

Religion, Belief, Education and Discrimination

Richy Thompson¹

Introduction

The United Kingdom is unusual amongst the Organisation for Economic Co-operation and Development (OECD) member states in having state-run religious schools.² In England and Wales, one third of state-funded schools are legally designated as having a “religious character”, and these include Church of England, Church in Wales, Roman Catholic, Jewish and Methodist schools, and since 1998, Muslim, Hindu and Sikh state schools have also opened, as well as an increasing number of Christian schools of no specific denomination.

The three areas of principal interest to us are admissions, employment and the education provided (whether through the curriculum, as with religious education, or outside of it, as with collective worship).³ The author will provide an overview of the domestic landscape of schools and of relevant equalities and human rights obligations, then deal with each of these three areas of interest in turn, before offering some concluding thoughts. The focus will primarily be on England and Wales.

1. An Overview of the Landscape of Schools

There are several different types of state-funded “faith school”, as the institutions are commonly known, namely “voluntary aided”, “voluntary controlled” and “foundation” schools – all types of “maintained school” (so called because they are maintained by the local authority in which they are located). In addition, there are “academies” (including “free schools”),

-
- 1 Richy Thompson is Campaigns Manager at the British Humanist Association (BHA). From May 2011 until February 2015 he was Campaigns Officer (Faith Schools and Education). The BHA is a member of both the Accord Coalition for inclusive education and the Fair Admissions Campaign (FAC) and the author is a member of the steering groups of both organisations.
 - 2 Some good overviews include, The International Center for Law and Religion Studies, *Religion and the Secular State: National Reports*, issued for the occasion of the XVIIIth International Congress of Comparative Law, 25–31 July 2010, available at: http://www.iclrs.org/index.php?blurb_id=975; Davis, D. and Miroshnikova, E. (eds), *The Routledge International Handbook of Religious Education*, Routledge, 2013; and Chapman, J.D., McNamara, S., Reiss, M.J. and Waghid, Y. (eds), *International Handbook of Learning, Teaching and Leading in Faith-Based Schools*, Springer, 2014.
 - 3 There are other areas we might also consider, such as uniform policies, the teaching of pseudoscience, and sex and relationships education, but for reasons of brevity we will just focus on these three.

which are legally independent schools and do not fall under the thumb of their local authority, but are entirely state-funded through a contract agreed directly with central government known as a funding agreement, which in turn commits them to following some of the laws that maintained schools must follow.⁴

These different types of faith school and schools with no religious character follow different rules with respect to funding, governance, land and building ownership, religious education (RE), collective worship, admissions and employment policies. The maintained schools must follow the national curriculum and are only allowed to employ teachers who hold qualified teacher status, while the academies and free schools do not have to do either of these things. Maintained schools must also legally designate as having a religious character in order to have any sort of religious ethos. Academies and free schools do not have to follow the national curriculum, are allowed to hire teachers who do not hold qualified teacher status, and can have a religious ethos without formally designating as having a religious character.⁵

Ninety three percent of all schools are state-funded. Of the 7% that are private, over three-quarters are legally designated as being religious. Many, if not most, of the others also have a religious ethos, although precise figures are not maintained.⁶

As of January 2014, 37% of state-funded English primary schools (i.e. ages 4–11) and 19% of state-funded English secondary schools (i.e. ages 11–18) are religiously designated, with a fairly small number having a religious ethos but no designation. They educate 29% and 18% of all state school pupils, respectively. About 54% of religiously designated state schools are voluntary aided, 34% are voluntary controlled (almost all of which are primary schools), 1% are foundation and 11% are academies or free schools (most of which are secondary schools). The number of academies and free schools has been rising rapidly since the Academies Act 2010 allowed existing maintained schools to “convert” to academy status, particularly amongst secondary schools, where some 46% of religious schools are now academies or free schools, compared to 8% four years earlier. The Act also created free schools, a type of brand new academy of which there are now several hundred.⁷

4 The term “academy” legally encompasses what are known as “converter academies”, “sponsored academies” and “free schools”, although in general parlance is used to refer to the first two. The terms “state-funded school” and “state school” refer to academies (including free schools), as well as to maintained schools. The term “independent school” refers to both academies (including free schools) and to private schools not in receipt of state funds.

5 For more on the permissibility of religious designation in the academies system, see British Humanist Association (BHA), *BHA BRIEFING: ‘Faith ethos’ Academies and Free Schools explained*, April 2012, available at: <https://humanism.org.uk/wp-content/uploads/bha-briefing-faith-ethos-academies-and-free-schools-explained.pdf>.

6 Figures are calculated from the Department for Education’s annual school census, and are available to download from Edubase (registration required), available at: <http://www.education.gov.uk/edubase/>.

7 Department for Education, *Schools, pupils and their characteristics: January 2014*, 12 June 2014, national tables 2c and 2d, available at: <https://www.gov.uk/government/statistics/schools-pupils-and-their-char>

In Wales, 15% of state schools are religiously designated, of which 63% are voluntary aided, 36% are voluntary controlled, and just 12 are foundation. There are no academies or free schools in Wales.⁸

Below I present a series of tables outlining the different rules that different types of school must follow with respect to funding, governance, land and building ownership, national curriculum, religious education, collective worship, admissions and employment policies. I will expand upon and define relevant terms in the subsequent sections of the article.⁹

Table 1: Funding, governance and land and building ownership rules for different types of state school

TYPE OF SCHOOL	FUNDING	GOVERNORS	LAND AND BUILDING OWNERSHIP
Community schools (not religious)	From local authority.	Appointed along secular lines.	Owned by local authority.
Voluntary Controlled schools designated as religious	From local authority.	One quarter appointed by the relevant religious authority.	Normally owned by a charitable foundation run by the relevant religious authority (apart from the playing fields which are normally vested in the local authority).
Voluntary Aided schools designated as religious	All running costs and 90% of building costs from local authority; remaining 10% from the religious authority.	More than half appointed by the relevant religious authority.	
Foundation schools designated as religious	From local authority.	The foundation usually appoints about one quarter of the school governors but in some cases it appoints the majority of governors.	Owned by the governing body or by a charitable foundation run by the religious authority.

acteristics-january-2014. The BHA has compiled from Government publications comprehensive annual data on the number of schools and pupils by type of establishment and religious character, available at: <https://humanism.org.uk/wp-content/uploads/data-on-faith-schools.xlsx> and covering 1998–2014 in England and 2012–13 in Wales.

8 Figures are calculated from Welsh Government, *Address list of schools*, 13 January 2015, available at: <http://wales.gov.uk/statistics-and-research/address-list-of-schools/?lang=en>.

9 The tables are drawn from the BHA's table of "Types of school with a religious character", available at: <http://www.humanism.org.uk/wp-content/uploads/schools-with-a-religious-character.pdf>, apart from the private schools rows, which have been added by the author for this text.

Table 1 (continued from p. 73)

TYPE OF SCHOOL	FUNDING	GOVERNORS	LAND AND BUILDING OWNERSHIP
Academies and Free Schools designated as religious	From central government. Before 2010, academy sponsor invested 10% or up to £2m of start-up capital costs (whichever is greatest) with remainder of funding from central Government. Often the sponsors' fee went unpaid, and sometimes were eventually waived altogether. Nowadays, no sponsor is required to invest any money.	If sponsored, the sponsor can appoint all the governors. If converting to academy status from another type of school, the governing body, foundation or trust will form the academy trust and then appoint the governing body. In the case of a brand new free school, the organisation setting it up can appoint all governors. Governing body must include at least two parents and the principal. If with a "faith ethos", governors may be appointed for religious reasons.	Land typically leased by local authority or diocese to the academy trust for 125 years at peppercorn rate. Otherwise, the school's land and buildings are owned by the academy trust.
Academies and Free Schools with no religious designation (but may have a 'faith ethos')			
Private schools designated as religious	No state funding.	The owners of the school appoint all the governors. These may be along religious lines.	Owned by the owners of the school.

Table 2: Curriculum and collective worship rules for different types of state school

TYPE OF SCHOOL	NATIONAL CURRICULUM	RELIGIOUS EDUCATION	COLLECTIVE WORSHIP
Community schools (not religious)	Must follow.	Set every five years by local Agreed Syllabus Conference (ASC) and overseen by Standing Advisory Council on RE (SACRE). Must be non-confessional. Inspected by Ofsted.	"Wholly or mainly of a broadly Christian character" but subject to SACRE approval may be changed to another faith, multi-faith or spiritual.
Voluntary Controlled schools designated as religious	Must follow.	As set by ASC and hence non-confessional – unless parents request RE for their children is taught in accordance with the trust deeds and faith of the school. Inspected by person chosen by the governing body (not Ofsted).	Must be "in accordance with the tenets and practices of the religion or religious denomination."

TYPE OF SCHOOL	NATIONAL CURRICULUM	RELIGIOUS EDUCATION	COLLECTIVE WORSHIP
Voluntary Aided schools designated as religious	Must follow.	Set by governors in accordance with the tenets of the faith of the school (i.e. the trust deeds), unless parents request non-confessional RE for their children as set by ASC. Inspected by person chosen by the governing body (not Ofsted).	Must be “in accordance with the tenets and practices of the religion or religious denomination.”
Foundation schools designated as religious	Must follow.	As set by ASC and hence non-confessional – unless parents request that RE for their children is taught in accordance with the trust deeds and faith of the school. Inspected by person chosen by foundation governors (not Ofsted).	Must be “in accordance with the tenets and practices of the religion or religious denomination.”
Academies and Free Schools designated as religious	Does not need to follow, but must teach a “broad and balanced curriculum” including English, Maths and Science.	If the academy is a former foundation or voluntary controlled school, non-confessional unless parents request faith-based RE for their children. Otherwise, set by governors in accordance with the tenets of the faith of the school, unless (for schools opened from 2012 onwards) parents request non-confessional RE for their children as set by ASC. Inspected by a person chosen by the Academy (not Ofsted).	Must be “in accordance with the tenets and practices of the religion or religious denomination.”
Academies and Free Schools with no religious designation (but may have a “faith ethos”)		Set by governors but must be non-confessional. Many schools choose the syllabus set by the ASC, although there is no requirement to and many don’t. Inspected by Ofsted.	“Wholly or mainly of a broadly Christian character” but subject to government approval may be changed to another faith, multi-faith or spiritual.
Private schools designated as religious	Does not need to follow, or teach a broad and balanced curriculum.	Can choose whether or not to have any RE and whether or not it will be confessional.	Can choose whether or not to have any collective worship and what its nature will be.

Table 3: Admissions and employment rules for different types of state school

TYPE OF SCHOOL	ADMISSIONS	EMPLOYMENT
Community schools (not religious)	Determined by local authority; cannot discriminate on religious grounds.	Cannot discriminate on religious grounds.
Voluntary Controlled schools designated as religious	Determined by local authority; most cannot discriminate on religious grounds although a quarter of authorities let some do.	Are required to use a religious test in appointing, remunerating and promoting a fifth of teachers (and in appointing other staff if an “occupational requirement” is demonstrated). These teachers must be able to teach religious education. The head teacher can be included in this.
Voluntary Aided schools designated as religious	Determined by governors “in consultation” with local authority; can discriminate against all pupils on religious grounds if oversubscribed.	Can use a religious test in appointing, remunerating and promoting all teachers (and in appointing other staff if an “occupational requirement” is demonstrated). Teachers can be disciplined or dismissed for conduct which is “incompatible with the precepts” of the school’s religion.
Foundation schools designated as religious	Determined by governors in consultation with local authority; can discriminate on religious grounds if oversubscribed.	Are required to use a religious test in appointing, remunerating and promoting a fifth of teachers (and in appointing other staff if an “occupational requirement” is demonstrated). These teachers must be able to teach religious education. The head teacher can be included in this.
Academies and Free Schools designated as religious	Determined by governors; can discriminate on religious grounds though with academies that do not replace a pre-existing state school, also known as free schools, can only do so for up to 50% of intake.	Can use a religious test in appointing, remunerating and promoting all teachers (and in appointing other staff if an “occupational requirement” is demonstrated). Teachers can be disciplined or dismissed for conduct which is “incompatible with the precepts” of the school’s religion. If converting from voluntary controlled or foundation to academy status, existing staff are protected from discrimination. Teachers do not need to hold Qualified Teacher Status.
Academies and Free Schools with no religious designation (but may have a ‘faith ethos’)	Determined by governors; cannot discriminate on religious grounds.	If with a “faith ethos”, can use a religious test in appointing, remunerating and promoting some staff if a “genuine occupational requirement” is demonstrated. Teachers do not need to hold Qualified Teacher Status.

TYPE OF SCHOOL	ADMISSIONS	EMPLOYMENT
Private schools designated as religious	Can discriminate against all pupils on religious grounds, whether or not oversubscribed.	Can use a religious test in appointing, remunerating and promoting all teachers (and in appointing other staff if an “occupational requirement” is demonstrated). Teachers can be disciplined or dismissed for conduct which is “incompatible with the precepts” of the school’s religion.

2. The Relevant Legal Framework

The UK has signed up to a range of international laws and treaties, many of which are relevant to this paper. Some, such as the UN Convention on the Rights of the Child (UNCRC), are not incorporated into UK law directly,¹⁰ but are nonetheless binding on the state. Furthermore, 2014 laws in Wales¹¹ and Scotland¹² require ministers to have regard to the UNCRC when exercising their functions. A similar law in England requires the Office of the Children’s Commissioner for England (the statutory body responsible for promoting and protecting the rights of children in England) to have regard to and monitor the implementation of the UNCRC.¹³

Other European laws are incorporated directly into UK law. The European Convention on Human Rights (ECHR) is incorporated into domestic law through the Human Rights Act 1998, the UK’s human rights law. The Human Rights Act also requires that other domestic legislation is, “[s]o far as it is possible to do so, read and given effect in a way which is compatible with the Convention rights.”¹⁴

There are also a number of European Union directives that deal with equality and non-discrimination, in particular the Employment Equality Directive (the Directive).¹⁵ These are incorporated into UK law by the Equality Act 2010, the UK’s domestic legislation that prohibits discrimination, harassment and victimisation on the basis of a range of protected characteristics, including religion or belief. The Act prohibits both direct and indirect discrimination (the latter being defined as discrimination that is not in itself *because* of a protected characteristic, but nonetheless results in individuals who share a protected characteristic being at

10 Something that the coalition Rights of the Child UK (ROCK) campaigns for. The BHA is a member of ROCK.

11 Rights of Children and Young Persons (Wales) Measure 2011.

12 Children and Young People (Scotland) Act 2014, Part 1.

13 Children and Families Act 2014, Section 107.

14 Human Rights Act 1998, Section 3.

15 European Union, COUNCIL DIRECTIVE 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2000.

a disadvantage to those who do not share it, where this discrimination cannot be said to be a proportionate means of achieving a legitimate aim).¹⁶

As we shall see, there is a tension within these domestic and international laws and treaties between the freedoms that religious schools in the UK enjoy and the wider equality and human rights obligations. First, faith schools, like all schools, must follow the Equality Act 2010. However, a number of exceptions are written into the Act to permit wider discrimination by religious schools on the basis of religion or belief than would be permitted for other schools. The author will argue that these exceptions are broader than what is permitted by the Directive. There are also a number of other ways in which faith schools discriminate that are problematic under the Act, in particular around admissions.

Second, Article 2 of Protocol 1 of the ECHR provides that:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The author will argue that the second requirement of this Article is not being met for parents who are not religious.

Finally, the author will question whether children's rights under the UNCRC are being ensured by the state, or if religious schools interfere with these rights.

3. Admissions

a. Overview

The admissions authorities for state schools are legally obliged to follow the School Admissions Code, which lays down a number of requirements that they must follow in devising their admissions procedures.¹⁷ If a state school is undersubscribed, then it must admit any applicant who applies for a place (except if it is a grammar school).¹⁸ However, if a state school is oversubscribed, then its admission authority is entitled to rank applicants in accordance with pre-published oversubscription criteria. For "community" schools (the main type of state school with no religious character) and voluntary controlled schools, the admission au-

16 Equality Act 2010, Section 19.

17 Department for Education, *School Admissions Code*, December 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389388/School_Admissions_Code_2014_-_19_Dec.pdf.

18 Which means that grammar schools can require all admitted pupils to meet a minimum academic standard.

thority is the local authority in which the school resides; for voluntary aided and foundation schools, the admission authority is the governing body of the school; and for academies and free schools, the admission authority is the academy trust.

The Equality Act 2010 prohibits discrimination by a school:

- a. in the arrangements it makes for deciding who is offered admission as a pupil;*
- b. as to the terms on which it offers to admit the person as a pupil;*
- c. by not admitting the person as a pupil.¹⁹*

However, an exception to the Act means that this does not apply to religiously designated schools with respect to religion or belief,²⁰ and similar exceptions are written into the School Admissions Code.²¹ Such religious discrimination is very unusual internationally – a 2012 OECD report only identified the UK, Republic of Ireland, Estonia and Israel as allowing state schools to do this.²² Research by the Fair Admissions Campaign (FAC) only adds some provinces in Canada and a few private schools in receipt of some state funding in Germany to this list, and, in addition, in the Netherlands private faith schools in receipt of state funding can loosely require that pupils and parents support the vision and mission of the school.²³

In practice what religious selection usually means is giving priority to those who attend worship regularly (for example, once a week for two years), or those who have been initiated into the faith (for example through baptism). But priority can also be given on other grounds as well (for example, one voluntary aided Charedi Jewish school requires pupils to dress modestly and have no TV or internet in the home).²⁴ This doesn't just mean that schools are able to discriminate in favour of their own faith: it also means that they can discriminate in favour of other faiths. This is justified by the Government in its guidance by pointing out that:

19 See above, note 16 Section 85.

20 *Ibid.*, Schedule 11, Para 5.

21 See above, note 17, Paras 1.9 i) and 1.36 and Para 6 of the Appendix.

22 Musset, P., "School Choice and Equity: Current Policies in OECD Countries and a Literature Review", *OECD Education Working Papers*, No. 66, OECD Publishing, 2012, available at: http://www.oecd-ilibrary.org/education/school-choice-and-equity_5k9fq23507vc-en.

23 See FAC, "It is out of step with our international competitors", available at: <http://fairadmissions.org.uk/why-is-this-an-issue>.

24 This being Yesodey Hatorah Senior Girls' School in north London. The school's admission arrangements are available at: <http://najos.org/schools/yhs>.

*It would, for example, allow a Church of England school to allocate some places to children from Hindu or Muslim families if it wanted to ensure a mixed intake reflecting the diversity of the local population.*²⁵

However, in practice what is much more common is for schools to prioritise other denominations over other faiths, or other faiths over those of no faith – for instance, a Catholic school might first prioritise Catholics, then other Christians, then those of other faiths, and then take any other applicant.

As a result of these exceptions and the delegation of authority for admissions, most voluntary aided, foundation, academy and free schools that are designated with a religious character religiously discriminate in their oversubscription criteria (although free schools are only allowed to select up to half of places on the basis of faith), while most voluntary controlled schools do not. In 2011, the Accord Coalition surveyed local authorities and found that only one quarter of them allow voluntary controlled schools to religiously discriminate.²⁶ In 2013, FAC examined the oversubscription criteria of every state-funded religious secondary school. It found that if all the schools were all oversubscribed, then their admissions policies dictate that 72% of their places would be religiously selected, while 28% would be allocated without reference to faith. From this FAC estimated that 1.2 million school places across England and Wales are subject to religious selection when oversubscribed. FAC also noted a great degree of variation between different faiths, with virtually all Catholic, Jewish and Muslim secondaries (none of which are voluntary controlled) being fully selective; while Church of England secondaries, some of which are fully selective, some partially selective and some not selective at all, on average select about half of their pupils on the basis of faith.²⁷

b. Religious selection and international laws and treaties

There is clearly a tension here between the freedom of faith schools to discriminate in this way and the ECHR. In practice, Article 2 of Protocol 1 does not mean that the state has to fund any particular sort of religious school – but it does mean that the state must offer secular education to those who want it. As Amnesty International put it:

25 Department for Education, *The Equality Act 2010 and schools: Departmental advice for school leaders, school staff, governing bodies and local authorities*, May 2014, Para 2.4, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf.

26 Accord Coalition, “Stop religious discrimination in pupil selection locally”, 27 October 2011, available at: <http://accordcoalition.org.uk/take-action/campaigning-for-inclusive-admissions-in-local-voluntary-controlled-faith-schools>.

27 FAC, “Groundbreaking new research maps the segregating impact of faith school admissions”, 3 December 2013, available at: <http://fairadmissions.org.uk/groundbreaking-new-research-maps-the-segregating-impact-of-faith-school-admissions/>. See also the “Overall averages” tab of the Campaign’s “Map of English secondary schools by religious and socio-economic selection”, available at: <http://fairadmissions.org.uk/map>.

*This article guarantees people the right of access to existing educational institutions; it does not require the Government to establish or fund a particular type of education. The requirement to respect parents' convictions is intended to prevent indoctrination by the state. However, schools can teach about religion and philosophy if they do so in an objective, critical, and pluralistic manner.*²⁸

On the other hand, Alice Donald, in a paper published by the Equality and Human Rights Commission, notes that:

*According to [Bob] Hepple (...) an unresolved issue is whether the fact that the law allows publicly funded schools to use faith-based admissions criteria is compatible with Article 2 of Protocol 1 of the European Convention on Human Rights (ECHR) (the right to education) and Article 14 ECHR (prohibition of discrimination). Sooner or later, Hepple argues, the government is likely to be called upon to provide evidence to support a defence that this discrimination because of religion or belief is necessary and proportionate in a democratic society for the protection of the rights and freedoms of others under Article 9(2) ECHR.*²⁹

Indeed, during its legislative scrutiny of the Equality Act 2010, the UK Parliament's Joint Committee on Human Rights commented:

*We do not find persuasive the argument that it is necessary to allow faith schools to discriminate in their admissions on grounds of religion and belief in order to avoid a breach of the parents' rights under Article 2 Protocol 1 of the European Convention. Another argument is that discrimination is necessary in order to maintain the distinctiveness of religious schools and so maintain the plurality of provision which, it is argued, is required by both Article 9 and Article 2 Protocol 1. This argument is weakened by evidence which suggests, in relation to Church of England schools, that plurality of provision has been preserved even where those schools do not have faith-based admissions criteria. It carries more weight in relation to other faith schools, however. In consequence, the exemption permitting faith schools to discriminate in their admissions on grounds of religion or belief may be overdrawn in this Bill.*³⁰

28 Amnesty International, *Amnesty*, September-October 2000.

29 Donald, A., *Religion or belief, equality and human rights in England and Wales*, Equality and Human Rights Commission Research report 84, 2012, available at: <https://metranet.londonmet.ac.uk/fms/MRSite/Research/HRSJ/Publications%20&%20reports/EHRC%20Religion%20%20Report%20300812.pdf>, quoting Hepple, B., *Equality: the New Legal Framework*, Hart Publishing, 2011.

30 Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill – Fourteenth Report of Session 2009–10*, 2010, available at: <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/73/73.pdf>.

Compounding this is the fact that the UNCRC pulls in the opposite direction to the status quo – the Convention seems to guarantee the right to a broad religious education that prepares children for “responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups”³¹ – something we will return to when we come on to the curriculum.

5 out of the 9 primary schools in our local area select pupils on the basis of religious affiliation. These religious schools gain the highest attainments, the best Ofsted reports and are all over-subscribed. The good non-religious schools are also over-subscribed, and we will need to move house to be within the cut-off distance of one of these schools. Schools should not be allowed to select pupils on the basis of the religious practices of their parents. And certainly should not be allowed to dominate an area. – email received by FAC from a parent in Birmingham, September 2014.

c. Religious selection and direct discrimination on the basis of race and gender

Then there is the question of other protected characteristics. Faith schools are allowed to discriminate in terms of who they admit on the basis of religion, but they are not allowed to discriminate on the basis of the other protected characteristics in the Equality Act 2010. Direct discrimination is not permitted, and this most notably was found by the Supreme Court in the case of JFS, a voluntary aided Jewish school in north London, in 2009, as the school gave priority to pupils who had a parent who was “halachically Jewish” (i.e. met the Orthodox Jewish definition of who is Jewish). According to Orthodox Jewish law, anyone whose mother is halachically Jewish is themselves halachically Jewish whether or not they practise the religion, while anyone else is not unless they convert. Since conversion is a burdensome process, and since Judaism is considered by UK law to be a race as well as a religion, this was found to constitute direct discrimination on the basis of race.³² In December last year, following objections by FAC, the Office of the Schools Adjudicator (OSA), the tribunal responsible for upholding the Schools Admissions Code, decided that neither membership of an Orthodox synagogue, nor requiring parents to have a ketubah (Orthodox Jewish marriage certificate), are permissible criteria in schools’ admission arrangements, as both similarly require the applicants’ parent or parents to be halachically Jewish. The two schools concerned were also found to be directly discriminating on the basis of gender, as a result of different internal arrangements for boys and girls being reflected in the schools having slightly different admission arrangements for each gender.³³

31 Convention on the Rights of the Child (UNCRC), Article 29.

32 UK Supreme Court, *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15.

33 Office of the Schools Adjudicator (OSA), determination *ADA2779: King David High School*, December 2014, available at: <https://www.gov.uk/government/publications/king-david-high-school>; and determination *ADA2765 and ADA2766: Hasmonean High School*, December 2014, available at: <https://www.gov.uk/government/publications/hasmonean-high-school>.

d. Religious selection and indirect discrimination on the basis of race and social class

Indirect discrimination is only permitted by the Equality Act 2010 where it is a “proportionate means of achieving a legitimate aim”.³⁴ In 2013, Dan Rosenberg and Raj Desai explored this point and speculated that a religiously selective school might be found by the OSA to be indirectly discriminating on the basis of race, disability or sexual orientation: race because religion and ethnicity often correlate, so discriminating in favour of the former also leads to discrimination on the basis of the latter; disability because requirements to attend religious worship are burdensome and it might not be possible for disabled parents or children to meet that burden; and sexual orientation on the basis that a same-sex couple or transgender individual might not be able to fulfil requirements to attend religious worship if the places of worship specified are not tolerant towards them.³⁵

The School Admissions Code has fairly analogous provisions for racial groups, disability and special educational needs, and, uniquely (given that it is not a protected characteristic in the Equality Act 2010), for social groups:

*Admission authorities must ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group, or a child with a disability or special educational needs.*³⁶

The question, of course, is when an admission procedure which disadvantages certain protected groups, is a proportionate means of achieving a legitimate aim. In 2014, FAC took up Rosenberg and Desai’s challenge and objected to a number of Church of England and Roman Catholic schools’ admission arrangements on the basis of their ethnic and socio-economic make-ups being different from those of the pupils living in their vicinities. Some of these cases are still ongoing. In decisions already taken in some of the cases focused on race, the OSA has found that selecting those of a particular faith could be a proportionate means of achieving a legitimate aim, with the legitimate aim being educating those of the faith of the school and the proportionate means of achieving it being prioritising those of the faith in admissions. However, adjudicators have written, while maintaining a religious ethos in a school is a legitimate aim, religious selection cannot be a proportionate means of achieving it as those Church of England schools that do not religiously select in their ad-

34 See above, note 16, Section 19.

35 Rosenberg and Desai also raised the public sector equality duty, which imposes general requirements on public authorities, including schools, to eliminate discrimination, harassment, victimisation and advance equality of opportunity on the basis of the protected characteristics of the Equality Act 2010; and the possibility of a secondary school with no religious character indirectly religiously discriminating by allocating a disproportionate number of places in its oversubscription criteria to pupils who attend primary schools that are themselves religiously selective. Rosenberg, D. and Desai, R., “The Admissions Arrangements of Faith Schools and the Equality Act 2010”, *Education Law Journal*, Volume 14, Issue 2, 2013, pp. 93–99, available at: http://fairadmissions.org.uk/wp-content/uploads/2013/05/2013_Ed_Law_93.pdf.

36 See above, note 17, Para 1.8.

missions policies show that it is possible for a school to maintain a religious ethos without religious selection.³⁷

Earlier in 2014, Canon Slade Church of England School in Bolton was found by the OSA to be disadvantaging unfairly those of a particular social group in having oversubscription criteria that required parents to attend worship for an extraordinary 11 years in order to maximise their chances of gaining a place.³⁸ Later that year, the London Oratory School, a Catholic Academy in west London, was also found by the OSA to be disadvantaging unfairly those who are worse off and not white. This followed on from a 2013 objection submitted by the British Humanist Association (BHA), and was in part a consequence of a number of other aspects of the school's admissions arrangements being found to be in breach of other aspects of the School Admissions Code, such as the requirement for parents to participate in voluntary activities for a period of three years that could include providing practical support for the Catholic Church.³⁹ With that said, these cases cannot be considered to be "test cases" of the sort described in the preceding paragraph, as both hinged on the school doing something unusual in its admission arrangements. The outcome of FAC's outstanding cases remains to be seen.

In general, the evidence suggests that religious selection causes socio-economic selection. As well as surveying how religiously selective English secondary schools are, FAC also compared schools to their local areas in terms of their socio-economic make-ups, as measured by pupils' eligibility for free school meals. It found that:

Comprehensive secondaries with no religious character admit 11% more pupils eligible for free school meals than would be expected given their areas. Comprehensive Church of England secondaries admit 10% fewer; Roman Catholic secondaries 24% fewer; Jewish secondaries 61% fewer; and Muslim secondaries 25% fewer. There is a clear correlation between religious selection and socio-economic segregation: Church of England comprehensives that don't select on faith admit 4% more pupils eligible for free school meals than would be expected, while those whose admissions criteria allow full selection admit 31% fewer.⁴⁰

37 With respect to Church of England schools not religiously selecting, see, for example, the positions of the Church of England Dioceses of London, Oxford and Lincoln, as cited at <http://fairadmissions.org.uk/our-supporters/what-others-say/>. With respect to the possible legitimate aims of maintaining an ethos and educating those of the faith, see for example OSA, determination ADA2594: *St Bonaventure's RC School*, July 2014, Para 73, available at: <https://www.gov.uk/government/publications/st-bonaventures-rc-school>.

38 OSA, determination ADA2576: *Canon Slade CE School*, April 2014, available at: <https://www.gov.uk/government/publications/canon-slade-church-of-england-school>.

39 OSA, determination ADA2410: *The London Oratory School*, July 2014, available at: <https://www.gov.uk/government/publications/the-london-oratory-school--3>. See also BHA, "Landmark ruling: Schools Adjudicator finds London Oratory School admissions policy to be both racially and socio-economically discriminatory", 15 July 2014, available at: <https://humanism.org.uk/2014/07/15/landmark-ruling-schools-adjudicator-finds-london-oratory-school-admissions-policy-racially-socio-economically-discriminatory>.

40 See "Groundbreaking new research maps the segregating impact of faith school admissions", above, note 27.

It also found that religiously selective schools make up about one half of the 100 schools least representative of their areas in terms of having fewer pupils who speak English as an additional language than live locally; as religiously selective schools make up one sixth of all schools, this means they are vastly overrepresented amongst the very least inclusive of immigrants.⁴¹ This corroborates research by academics like Rebecca Allen and Anne West, who in 2011 found that:

*[H]igher-income religious families are more likely to have a child at a faith school than lower-income religious families (...). Significantly, within the groups of both Church of England and Roman Catholic families, children from top quartile households are statistically significantly more likely to attend faith schools, though the differences are not very large (9 versus 8% for Church of England families and 52 versus 47% for Roman Catholic families).*⁴²

A number of other sources make the correlation between religious selection and the socio-economic privilege of schools' intakes look more like causation. For instance, research by the Sutton Trust has found that 6% of all parents, including 10% of upper middle class parents, said that they had "[a]ttended church services [when they otherwise wouldn't] so that [their] child(ren) could enter a church school".⁴³ Six percent may not sound like much, but when compared to the fact that only 4–5% of parents attend church on any given weekday,⁴⁴ it becomes clear that this is a significant trend. On top of that, the Church of England's own, unique research into what leads their churches to grow found that:

The results for church growth are interesting. Here the Church school has a key role (...) The most direct impact on attendance may be felt in areas where a pop-

41 *Ibid.*

42 Allen, R. and West, A., "Why do faith secondary schools have advantaged intakes? The relative importance of neighbourhood characteristics, social background and religious identification amongst parents", *British Educational Research Journal*, Vol. 37(4), 2011, pp. 691–712.

43 Francis, B. and Hutchings, M., *Parent Power? Using money and information to boost children's chances of educational success*, Sutton Trust, December 2013, pp. 24–25, available at: <http://www.suttontrust.com/wp-content/uploads/2014/08/1parentpower-final.pdf>.

44 The last major survey of church attendance figures was published in 2008 and reports up to 2005. Brierley, P., *Religious Trends 7*, Christian Research, 2008, as presented in McAndrew, S., "Church Attendance in England, 1980–2005", *British Religion in Numbers*, 23 March 2011, available at: <http://www.brin.ac.uk/news/2011/church-attendance-in-england-1980-2005/>. From the figures presented we can calculate that in 2005 weekly church attendance stood at 6% of the population. Other sources such as NatCen Social Research's annual *British Social Attitudes Survey* (BSAS) and the Church of England's annual *Statistics for Mission* suggest that attendance will have declined since, and BSAS also points to lower attendance amongst those of parent age. Figures for BSAS are available at: <http://www.britisocat.com/> (free registration required). The most recent *Statistics for Mission* is Church of England, *Statistics For Mission 2013: Research and Statistics Department Archbishops' Council*, Archbishops' Council, November 2014, available at: <https://www.churchofengland.org/media/2112070/2013statisticsformission.pdf>.

*ular C of E school is over-subscribed. Some churchgoing is clearly motivated by a desire to qualify for school admission (...) Middle class suburbs with church schools (...) offer great opportunities [for growth].*⁴⁵

The researchers even wrote that “[b]eing connected with an over-subscribed school is helpful, if not easy to engineer!”⁴⁶

And while ethnicity is more complicated, due to the fact that not all religions are largely mono-ethnic, FAC has nonetheless also seen that a greater degree of religious selection by Christian schools leads to fewer Asian pupils being admitted. Asian families are much less likely to be Christian, but nonetheless may well want to send their children to Christian schools. Religious selection, where it occurs, prevents that.⁴⁷

On top of this, Barnardo’s have reported that:

[S]ervices in Bradford and Luton have found themselves advising increasing numbers of newly arrived eastern European families in recent years. While these families are often devout Catholics and wish their children to attend a faith school, they can struggle to meet the priority admissions criteria for local Catholic secondary schools. In Luton for example, some have only recently arrived or have moved around the city and therefore have not had consistent enough attendance at a particular church to be able to gain the required reference from a priest;

45 Voas, D., and Watt, L., *The Church Growth Research Programme: Report on Strands 1 and 2 – Numerical change in church attendance: National, local and individual factors*, Church of England, February 2014, available at: http://www.churchgrowthresearch.org.uk/UserFiles/File/Reports/Report_Strands_1_2_rev2.pdf.

46 Voas, D., *Numerical Change in Church Attendance: National, Local and Individual Factors*, presentation at the Faith in Research Conference, 16 January 2014, available at: http://www.churchgrowthresearch.org.uk/UserFiles/File/Presentations/CGRP_Voas.pdf.

47 What about other, non-Christian, religious schools? BHA research has found that “the majority of Sikh, Muslim and Hindu state-funded schools have no ‘white British’ pupils at all, while the rest have only one or two at most. At the same time, most Jewish state schools have no ‘Asian’ pupils at all. By comparison, the average Muslim, Hindu and Sikh school is situated in an area where a third of the local population is ‘white British’, whereas Jewish schools are in areas where 12 percent is ‘Asian.’” BHA, “Religious schools most racially segregated state schools, new findings show”, 18 October 2013, available at: <https://humanism.org.uk/2013/10/18/religious-schools-racially-segregated-state-schools-new-findings-show/>. However, this appears to be more an issue of parental preference than oversubscription criteria erecting barriers, as even where these schools have somewhat open admissions policies (for example, free schools having 50% open admissions), such segregation still occurs. One head of a Muslim school told the *Mirror*, “We want non-Muslim girls’ – it’s just that none have ever applied.” Penman, A., “Blackburn Islamic faith school causes controversy despite great exam results”, *The Daily Mirror*, 18 October 2013, available at: <http://www.mirror.co.uk/news/uk-news/tauheedul-islam-girls-high-blackburn-2465895>. Conversely, it is clear that there is a demand from non-Christian parents to have their children attend Christian schools. Unpublished FAC research shows that the more religiously selective a Church of England secondary school is, the less inclusive it will be of the local Asian population.

*others are denied admission because they failed to gain entry (particularly if they arrived mid-year) into a Catholic primary school which operates as a “feeder” to the secondary school.*⁴⁸

This shows that religious selection is particularly problematic when it comes to immigration. Barnardo’s cite patterns of attendance and feeder schools. It is also easy to imagine that complex admission arrangements are harder to navigate when there are language barriers, and immigrants might also be less likely to have baptism certificates which are often required.

e. The opposite problem: parents wishing to avoid religious schools

Frequently parents find themselves unable to access their local schools, or the best school in their area, due to religiously selective admissions policies. But one final issue worth discussing is the converse problem, namely that parents often end up having their child allocated a faith school by the state against their wishes. There is no clearly established legal right for parents to not have their child allocated a faith school by their local authority, and my inbox attests to the fact that this frequently occurs when faith schools are under-subscribed, or have open admissions policies. Whether this is legal is a difficult question. The Government would argue that the fact that parents have the ability to opt their children out of any religious education and collective worship provided means that a parent allocated a faith school is not being discriminated against under Article 14 and Article 2 of Protocol 1. However, such opt-outs are plainly frequently inadequate, especially given how many faith schools like to talk about how their religious ethos permeates all aspects of the school life, possibly with religious elements incorporated throughout the curriculum.⁴⁹ We will return to this issue later on, but for now note that the School Admissions Appeals Code says:

The Human Rights Act 1998 confers a right of access to education. This right does not extend to securing a place at a particular school. However, admission authorities and appeal panels need to consider parents’ reasons for expressing a preference when they make admission decisions and when making decisions on appeals. These reasons might include, for example, the parents’ rights to ensure that their child’s education conforms to their own religious or philosophical convictions (as

48 Barnardo’s, *Unlocking the gates: Giving disadvantaged children a fairer deal in school admissions*, August 2010, available at: http://www.lgcplus.com/Journals/3/Files/2010/8/27/unlocking_the_gates.pdf.

49 For example, in the Catholic Education Service’s policy document it is written that “A Catholic school’s ‘ethos’ may be understood to be the outward signs and the personal experiences of the teachings of Christ and the Catholic Church in the totality of daily life in a Catholic school.” Stock, M., *Catholic Education Service, Christ at the Centre: Why the Church provides Catholic schools*, The Incorporated Catholic Truth Society, 2013, available at: <http://www.secularism.org.uk/uploads/christ-at-the-centre.pdf>. Many more examples can be found simply by searching on Google: <https://www.google.co.uk/search?q=christian%20ethos%20permeates%20school&rct=j>.

*far as is compatible with the provision of efficient instruction and the avoidance of unreasonable public expenditure).*⁵⁰

f. Summary

We have seen over the course of this chapter that there are a range of tensions to do with admissions to religiously selective schools. Such selection is permitted by the Equality Act, but may not be compatible with the ECHR right to education and prohibition on discrimination. There are also related issues with Jewish schools being found to be directly discriminating on the basis of race and gender. And there are unresolved questions about religious schools indirectly discriminating on the basis of ethnicity, social background, and perhaps other factors too, with evidence suggesting that religious discrimination causes such ethnic and socio-economic selection. We expect upcoming OSA decisions to shed some light on whether such indirect discrimination is lawful. More generally the author hopes that future governments might restrict, and ultimately outlaw, religious selection by state schools.

4. Employment

a. Overview

We now turn to employment and once again we must start by considering the statute. The Directive prohibits discrimination by employers against employees on the basis of a number of protected characteristics, including religion or belief. However, Article 4 provides an exception to this in the case where a “genuine occupational requirement” (GOR) can be claimed, namely where:

[B]y 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.

and, for “churches and other public or private organisations the ethos of which is based on religion or belief”, “where (...) a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement” – but only if legislation permitting such discrimination has existed for longer than the Directive itself.⁵¹

The Equality Act 2010 recreates this law, similarly prohibiting discrimination, and also providing an exception for “occupational requirement[s]” where “the application of the requirement is a proportionate means of achieving a legitimate aim”.⁵²

50 Department for Education, *School Admission Appeals Code*, February 2012, available at: <https://www.gov.uk/government/publications/school-admissions-appeals-code>.

51 See above, note 15, Article 4.

52 See above, note 16, Schedule 9, Part 1.

However, unlike in the Directive, there is an *exception to this exception*, which excludes four sections of education legislation from the Equality Act entirely.⁵³ These sections of the School Standards and Framework Act 1998 permit voluntary aided schools, academies, free schools and private schools to give:

*[P]reference (...) 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.*⁵⁴

It similarly provides that:

*[R]egard may be had, in connection with the termination of the employment 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.*⁵⁵

They also permit voluntary controlled and foundation schools to behave in an identical manner for up to one fifth of teaching staff (and for academies that were voluntary controlled or foundation schools before converting to academy status, a similar limit is applied).⁵⁶

b. Genuine occupational requirements examined

It seems clear that if it were not for the exception to the GOR legislation, schools with a religious character would not be able to require all teachers to share the faith of the school. Schools that teach faith-based religious education would certainly be able to claim a GOR for the head of their RE department, and *might* also be able to claim a GOR for the headteacher and other senior teaching posts. Some schools might argue that they require a certain proportion of teachers to be of a certain faith, in order to ensure the religious ethos of the school. But surely it goes beyond GOR to permit every voluntary aided school to require every single teacher to share the faith of the school.

The evidence clearly shows that schools go beyond what is permitted by GOR. For instance, the clear policy of the Catholic Education Service for England and Wales (CES), the agency

53 *Ibid.*, Schedule 22, Para 4, The four sections are School Standards and Framework Act 1998, Sections 58(6)–(7); 60(4)–(5); section 124A; and 124AA.

54 Quoted is School Standards and Framework Act, Section 60(5)(a). This and Sections 124A(2) and 124AA(6) extend the same provisions to all religiously designated schools.

55 *Ibid.*, Section 60(5)(b). This and Sections 124A(3) and 124AA(7) extend the same provisions to all religiously designated schools.

56 *Ibid.*, Section 58(1)–(3).

of the Catholic Bishops' Conference of England and Wales that is responsible for education, is that "the posts of Headteacher, Deputy Headteacher and Head or Coordinator of Religious Education are to be filled by baptised and practising Catholics"; for other "Teacher posts – Applicants are advised that schools/colleges are entitled to give priority to practising Catholic applicants." For non-teaching posts, discrimination is explicitly limited to where a GOR can be demonstrated:

*Applicants are advised that schools/colleges (in England only) are entitled to give priority to practising Catholic applicants where it can be demonstrated that it is a proportionate means of achieving a legitimate aim (commonly known as a "genuine occupational requirement").*⁵⁷

Similarly, the CES's policy is that:

*The Bishops require that the Headteacher or Principal, Deputy Headteacher or Vice-Principal, and Head of RE/RE Co-ordinator must be practising Catholics. Preferential consideration should also be given to practising Catholics for all teaching posts and for non-teaching posts where there is a specific religious occupational requirement, i.e., chaplaincy post. In England and Wales statutory provision allows for such preferences to be made.*⁵⁸

The meaning is clear: the CES believes that every teacher in every Catholic school can be required to be a practising Catholic, and furthermore that preferential consideration should be given to practising Catholics for every teaching post. The fact that it is not *required* that Catholics fill every teaching post, and that only *preferential consideration* is given to practising Catholics for these posts, shows that it cannot be said to be a GOR that the posts are filled by Catholics.

It is easy to find examples of this kind of discrimination happening in practice. A cursory glance at a recruitment website reveals several in just a couple of minutes.⁵⁹

57 As quoted from the Catholic Education Service for England and Wales's application forms, available at: <http://www.catholiceducation.org.uk/employment-documents/application-forms>.

58 See Stock, M., above, note 49.

59 See for example St Bede's School, "Person Specification: Head of Mathematics" which states as desirable, "Personally committed and practicing Christian, member in good standing of any denomination served by the school.", available at: https://docs.google.com/document/d/1VfB57yrx6MKl_hsZVCaj3ciobmSwCf-hVgo6IXF2GBc/edit?usp=sharing; St Gregory's Catholic College, "Person Specification: Head of English", which states as desirable, "Practicing Catholic", available at: <https://www.tes.co.uk/Upload/Attachments/TES/041Dcf0001/Head%20of%20English%20-%20Person%20Specification%20April%202014.pdf>; St. Monica's R.C. High School, "Person Specification: Head of ICT", which states, "The Governors particularly welcome applications from Practicing Catholics but all applications will be considered.", available at: <https://docs.google.com/a/humanism.org.uk/document/d/1bj-CPBu0jsZlJuK9v8uW2udx-TikXOAYUhjoCzYoIco/edit>; Holy Family Catholic Primary School, letter to prospective candidates titled

It is also clear that this broad freedom of faith schools to discriminate is, or perhaps was, the UK Government's understanding of the law. The following exchange in parliament between an opposition Member of Parliament and the Minister of State for Schools attests to this fact:

Mr Jim Cunningham: To ask the Secretary of State for Education by what mechanism he will ensure that the selection and appointment of teachers in academy faith schools is compatible with the provisions of the Equalities Act 2010 [stet].

Mr Gibb: All new academies, as with existing academies, will be governed by the employment provisions contained in the School Standards and Framework Act 1998 (SSFA). The SSFA permits faith schools, including faith academies, to discriminate on religious grounds in relation to certain staff and its provisions are preserved under the Equality Act 2010. Faith academies, in line with voluntary aided schools, may apply religious criteria to the appointment of teaching staff but not to non-teaching staff unless there is a genuine occupational requirement for them to be of a particular faith.⁶⁰

Furthermore, the Government's Equality Act guidance, last revised in May 2014, states that:

Voluntary-aided schools may apply religious criteria when recruiting or dismissing any member of their teaching staff (...) Religious criteria may not be applied

"Important information on equal opportunity", which states that, "Some teaching posts include specific responsibility for providing leadership and direction in the religious life and Catholic identity of the school and in these cases there will be a requirement that the successful candidate is a baptised and practicing Catholic. In other appointments, where two or more candidates for teaching posts are equally strong in the context of the criteria for appointment, preference may be given to a candidate who is Catholic.", available at: https://docs.google.com/a/humanism.org.uk/document/d/1x3pRDiTZ_albqEy-9IBr_dVADPgZGIYuL-VNEzXUbaEo/edit. Such practice is widespread – many more similar examples are easy to find. Thirteen more are given at BHA, "European Commission re-opens investigation into whether UK 'faith' school laws break European employment laws as UK Government shifts position", 20 February 2015, available at: <https://humanism.org.uk/2015/02/20/european-commission-re-opens-investigation-whether-uk-faith-school-laws-break-european-employment-laws-uk-government-shifts-position>.

- 60 "Written Answers for 06 September 2010", *House of Commons Hansard*, 2010, columns 340W-341W, available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100906/text/100906w0013.htm#10090816001725>. Further examples include "Written Answers to Questions: Monday 23 January 2012", *House of Commons Hansard*, 2012, Column 7W, in which the Minister states, "Only designated faith schools have an exemption from the Equality Act 2010 which allows them to apply religious criteria to certain posts, in line with the provisions of the Schools Standards and Framework Act 1998. Other schools may only discriminate in relation to senior posts if they can demonstrate that there is a genuine occupational requirement for the post holder to be of a particular religion or belief", available at: <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120123/text/120123w0001.htm#12012310000029>. See also "Written Answers: Monday 12 July 2010", *House of Commons Hansard*, 2010, Column WA111, available at: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/100712w0001.htm#10071230000823>.

*to any other posts in a [voluntary-aided] school unless there is a genuine occupational requirement.*⁶¹

Similar exceptions from the GOR law apply in Scotland and Northern Ireland. With respect to Northern Ireland, this is expressly permitted by the Directive itself, which says:

*In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.*⁶²

However there is no similar permission for derogation for England, Wales and Scotland. There are similar issues in some other countries as well, but in 2012 the European Commission (EC), told the European Humanist Federation that the only complaints received had been from the UK.

c. European Commission formal investigation

As a result of these problems, in April 2010 the BHA submitted a formal complaint to the EC, alleging that UK law does not correctly implement the Directive, instead allowing discrimination too broadly.⁶³ In July 2012, the EC took the matter up as a formal investigation.⁶⁴ In March 2013, the EC asked the UK Government a number of questions, to which the Government responded in June.⁶⁵

In its response, the Government set out a different position from the one publicly stated. It argued that:

[I]f a teacher brought a claim against a school (on the basis that the school, as an employer, had discriminated against them in their remuneration, for example), then the court or tribunal would consider the legislation in this wider context.

61 See above, note 25, Paras 8.17 and 8.19.

62 See above, note 15, Article 15.2.

63 BHA, *Complaint to the Commission of the European Communities concerning failure to comply with community law*, April 2010, Para 11, available at: <https://humanism.org.uk/wp-content/uploads/bha-complaint-to-the-european-commission-on-employment-in-faith-schools.pdf>.

64 Letter from EC to BHA, 17 July 2012, available at: <https://humanism.org.uk/wp-content/uploads/european-commission-response-to-bha-complaint-on-employment-in-faith-schools.pdf>.

65 As set out in BHA, *Conformity of various UK laws with Article 4 of Directive 2000/78/EC: Response from the British Humanist Association to the observations of the United Kingdom Government*, July 2013, available at: <https://humanism.org.uk/wp-content/uploads/BHA-comments-on-UK-Government-observations-final.pdf>.

There is a well-established principle in English and European law that legislation, to the extent possible, must be construed as being consistent with the requirements of European law. If that is not possible, it is to be dis-applied to the extent required for consistency with European law. Bearing this in mind, section 60(5) (a) [of the School Standards and Framework Act 1998, which permits religious discrimination against teachers] could and would, if necessary, be construed and applied by a court or tribunal as permitting preferential decisions on grounds of religious belief, only to the extent that such decisions were consistent with genuine, legitimate and justified occupational requirements.⁶⁶

There are several things worth noting about this. First, this is a different position from the one publicly taken by the Government, which by distinguishing non-teaching posts as requiring a GOR, makes it clear that religious discrimination in teaching posts is free from that restriction. Second, it is contrary to the position taken by the CES and most faith schools – understandably, given the public position taken by the Government – the consequence of which is that the vast majority of teachers applying for or considering applying for jobs at faith schools, unaware of the fact that UK law is broader than EU law, will be discriminated against without even realising this discrimination is unlawful.

Third, it means that the exception from GOR in the Equality Act 2010 has no point or effect, which leads to the question why it was included in the legislation at all. Fourth, it is not clear that a court or tribunal dealing with a relevant case would behave in the manner the UK Government claims to expect. Indeed, in its portion of the UK Government’s response, the Scottish Government cited a 2012 Employment Tribunal case in which the claimant, a supply teacher, lost, but in the author’s opinion, would not have done, had GOR laws been considered, which they were not. The fact that they were not considered reflects the lack of awareness.⁶⁷

And finally, as the BHA pointed out in its response in July:

[I]t is not considered acceptable by the European Court of Justice for a national Government to inadequately implement a Directive, instead relying on domestic courts to resolve the difference. In Infringement No 2006/2450, [footnote omitted] the European Commission ruled:

“As the Commission pointed out in the letter of formal notice, the European Court of Justice has consistently held that the provisions of Directives must be implemented with sufficient clarity and precision to satisfy the requirements of legal

66 UK Government, *Conformity of various UK laws with Article 4 of Directive 2000/78/EC: The observations of the United Kingdom Government*, June 2013 as quoted in *Ibid.*, Para 11.

67 Employment Tribunals (Scotland), *McShane v Glasgow City Council*, Case No: S/105844/2010, available at: <https://humanism.org.uk/wp-content/uploads/3800-12-JUST-UK-Response-Annex-1.pdf>.

certainty (see in particular cases 29/84 Commission v Germany [1985] ECR 1661 paragraph 23, C-159/99 Commission v Italy [2001] ECR I-3541 paragraph 24, case C-365/93 Commission v Greece [1995] ECR I-499, paragraph 9; and C-144/99 and case Commission v The Netherlands, [2001] ECR I-3541, paragraphs 17 and 21)."

*The Commission then goes on to state "that in relation to a common law legal system a Court of Appeal judgment with precedent value may constitute an adequate transposition of a provision of a Directive." But in this case we do not have any such judgment.*⁶⁸

However, in March 2014 the EC wrote to the UK Government saying that:

*[W]e have come to the conclusion that you have provided sufficient clarifications as regards the narrow interpretation of this legislation in line with the Directive. These points are based on complaints which concern the legislation itself and not individual cases. Since we have no evidence of incorrect application of the laws at stake, the clarifications you have provided are considered sufficient. However, we reserve the right to re-assess this position in case we in the future receive evidence of incorrect application, for example complaints concerning individual cases of incorrect application.*⁶⁹

This is in spite of the Scottish Tribunal case noted above and the ease with which it is possible to find individual job recruitment advertisements following UK law but not the Directive. The EC did not inform the BHA of its decision until October 2014,⁷⁰ and only provided the BHA with the reasoning in December 2014. In light of the individual examples cited earlier in this paper, the BHA asked the EC to re-open the case, which it agreed to do in January 2015.

d. Discrimination on grounds other than religion

Finally, to provide wider context, it is worth noting that there are other ways that schools can discriminate against staff. Marriage and civil partnership are not protected characteristics for the purposes of the Directive, and there have been several high profile incidents of Catholic schools dismissing senior staff for getting divorced, having affairs, having pre-marital relationships, and so on.⁷¹ In Spain, teachers of confessional religious education in state schools

68 See above, note 63, Para 13.

69 European Commission, *Note for the attention EU pilot contact point of the United Kingdom*, March 2014.

70 Stein, A., *Subject: Your complaint EU PUot 3800/12/JUST – CHAP (2010) 1206*, European Commission, 20 October 2014.

71 For example, Prynne, M., "Headmaster sacked from Catholic school over marriage split", *The Daily Telegraph*, 25 April 2014, available at: <http://www.telegraph.co.uk/education/educationnews/10787455/Headmaster-sacked-from-Catholic-school-over-marriage-split.html> See above, note 49, "What are examples of substantive life choices which are incompatible with the teaching of the Catholic Church?", pp. 31–32, for a fuller list.

are employed by the Catholic Church. In one 2012 case, the bishop refused to renew the employment contract of a priest who chose to get married; the priest challenged this decision at the European Court of Human Rights, but it was decided that the Church's freedom of religion trumped the priest's right to a private life under Article 8.⁷² Additionally, last year, three Muslim state schools where the pupils are single-sex were found to be claiming GORs on the basis of gender when hiring staff (two were identified by the BHA, one by someone else). The schools were told by the Government that this is unlawful and ordered to stop doing so.⁷³

e. Summary

It seems clear that the Directive means that religious schools do not have the legal freedom to religiously discriminate against more than just a few teaching staff. But a straightforward reading of UK law suggests that they can require every teacher to be of a certain religion. The UK Government has in the past confirmed this and the CES has adopted this position as well. As a consequence it is unsurprising that many schools have discriminated in this manner; even though the EC case has shown that even in the Government's view, such discrimination is unlawful. The apparently meaningless exception in the Equality Act which seemingly permits such discrimination should be repealed.

5. Education

a. Overview

We are principally concerned with two areas of education, namely RE and collective worship.

By law, every state school in England and Wales has to make "provision for religious education for all registered pupils at the school".⁷⁴ At maintained schools without a religious character, and voluntary controlled and foundation schools with a religious character, such RE is overseen by a local authority body known as a "standing advisory council on religious education" (SACRE) and must follow a "locally agreed syllabus", set at least every five years by another local authority body (often with an identical membership) known as an "agreed syllabus conference" (ASC). Agreed syllabuses must "reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religions represented in Great Britain",⁷⁵ but must not:

72 *Fernández Martínez v Spain*, Application No. 56030/07, 15 May 2012.

73 BHA, "Government tells Muslim state schools to stop discriminating against staff on the basis of gender", 6 March 2014, available at: <https://humanism.org.uk/2014/03/06/government-tells-muslim-state-schools-stop-discriminating-staff-basis-gender>.

74 Education Act 2002. The relevant sections are Section 80 for England and Section 101 for Wales.

75 Education Act 1996, Section 375.

[P]rovide for religious education to be given to pupils at a school to which this paragraph applies by means of any catechism or formulary which is distinctive of a particular religious denomination (but this is not to be taken as prohibiting provision in such a syllabus for the study of such catechisms or formularies).⁷⁶

At voluntary aided schools with a religious character, such RE must be “in accordance with the tenets of the religion or religious denomination” of the school.⁷⁷ The funding agreements of academies and free schools also require them to teach RE, and allow them to set their own syllabus. For academies and free schools with no religious character, and faith academies that converted from being voluntary controlled or foundation schools, the syllabuses must be set “in accordance with the requirements for agreed syllabuses”; while for other academies and free schools with a religious character, the RE must be “in accordance with the tenets of the Academy’s specified religion or religious denomination.”⁷⁸

In addition, the Equality Act 2010 precludes discrimination by a school “in the way it provides education for the pupil”,⁷⁹ although there is an exception to this for schools with a religious character,⁸⁰ and for the *content* of the curriculum (so as not to make it illegal to teach about, for example, works of fiction in English with racist, sexist or homophobic portrayals of characters).⁸¹

Every school in England and Wales also has to have a daily “act of collective worship”.⁸² For schools with a religious character, this has to be “in accordance with the tenets and practices of the religion or religious denomination” of the school.⁸³ For schools with no religious character, this has to be “wholly or mainly of a broadly Christian character”.⁸⁴ Schools can apply for a “determination” to lift the requirement that the worship is Christian (if, for example, the school considers it would be more appropriate for some or all pupils to attend daily worship in line with another faith), but the requirement to have an act of worship cannot be lifted entirely.⁸⁵ It is not legally possible for a school to have assemblies that are wholly or mainly secular, let alone humanist. Again, there is an

76 See above, note 54, Schedule 19.

77 *Ibid.*, Schedule 19.

78 Department for Education, *Mainstream academy and free school: single model funding agreement*, December 2014, available at: <https://www.gov.uk/government/publications/academy-and-free-school-single-model-funding-agreement>.

79 See above, note 16, Section 85.

80 *Ibid.*, Section 89.

81 *Ibid.*, Schedule 11, Para 5.

82 See above, note 54, Section 70.

83 *Ibid.*, Schedule 20.

84 *Ibid.*

85 *Ibid.*

exception written into the Equality Act 2010 to ensure that collective worship does not fall afoul of the legislation.⁸⁶ We believe the UK is the only country in the world to require all pupils to take part in a daily act of worship, with the default assumption that this worship is Christian.⁸⁷

b. The place of non-religious worldviews in RE

Several issues arise from this. One is the place of non-religious worldviews such as Humanism in the RE curriculum at schools with no religious character, as well as the place of religions that are not deemed to be “principal” (a term generally understood to mean Christianity, Islam, Judaism, Hinduism, Sikhism, and Buddhism). This article will address the question of non-religious worldviews, and at this stage we will deviate from considering issues to do with faith schools. The BHA believes the most appropriate place for teaching about non-religious worldviews to occur is in RE, because all the contemporary justifications for the subject of RE in schools (other than when such teaching is confessional) logically also apply to teaching about non-religious worldviews.⁸⁸ The law, on the face of it, only refers to the teaching of “principal religions”. But since the relevant domestic legislation was passed, the Human Rights Act 1998 has also been passed. Legal advice the BHA has obtained from David Wolfe QC explains that this Act⁸⁹ and subsequent case law such as the *Folgerø* case (a Norwegian case that essentially established that the state must be neutral on matters of religion or belief in the school curriculum),⁹⁰ taken together, mean that prior references in law to “religion” should, as much as possible, be read as “religion or belief”.

This matches most international guidance on the matter, for example the Office for Democratic Institutions and Human Rights-Organization for Security and Co-operation in Europe’s Toledo Guiding Principles on teaching about religions and beliefs in public schools,⁹¹ the Final Document of the International Consultative Conference on School Education in Relation to Freedom of Religion or Belief, Tolerance and Non-Discrimination,⁹² and the Council of Eu-

86 See above, note 16, Schedule 11, Para 6.

87 Lord Avebury, the International Humanist & Ethical Union and National Secular Society, *A Joint UPR Submission on the United Kingdom of Great Britain and Northern Ireland – Session 13 (21st May – 1st June 2012)*, November 2011, Para 20, available at: <http://www.secularism.org.uk/uploads/nss-briefing-for-the-universal-periodic-review-of-uk.pdf>.

88 BHA, “Why Humanism is included in Religious Education”, *Humanism for Schools* website, available at: <http://humanismforschools.org.uk/guidance/why-humanism-is-included-in-religious-education-re>.

89 In particular, see above, note 14, Section 3(1).

90 European Court of Human Rights, *Folgerø and Others v. Norway*, Application No. 15472/02, 29 June 2007.

91 Organization for Security and Co-operation in Europe, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*, November 2007.

92 *Final Document of the International Consultative Conference on School Education in Relation to Freedom of Religion or Belief, Tolerance and Non-Discrimination*, November 2001, available at: http://www.hurights.or.jp/archives/human_rights_education_in_asian_schools/section2/2002/03/final-document-of-the-international-consultative-conference-on-school-education-in-relation-to-freed.html.

rope's Recommendation of the Committee of Ministers to member states on the dimension of religions and non-religious convictions within intercultural education.⁹³ Such inclusion was specifically recommended in the UN Special Rapporteur on freedom of religion or belief's last report on the UK.⁹⁴

This legal advice and these recommendations have implications not only for RE curriculums, but also for the composition of ASCs and SACREs, which at the moment have a group for "religions and denominations" reflecting "the principal religious traditions in the area" (other than the Church of England who in England get their own separate group).⁹⁵ It has been the subject of some debate as to whether humanists can be full members of that group, or are limited to co-option onto SACREs in a non-voting capacity (ASCs do not provide for the possibility of co-option). The vast majority of SACREs in England now have a humanist as a member. An increasing number have full members, but there is still some uneasiness, with most humanists being co-opted, and half a dozen only being observers (SACRE meetings are public meetings which anyone is entitled to attend), unallowed to speak without the chair's permission. One SACRE (Birmingham's) actively campaigns against Humanism being on locally agreed syllabuses and humanists being members of the SACRE. Birmingham SACRE even successfully threatened the Government over this matter when it was producing new guidance in 2009.⁹⁶ The SACRE has also had long-running difficulty over the place of the Ahmadiyya Muslim Community, with the other Muslim representatives refusing to grant membership to an Ahmadi Muslim under the title "Ahmadi Muslim".⁹⁷

With regard to the curriculum, locally agreed syllabuses have increasingly become inclusive of non-religious worldviews. The last major survey on the matter found that over three quarters of locally agreed syllabuses include Humanism to some extent.⁹⁸ With progressively more inclusive national guidance published in recent years, that inclusion has become deep-

93 Council of Europe, *Recommendation CM/Rec(2008)12 of the Committee of Ministers to member states on the dimension of religions and non-religious convictions within intercultural education*, December 2008.

94 Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir into the United Kingdom of Great Britain and Northern Ireland (June 2007)*, UN Doc., A/HRC/7/10/Add.3, 7 February 2008, (amongst others) Para 69.

95 See above, note 76, Section 390 for Standing Advisory Councils on Religious Education (SACRE) and Schedule 31, Para 4 for Agreed Syllabus Conferences.

96 BHA, "Birmingham taxpayers' money used to urge systematic discrimination against non-religious in RE", 12 June 2014, available at: <https://humanism.org.uk/2014/06/12/birmingham-taxpayers-money-used-council-urge-systematic-discrimination-non-religious-re/>, and BHA, *BHA BRIEFING: Discrimination by Birmingham SACRE against humanists*, 12 June 2014, available at: <https://humanism.org.uk/wp-content/uploads/BHA-BRIEFING-Discrimination-by-Birmingham-SACRE-against-humanists.pdf>.

97 *Ibid.*

98 Watson, J., *Humanism in Agreed Syllabuses for Religious Education: A Report to the British Humanist Association*, November 2007, available at: <http://humanism.org.uk/wp-content/uploads/Watson-Syllabus-Report.pdf>.

er,⁹⁹ and in 2013 the RE Council for England and Wales published a new Curriculum Framework for Religious Education in England, endorsed by the Government, which covered key stages 1–3 (ages 5–14) and put Humanism on an equal footing to the principal religions.¹⁰⁰

However, since then the Government has introduced new General Certificate of Secondary Education (GCSE), AS level and A level subject content for religious studies in England (these being the primary qualifications for students aged 14–18, and religious studies courses being *de facto* the way that schools meet their statutory obligations to teach RE).¹⁰¹ The subject content allows for systematic study of the principal religions, and has annexes at GCSE level prescribing content for the six “principal religions”. But it does not allow for the systematic study of non-religious worldviews such as Humanism. This was in spite of the BHA producing an analogous annex at the request of Department for Education officials and alongside the RE Council and others having campaigned to have Humanism included.¹⁰² Disappointingly, however, since this campaign launched, the Government amended guidance for schools which had recommended they “[u]se teaching resources from a wide variety of sources to help pupils understand a range of faiths, and beliefs such as atheism and humanism” by deleting “and beliefs such as atheism and humanism”.¹⁰³

99 See, for example, BHA, “New RE syllabuses put Humanism on equal footing to major religions”, 12 December 2014, accessible at: <https://humanism.org.uk/2014/12/12/new-re-syllabuses-put-humanism-equal-footing-major-religions>.

100 The Religious Education Council of England and Wales, *A Curriculum Framework for Religious Education in England*, October 2013, available at: http://resubjectreview.recouncil.org.uk/media/file/RE_Review_Summary.pdf. For commentary, see BHA, “New RE subject framework makes clear: schools should put non-religious beliefs on equal footing”, 23 October 2013, available at: <https://humanism.org.uk/2013/10/23/new-re-subject-framework-makes-clear-schools-put-non-religious-beliefs-equal-footing>.

101 For GCSE, see Department for Education, *Religious studies GCSE subject content*, 12 February 2014, available at: <https://www.gov.uk/government/publications/gcse-religious-studies>. For AS and A level, see *Religious studies AS and A level subject content*, 12 February 2014, available at: <https://www.gov.uk/government/publications/gce-as-and-a-level-religious-studies>. For the consultation that led to the new content, see Department for Education, *Reformed GCSE and A level subject content consultation*, 7 November 2014, available at: <https://www.gov.uk/government/consultations/gcse-and-a-level-reform-religious-studies>.

102 See BHA, “Option to study humanism excluded from new GCSE and A level criteria; academics, teachers, parents call on Government to reconsider”, 7 November 2014, available at: <https://humanism.org.uk/2014/11/07/option-study-humanism-excluded-new-gcse-level-criteria-academics-teachers-parents-call-government-reconsider/>. See also BHA, “BHA calls for inclusion of Humanism in responses to consultations on GCSE, AS and A level religious studies”, 5 January 2015: <https://humanism.org.uk/2015/01/05/bha-calls-inclusion-humanism-responses-consultations-gcse-level-religious-studies>.

103 BHA, “First GCSE, now British values: Government again deletes atheism and humanism from study”, 1 December 2014: <https://humanism.org.uk/2014/12/01/first-gcse-now-british-values-government-deletes-atheism-humanism-study>.

c. The adequacy of opt-outs

So: breadth of the curriculum is one issue. Another issue relates to parental rights to have their children educated in line with their own beliefs, and the adequacy of opt-outs. In order to ensure that parents' rights under Article 2 of Protocol 1 of ECHR are not infringed by RE or collective worship, whether in a school with no religious character or a faith school that a child has been allocated to against its parents' wishes, parents have the right to "wholly or partly excuse" their child "from receiving religious education given at the school" and, in the case of pupils who are not yet in the sixth form, "from attendance at religious worship at the school". In addition, a child who is in the sixth form (i.e. in the two final years of school education when aged 16–17 or 17–18) may choose to opt-out of religious worship.¹⁰⁴

These opt-outs are infrequently taken up, both because of low awareness of them and because of concerns about opted out children being victimised. In addition, schools do not have to arrange any alternative activity for opted out children. Although parents are allowed to take their children out of school "to receive religious education of a kind which is not provided in the school during the periods of time during which he is so excused",¹⁰⁵ this is normally quite impractical and requires parents to have the time and expertise to do this. In the BHA's experience, many opted out children end up having to sit outside in the hallway, or alone in an empty classroom. In addition, children often inadvertently miss out on inclusive parts of assemblies, or other important parts of the day, such as school notices. This is in spite of the *Folgerø* case concluding, in the words of W. Cole Durham, Jr.,

*Even there, one of the points that became clear from the Norwegian cases is that not any opt-out program is sufficient. This needs to be handled in a sensitive way. One of the children in the Norwegian cases was granted an opt-out, but it involved sending her to another room for the class period. This treatment was just the same as punishment of other students for bad behavior. An opt-out structure that can easily be interpreted as a punishment is certainly not satisfactory.*¹⁰⁶

After researching and thinking it over for several years, I informed the Head of my children's school that I was removing them from collective worship. She said she completely understood and agreed to it. She then went on to ask what religion I was – "Is it Christian Science, or something like that?" I had mentioned in the past that I am a scientist. I replied, "No. I am an atheist." She appeared a little put out.

104 See above, note 54, Section 71, as amended by Education and Inspections Act 2006, Section 55.

105 *Ibid.*

106 Durham, Jr., W.C., "Introduction", in Davis, D. and Miroshnikova, E. (eds), *The Routledge International Handbook of Religious Education*, 2013, p. 12.

At the end of year service, not attended by my children, the school handed out certificates for completion of their first year at school. My daughter was supposed to get hers later at the class picnic. That evening she burst into tears and said that as she had not gone to the service, she did not get her certificate. My daughter is 5 years old. It was then the summer holidays so I had no way of complaining and thought I would see if the next year started well; it could have been an innocent oversight. It is now 3 days into the start of the school year and my children have just told me that they are still going to assembly every day.

Do you have any suggestions as to where I go from here? I do not want an ugly confrontation at school but I also believe that if I was the follower of ANY religion, this would not be happening to me; I would be protected by law. As I am without a religion, I do not seem to have any rights over my children's spiritual well being. – email received by the BHA, September 2011.

Such issues are commonplace – the author is contacted by parents dealing with proselytising in school which they consider to be inappropriate, or issues to do with opt-outs, almost every day. They are even more acute with respect to faith schools, which often like to talk about how their religious ethos permeates through the whole of school life. This makes opting out all but impossible.

d. Children's rights

Finally, we turn to the issue of children's rights. The UNCRC provides children with "the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers", and says that children have the right to be prepared for "responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups". This seems to go against the notion of faith-based schooling, a point that is reiterated by other parts of the Convention:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (...)

States Parties shall respect the right of the child to freedom of thought, conscience and religion. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Freedom to manifest one's religion or beliefs may be subject

*only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.*¹⁰⁷

Complementing the UNCRC is the ECHR-related case law known as “Gillick competence”, establishing that once a child obtains sufficient understanding and intelligence to be mature enough to make up their own mind on the matter, a child’s right to make their own decisions overrides their parents’ rights over them.¹⁰⁸ The *Gillick* case that led to the case law had to do with sexual health, but there is no reason why it should not also apply with respect to religion or belief as well.¹⁰⁹

This raises two problems. First, particularly at secondary schools, is that Gillick-competent children may be forced by their parents to attend a faith school against their own wishes. This raises wider questions about the right of school choice and the appropriateness of faith schools.

Secondly, regardless of whether the school a child attends is religious or not, it is clearly the case that many young people attain Gillick competence in matters of religion or belief before the age of 16, and therefore the age at which opt-out rights transfer from parent to child – and then only for worship – is too late. This is not just an issue with RE and collective worship, but also sex education, where the age at which the transfer occurs is currently 19. Indeed, the previous (Labour) Government proposed, in the Children, Schools and Families Act 2010, to lower this age to 15. However, the Government failed to pass the Bill before the “wash-up” period at the end of Parliament when only legislation that has the consent of all major parties gets through. All the major parties supported wider reforms in the bill around sex and relationships education and personal, social, health and economic (PSHE) education, which would have seen PSHE added to the national curriculum. A new primary national curriculum was also being introduced. However, the Opposition (Conservatives) refused to support the lowering of the opt-out age to 15, instead only supporting 16. The Government’s legal advice was that this would be incompatible with Gillick competence, and so as a consequence decided that it had to strip the entirety

107 See above, note 31, Articles 13, 29, 12 and 14.

108 *Gillick (A.P.) (Respondent) v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security (Appellants)* [1986] AC 112, [1986] 1 FLR 229, [1985] UKHL 7.

109 This is not to say that parents of children who are not yet Gillick-competent have the right to state-funded religious schooling in line with their own faith. As we discussed in the admissions chapter, Article two of Protocol one of the ECHR provides no such right, instead merely mandating that the state does not interfere. What we are saying here is that until children are Gillick-competent, Article two of Protocol one of the ECHR provides parents with the right to bring children up in line with their own faith; after that, the right transfers to the child. And even then, parents’ rights over children who are not yet Gillick-competent are limited by the UNCRC, as set out earlier in this section.

of the curriculum reforms out the bill.¹¹⁰ As of writing, PSHE is still not a statutory part of the curriculum.

e. Private schools and opt-outs

Finally, while we have not discussed private schools at great length, it is worth noting that no law exists with respect to RE and collective worship at private schools, other than that those registered as religious are also exempted from provisions in the Equality Act 2010. This means that private schools can choose not to provide RE and collective worship. However, most private schools in England and Wales are religious. Furthermore, there are no opt-out rights for parents or pupils. The rationale for this is that if parents are unhappy with the religious education or worship being provided, they can remove their children from the school entirely and instead have them attend a state school, where their opt-out rights should be ensured. However, this option is clearly not open to a young person whose views differ from those of his or her parents – even one who is in the sixth-form and would have the right to opt out of worship if attending a state school. The Government has indicated to the BHA an unwillingness to address this issue.

f. Summary

We have seen that the UNCRC and Gillick competence, taken together, lead to serious questions about the very existence of religious schools, particularly at the secondary level. But more straightforward, narrower questions can be asked about the breadth of the RE curriculum (in particular the place of non-religious worldviews), the adequacy of opt-outs, the fact that for Gillick-competent children it should be children, not parents, who are opting out, and the fact that no rights at all are provided to children's schools. The author hopes that a future government will deal with these narrower questions soon.

Conclusion

We have seen that there are many areas where the intersection between religion or belief and education in English and Welsh state schools leads to tensions between domestic law

¹¹⁰Department for Children, Schools and Families, "Statement on the Children, Schools and Families Bill", 7 April 2010, available at: https://web.archive.org/web/20100413095457/http://www.dcsf.gov.uk/news/index.cfm?event=news.item&id=statement_on_the_children_schools_and_families_bill. See also Balls, E., "Letter to Michael Gove on the Children, Schools and Families Bill", 7 April 2010, which states, "your insistence that parents should have a right to withdraw their children until they reach the age of 16 – the age at which they are in many respects considered adults – makes it impossible for us to proceed. Both British and European case law do not support an opt-out up to the age of 16. As I explained when we discussed yesterday, that amendment would have meant that the bill would not have been compliant with the ECHR. Your insistence that the age limit must be increased to 16 would have made the entire bill non-compliant with UK and European law and, therefore, our lawyers advised me that, as Secretary of State, I had no choice but to remove all the PSHE provisions.", available at: <https://web.archive.org/web/20100411203246/http://www.edballs.co.uk/index.jsp?i=4812&s=1111>.

and practice and international equality and human rights obligations. In all these areas, the status quo is unpopular: by more than four to one, UK adults are against religious discrimination in state school admissions.¹¹¹ By more than seven to one, they are against religious discrimination in state school employment.¹¹² Most oppose state-funded faith schools per se.¹¹³ Very few parents consider religion to be an important factor when picking which schools to send their children to.¹¹⁴ Most do not think the laws requiring collective worship should be enforced.¹¹⁵

Progress in addressing these issues is inexorably slow – many of the issues we have explored arise from unique exceptions to general prohibitions on discrimination written into the Equality Act 2010. Further, it is remarkable that the problematic aspects of the School Standards and Framework Act 1998 with respect to faith school employment were first tabled as amendments to the then bill by a bishop in the House of Lords.¹¹⁶

It is clear that progress towards eliminating discrimination and advancing equality in these areas has been much slower than in many other areas of UK life. The cause of this lies plainly in the fact (with which this article started) that one-third of state-funded schools are religious. These schools constitute an extremely powerful lobby, as do the major national religious organisations. This is compounded by the fact that the biggest organisation, the Church of England, has the most moderate schools, but frequently defends the practice of other faith schools.

111 ComRes, “Accord Coalition & Faith Schools Study”, 4 November 2012, available at: http://accordcoalition.org.uk/wp-content/uploads/2013/02/Accord-Coalition_Faith-Schools_November2012.pdf; and Office of the Children’s Commissioner, *Children and young people’s views of education policy*, March 2011, available at: http://www.childrenscommissioner.gov.uk/force_download.php?fp=%2Fclient_assets%2Fcp%2Fpublication%2F483%2Fchildrens_and_young_peoples_views_of_education_policy.pdf.

112 YouGov, *YouGov/Accord Coalition Survey Results*, 3-5 June 2009, available at: https://d25d2506sfb94s.cloudfront.net/today_uk_import/YG-Archives-lif-accord-faithschools-090624.pdf.

113 Helm, T., and Townsend, M., “Taxpayers’ cash should not be used to fund faith schools, say voters”, *The Observer*, 14 June 2014, available at: <http://www.theguardian.com/education/2014/jun/14/taxpayers-should-not-fund-faith-schools>; and ICM, *Faith Schools Survey for Channel 4*, 25–27 August 2014, available at: http://www.icmunlimited.com/pdfs/2010_august_c4_FaithSchools.pdf.

114 YouGov, *YouGov/University of Lancaster Survey Results*, 5-13 June 2013, available at: http://cdn.yougov.com/cumulus_uploads/document/4n6d3tnayp/YG-Archive-University-of-Lancaster-Faith-Matters-Debate-results-180613-faith-schools.pdf; and *YouGov / Daybreak Survey Results*, 12-13 September 2010, available at: http://cdn.yougov.com/today_uk_import/YG-Archives-Life-YouGov-DaybreakReligion-130910.pdf.

115 ComRes, *Worship in School Study*, 15–24 July 2011, conducted for the BBC, available at: [http://www.comres.co.uk/polls/BBC_Religion_Worship_in_schools_results_\(plus_regions\)_July11.pdf](http://www.comres.co.uk/polls/BBC_Religion_Worship_in_schools_results_(plus_regions)_July11.pdf).

116 See e.g. Straw, J., debate on “Human Rights Bill [Lords]” *House of Commons Hansard*, 20 May 1998, Columns 1026-7, available at: http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980520/deb-text/80520-43.htm#80520-43_para2.

However, the proportion of the population that is not religious has been steadily rising for many years.¹¹⁷ As of last year the Church of England has more children in its schools doing collective worship every weekday than it has parishioners on its pews on any given Sunday¹¹⁸ – its own research has shown that church growth is strongest when there is an oversubscribed school nearby.¹¹⁹ The trend against discrimination and against religious privilege is strong, assisted by frequent reports of abuses (for example of admissions procedures) by religious schools. The European Commission is still considering the unwarranted exceptions to the UK’s employment equality laws. The status quo is steadily becoming less tenable and it can only be a matter of time before politicians stop seeing these issues as a can of worms too contentious to tackle and decide that they have to face up to them and introduce reforms.

117 As can be seen through NatCen Social Research’s *British Social Attitudes Survey*, available at: <http://www.britsocat.com/> (free registration required).

118 As can be seen by comparing figures from the Department for Education’s annual school census, the most recent of which is from January 2014, see above, note 7; with the Church of England’s annual *Statistics for Mission*, see above, note 44.

119 FAC, “New Church research shows growth is strongest where there are oversubscribed schools”, 7 March 2014, available at: <http://fairadmissions.org.uk/new-church-research-shows-growth-is-strongest-where-there-are-oversubscribed-schools>.