SO Regulations are contained within Regulations 7(2) and (3).

39. Regulation 7(2) provides that: “(2) *this paragraph applies where, having regard to the nature of the employment or the context in which it is carried out – (a) being of a particular sexual orientation is a genuine and determining occupational requirement; (b) it is proportionate to apply that requirement in the particular case; and (c) either – (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it, and this paragraph applies whether or not the employment is for the purposes of an organised religion.*”
40. Regulation 7(3) provides that: “*This paragraph applies where – (a) the employment is for the purposes of an organised religion; (b) the employer applies a requirement related to sexual orientation – (i) so as to comply with the doctrines of the religion, or (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers.*”
41. There was a challenge by way of judicial review to the SO Regulations, which unsuccessfully asserted that they did not correctly implement, so far as sexual orientation was concerned, the derogations contained within Articles 4(1) and (2) of the Framework Directive: **R. (on the application of Amicus MSF section and Others) v. Secretary of State for Trade and Industry [2004] IRLR 430.**
42. Therefore the position in our view is that so far as the RB Regulations and the SO Regulations are concerned the UK Government has correctly implemented the derogation contained within Article 4 of the Framework Directive. However, Regulation 39 of the RB Regulations provides that those Regulations are expressly without prejudice to Sections 58 to 60 of the SSFA.

Therefore, the central concern of the Society is as to whether those sections are incompatible with the Framework Directive. It is convenient to set out those sections.

43. Section 58 provides that:

(1) *In this section—*

(a) *subsections (2) to (6) apply to a foundation or voluntary controlled school which has a religious character; and*

(b) *subsection (7) applies (subject to subsection (8)) to a voluntary aided school which has a religious character;*

*and references in this Chapter to a school which has (or does not have) a religious character shall be construed in accordance with section 69(3).*

(2) *Where the number of [teachers at] a school to which this subsection applies is more than two, [the teachers shall] include persons who—*

(a) *are selected for their fitness and competence to give religious education as is required in accordance with arrangements under paragraph 3(3) of Schedule 19 (arrangements for religious education in accordance with the school's trust deed or with the tenets of the school's specified religion or religious denomination), and*

(b) *are specifically appointed to do so.*

(3) *The number of reserved teachers in such a school shall not exceed one-fifth of [the total number of teachers], including the head teacher (and for this purpose, where [the total number of teachers] is not a multiple of five, it shall be treated as if it were the next higher multiple of five).*

(4) *. . .*

(5) *Where the appropriate body propose to appoint a person to be a reserved teacher in such a school, that body—*

(a) *shall consult the foundation governors, and*

(b) *shall not so appoint that person unless the foundation governors are satisfied as to his fitness and competence to give such religious education as is mentioned in subsection (2)(a).*

(6) *If the foundation governors of such a school consider that a reserved teacher has failed to give such religious education efficiently and suitably, they [may—*

(a) *in the case of a teacher who is an employee, require the appropriate body to dismiss him from employment as a reserved teacher at the school, and*

(b) *in the case of a teacher who is engaged otherwise than under a contract of employment, require the governing body to terminate his engagement].*

(7) *If a teacher appointed to give religious education in a school to which this subsection applies fails to give such education efficiently and suitably, he may be dismissed on that ground by the governing body without the consent of the local education authority.*

(8) *Subsection (7) does not apply—*

(a) *where the school has a delegated budget, or*

(b) *to religious education in accordance with an agreed syllabus.*

(9) *In this section—*

*“the appropriate body” means—*

(a) *in relation to a foundation school, the governing body, and*

(b) *in relation to a voluntary controlled school, the local education authority;*

*“reserved teacher”, in relation to a foundation or voluntary controlled school, means a person employed [or engaged] at the school in pursuance of subsection (2).*

44. Section 59 provides that:

(1) *This section applies to—*

(a) *a community school or a community or foundation special school, or*

(b) *a foundation or voluntary school which does not have a religious character.*

(2) *No person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship—*

(a) *from being a teacher at the school, or*



(b) *from being employed [or engaged] for the purposes of the school otherwise than as a teacher.*

(3) *No teacher at the school shall be required to give religious education.*

(4) *No teacher at the school shall receive any less remuneration or be deprived of or disqualified for, any promotion or other advantage—*

(a) *by reason of the fact that he does or does not give religious education, or*

(b) *by reason of his religious opinions or of his attending or omitting to attend religious worship.*

45. Section 60 provides that:

(1) *This section applies to a foundation or voluntary school which has a religious character.*

(2) *If the school is a foundation or voluntary controlled school, then (subject to subsections (3) and (4) below) section 59(2) to (4) shall apply to the school as they apply to a foundation or voluntary controlled school which does not have a religious character.*

(3) *Section 59(2) to (4) shall not so apply in relation to a reserved teacher at the school; and instead subsection (5) below shall apply in relation to such a teacher as it applies in relation to a teacher at a voluntary aided school.*

(4) *In connection with the appointment of a person to be head teacher of the school (whether foundation or voluntary controlled) [in a case where the head teacher 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 school.*

(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.*

(6) *If the school is a voluntary aided school [in Wales], no person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship, from being employed [or engaged] for the purposes of the school otherwise than as a teacher.*

(7) *Where immediately before the appointed day a teacher at a school which on that day becomes a school to which this section applies enjoyed, by virtue of section 304 or 305 of the Education Act 1996 (religious opinions of staff etc), any rights not conferred on him by this section as a teacher at a school to which it applies, he shall continue to enjoy those rights (in addition to those conferred by this section) until he ceases to be employed as a teacher at the school.*

(8) *In this section “reserved teacher”, in relation to a foundation or voluntary controlled school, means a person employed at the school in pursuance of section 58(2).*

46. The meaning of those sections is not likely to be the subject of controversy. Put in very brief terms, the effect of the sections is that

(i) As regards any community school, or community or foundation special school, and as regards any foundation or voluntary controlled or voluntary aided school, there is no permissible employment discrimination on grounds of religion or belief as regards any non-teaching member of staff.

(ii) In relation to a foundation or voluntary controlled school with a religious character, up to 20% of the teaching posts including the post of head teacher may be “reserved”, and in relation to such a reserved post, preference may be given in the appointment, remuneration or promotion of such post holders to those whose religious opinions accord with those of the school or who attend religious worship or who give or are willing to give religious education; and as concerns dismissal, regard may be had

to any conduct on the part of the post holder incompatible with the religion of the school.

- (iii) The position for teaching staff at a voluntary aided school with a religious character is the same as for reserved posts at a foundation or voluntary controlled school with a religious character.

### **Compatibility**

- 47. In considering whether these SSFA provisions are compatible with the derogation contained within Article 4 of the Framework Directive, regard must be had to certain important principles of interpretation.
- 48. One of these is the principle developed by the ECJ known as “the principle of interpretation in conformity with Directives” as for example in **Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 26, Case C-456/98 Centrosteeel [2000] ECR I-6007, paragraph 16, and Case C-397/01 Pfeiffer [2004] ECR I-8835, paragraph 114ff.** As its name suggests, the principle means that domestic legislation must be construed in conformity with relevant Directives. The principle can be seen in operation in strong form in the UK decision in the **Amicus** case, where the Court gave a very strict and narrow interpretation to the derogations contained within the SO Regulations, in order to give proper effect to the Framework Directive.

49. A further important principle is that domestic legislation of a Member State will be construed in accordance with this principle where its subject matter relates to the subject matter of the Community legislation, and whether it was passed before or after that Community legislation (see **Marleasing**). Therefore, Sections 58-60 SSFA have to be construed in accordance with the principle of conformity, notwithstanding that they were enacted prior to the adoption of the Framework Directive.
50. As noted above, the preamble to the Framework Directive refers to respect for fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“EConv”). Although the preamble does not form part of the body of the Directive itself, it is an aid to its interpretation, and it is likely that the ECJ will increasingly use instruments such as EConv as an aid to interpretation of its legislation.
51. It goes without saying that EConv enshrines the unqualified right to freedom of thought, conscience and religion, and a qualified right to freedom to manifest such religion or belief.
52. In any event, the UK Courts as public authorities are required to act in accordance with Convention rights, and Section 3 of the Human Rights Act 1998, as is well-known, provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the EConv rights that have been adopted in UK legislation.

53. One of the Society's concerns is that the sexual orientation of a teacher may be used as the basis to refuse his or her appointment to a post. However, having regard to the interpretive principles identified above, and having regard to the prohibition within the SO Regulations of direct discrimination on grounds of sexual orientation, save where there is a genuine occupational requirement, Sections 58-60 of the SSFA will be read down so as to prohibit less favourable treatment that would come within any prohibition contained within the SO Regulations. We would add that although this proposition is simple to state, it is far from simple to apply in practice, since the distinction between an individual's identity (discrimination prohibited by the SO Regulations) and his or her conduct (permitted discrimination in certain circumstances in the SSFA) is often difficult to determine. For example, where is the dividing line between the identity of a male teacher as gay, and his conduct in living in a long-term partnership with a gay male partner, and where that relationship is not known to colleagues or pupils at his school?
54. A further concern of the Society is that the process by which posts are reserved in the case of foundation or voluntary controlled schools is not open to individual challenge, and that the SSFA provisions as to conduct do not consider posts and post holders on an individual basis.
55. As to this concern, a distinction needs to be drawn between the content of the rights conferred by the Framework Directive, and the legislative techniques available under the Directive to Member States in order to safeguard such rights. It is in our view correct that Sections 58-60 SSFA set out a pre-determined

mechanism for weighing competing rights, and do not approach competing rights (of the school and the post holder) on a case by case basis. In our view, as a matter of legislative technique, it is unobjectionable for a Member State to enact domestic legislation of this sort. There can be very real practical advantages for the courts or tribunals of a Member State not seeking to analyse each case as it is presented, but instead having a yardstick against which to determine whether relevant rights have been infringed. This has been recognised in terms by the Divisional Court in the **Amicus** case, where the Judge at [123] held in relation to Regulation 7(3) of the SO Regulations that *“The exception involves a legislative striking of the balance between competing rights. It was done deliberately in this way so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field. As a matter of principle, that was a course properly open to the legislature.”*

56. Therefore the question remains whether the balance struck by the UK in Section 60(5) SSFA is one permitted by Article 4(2). We find that Article 4(2), and in particular the second paragraph concerned with conduct, is far from clear. Ultimately the issue is whether the discrimination permitted by Section 60(5) – religious tenets according with those of the school; attending religious worship; giving religious education; any incompatible conduct - is within the discretion permitted in Article 4(2) second paragraph as to “act in good faith and with loyalty to the organisation’s ethos”.
57. In our view, the analysis of those provisions of the SSFA is as follows:

- (i) The discrimination permitted by the SSFA on grounds of giving religious education is likely to be compatible with Article 4(2), since it can be seen that this can relate to loyalty to the organisation's ethos.
- (ii) The discrimination permitted by the SSFA on grounds of attending worship probably is compatible, but we can see that attendance at worship could be a proxy for sharing the organisation's beliefs, and therefore there must remain doubt about its compatibility in the absence of a genuine occupational requirement for the postholder to share those beliefs.
- (iii) As for "any conduct" which is incompatible with the organisations's ethos, and which the SSFA permits as a ground for dismissal, this is very likely to be read down in accordance with Article 4(2) using the interpretive techniques above so as to mean "any conduct so far as it affects his post at the school", and therefore in our view is not likely to be incompatible with it.
- (iv) As for the discrimination permitted by the SSFA on grounds of "*religious beliefs [...] in accordance with the tenets of the religion [of the] school*", in our view this is not conduct, and instead it relates to an individual's identity. The SSFA permits the organisation to "give preference" to those beliefs in matters of appointment, remuneration and promotion. In other words, if there are two candidates for a post, A and B, even if B is the more suitable candidate, the organisation can prefer A on grounds of his or her

beliefs. Our view is that the Framework Directive only permits such discrimination to the extent that such a belief can be said to be a “genuine, legitimate and justified occupational requirement” within Article 4(2). Therefore this provision is likely to be incompatible.

- (v) However, and importantly, a question arises in the case of voluntary controlled faith schools as to whether the local authority, which is in law the employer of its teachers, can be, within the wording of Article 4(2), an “organisation the ethos of which is based on religion or belief.” In the domestic case of **Glasgow City Council v McNab [2007] IRLR 476, EAT**, which construed the RB Regulations, it was held that it could not be. We have some doubt that it was the intention of Article 4(2) to exclude local authority faith schools from its ambit. Nevertheless, that is what its wording provides, and there is a respectable argument that the SSFA is incompatible with Article 4(2) to the extent that Section 60(5)(a)(i) permits discrimination on grounds of belief within voluntary controlled faith schools. The contrary argument would for these purposes construe the reference in the Framework Directive to “organisation” as being a reference to any sufficiently identifiable and self-sufficient unit and would hold a school to be such a unit.
- (vi) Our view is that, by contrast, a voluntary-aided school, where in law the governing body is the employer, probably is an “organisation” and therefore is capable of having a religious ethos.



58. The recently published Equality Bill proposes to continue to permit the discrimination allowed by Sections 58-60 SSFA, and these proposals if enacted would equally in our view be incompatible with the Framework Directive to the same extent as described above.

### **Next steps**

59. Where the legislation of a Member State is incompatible with directly effective Community legislation, by virtue of the UK's European Communities Act 1972, and as the ECJ has consistently held, that national legislation may in certain circumstances be disapplied.
60. One of those circumstances is where the Community legislation is a directly effective Treaty provision. However, Article 13 EC is not a directly effective Treaty provision; instead, it is an enabling provision. Therefore that Article cannot be relied on in order to set aside the relevant provisions of the SSFA.
61. Another situation is where an individual seeks to rely, as against the State or an emanation of the State, on a directly effective provision contained within a Directive. This is known as vertical direct effect. A provision will be of direct effect where it is sufficiently precise and unconditional. (Although the direction of travel of the ECJ may well be towards horizontal direct effect i.e. a private party relying on a Directive against a private party, that is not yet EC law.)

62. The ECJ tends to deal in a pragmatic way with whether a provision within a Directive is of direct effect. In many cases it does not differentiate between the two parts of the test. However, as for precision, this is concerned with the wording of the provision relied on. A provision is sufficiently precise if a Court may rely on it in order to give a judgment, even if the provision itself may require some interpretation. A provision is unconditional where the period for its implementation has expired and where there are no further factual or other conditions to be satisfied prior to the application of the Directive. The fact that a discretion exists as to the manner in which a Directive may be implemented by a Member State does not prevent it from being of direct effect. Even where discretion is conferred on the Member States as to the content of the Directive, the relevant provision may be found to be unconditional, as in **C-6/90 Francovich [1991] ECR I-5357**.
63. In our view, notwithstanding that Directive 2000/78/EC is a Framework Directive, and notwithstanding the measure of discretion left to Member States under Article 4, the prohibition on discrimination on grounds of religion or belief and sexual orientation subject to the derogations contained within Article 4 is likely to be of direct effect.
64. Therefore, so far as an individual Claimant seeks to rely on those provisions as against the State or an emanation of it, he or she is entitled to seek to have the offending parts of Sections 58-60 disapplied, in reliance on the protections conferred by the Framework Directive. This will be the case so far as claims are made by individuals in respect of discrimination as concerns appointment, terms

and conditions of employment, or dismissal, in relation to voluntary controlled schools with a religious character, since the Local Education Authority is the employer, and is an emanation of the State.

65. Voluntary-aided schools are in our view an emanation of the state and therefore an employee can rely on vertical direct effect in bringing a claim to enforce a right under the Framework Directive against that school. The case of **National Union of Teachers and others (appellants) v. Governing Body of St Mary's Church of England (Aided) Junior School and others (respondents)** [1997] **IRLR 242** decided that such a school governed by the provisions of the Education Act 1944 was an emanation of the state. The current legislation governing such schools is contained in the SSFA and is not materially different, so the same result is likely for a voluntary-aided school under the SSFA.
66. The position is likely to be the same as regards reserved teaching posts at foundation schools with a religious character. Such a school is also likely to be an emanation of the state, since the SSFA provisions governing their maintenance, their standards, and Government powers of intervention are similar to those governing voluntary-aided schools.
67. It follows from the above that the Society might wish to identify a suitable Claimant for the purposes of bringing a claim in respect of a voluntary controlled school or voluntary-aided or foundation school and seeking to rely on the Framework Directive.

68. As an alternative, the Society should consider an application for judicial review, brought by it (and possibly also a would-be Claimant), in order to seek a declaration as to the incompatibility of the provisions of the SSFA (or the Equality Act if then enacted) with the Framework Directive. The House of Lords decision in **R. v. Secretary of State for Employment ex parte Seymour Smith and Perez** [1997] IRLR 315 demonstrates the availability of the declaration in such circumstances, where it serves a purpose of bringing to the Government's attention the fact (if the claim is upheld) of non-compliance.
69. A further alternative, if the Society has not done this in its existing complaint, would be to inform the European Commission of the incompatibilities identified above, with a view to the Commission taking infringement proceedings against the UK.

### **Conclusion**

70. In summary, our main conclusion is that the discrimination permitted by Section 60(5) of the SSFA on grounds of religious belief is probably incompatible with the Framework Directive, in that it does not restrict such discrimination to circumstances where there is a genuine, legitimate and justified occupational requirement..

**PAUL EPSTEIN Q.C.**

**CARLA REVERE**

**24th June 2009**

IN THE MATTER OF SECTIONS 58-60 OF THE  
SCHOOLS STANDARDS AND FRAMEWORK ACT

AND IN THE MATTER OF COUNCIL DIRECTIVE  
2000/78/EC

AND IN THE MATTER OF THE EQUALITY BILL

AND IN THE MATTER OF THE NATIONAL  
SECULAR SOCIETY

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ADVICE

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