

Response to Consultation on draft 'Religious Education in English schools: non-statutory guidance 2009' from the British Humanist Association

A: Introduction to our comments

B: Humanism and Humanists – our concerns with the present guidance

C: Comments on the draft guidance

A: Introduction to our comments

As a preface to all our comments, we wish to stress once again that, in common with many others, we strongly believe that reform of the primary legislation is necessary. In particular, we believe that references of 'religions' in primary legislation should become 'religions and beliefs' and we do not believe that local syllabuses are the best way of delivering good RE. They give rise to patchy quality, uneven provision, and a postcode lottery. We believe they also prevent effective teacher training and effective progression for pupils who may move from local authority to local authority. We are in favour of a national entitlement to a subject called 'Religions and Beliefs' (or some such name) that will deal with religious and non-religious beliefs in a fair, objective and balanced manner and take the place of local determination.

We welcome the fact that the new guidance generally uses the language of 'religions and beliefs', which includes Humanism, and reflects the inclusive progress made in the government's Non-Statutory National Framework for RE (2004), the non-statutory programmes of study for RE at key stages 3 and 4 (2007) and the draft non-statutory area of learning for RE at the primary level (2009).

We also welcome the fact that the new guidance restates again the government's view that RE should entail, not a confessional induction into any one religion or belief, nor religion generally, but a genuinely educational study of religious and non-religious beliefs about questions of importance, in the process of which young people will develop their own responses to these questions. (But we continue to believe that the current primary legislation is not fit for this purpose.)

B: Humanism and Humanists – our concerns with the present guidance

The content of the curriculum

Although the educational arguments in favour of it are strong and have won broad acceptance, the inclusion of Humanism in RE remains vague and patchy. Although the word at least receives a mention in many syllabuses, the required teaching usually remains at a minimal level.

The present guidance is a crucial document for reinforcing the Government's commitment to a fully inclusive approach to RE in schools. A failure here to back up and build on what has been said in the Non-Statutory National Framework for RE, in the RE programmes of study for KS3-4 and the draft programmes of learning for the primary curriculum will undermine what those documents recommend.

The new guidance should explicitly state that the subject matter for RE is the principal religions and beliefs represented in Great Britain and that membership of the relevant group or committee on SACREs and ASCs respectively should be representative of the principal religious and belief traditions in the area. It should then define what is meant by 'belief' in this context. We set out below further details of how this should be done.

Eligibility of Humanists for full membership of SACREs and ASCs

As it stands, the new guidance appears to be recommending co-opted, non-voting membership of Standing Advisory Councils for RE (SACREs – the local committees that oversee RE) for humanists and no membership at all of Agreed Syllabus Conferences (ASCs – the local committees that set the RE syllabus). Given that, at the same time, government is recommending that Humanism be included in the syllabus, we believe that a prohibition on humanists being involved in deciding what will be said about them and their beliefs (when religious representatives are included) is a gross inequality.

When Circular 1/94 was issued, most humanists who had been full members of existing SACREs were demoted to non-voting, co-opted membership, if they were retained at all, and most of the new SACREs established had no humanist members. Only the two SACREs of Oxford and Westminster, in defiance of the guidance, chose to keep their humanists as full members of SACRE group A and ASC committee A.

In the years since 1994, some co-opted humanists have been chairs and vice chairs of SACREs and given distinguished service in the development of RE and the inclusion of all pupils. Where there have been SACREs of good will, the position of humanists has not been as bad in practice as circular 1/94 mandated in theory. The experience of other humanists, however, (and this is the case for most) has been that circular 1/94 makes SACREs and ASCs feel unable to appoint humanists as members of SACREs and ASCs, and gives cover to those who, for reasons of prejudice, do not wish to do so. Crucially, even where humanists have been able to be co-opted members of SACREs, they have still been prevented from being members of ASCs and so actually involved (as their religious colleagues are) in the writing of syllabuses. On other SACREs humanists have been made to feel unwelcome and present only on sufferance.

We are concerned that this situation will not be resolved by the draft guidance and that by stopping short of recommending full membership of SACREs and ASCs for humanists, it may actually reverse the progress made in some areas. Whereas Oxford and Westminster were the only SACREs we are aware of that chose to retain their humanists as full members in 1994, we are aware of at least seven further SACREs who have restored full group/committee A membership to humanists since 1998 – Brent, Suffolk, Portsmouth, Northumberland, Harrow, Ealing and Camden. In the case of Brent, Portsmouth, and Suffolk this was explicitly in light of the Human Rights Act and Equality Act 2006. If the new guidance fails to provide appropriate justification for the actions of these local authorities, we are concerned that the position of humanists on these SACREs may deteriorate again.

The new guidance should state explicitly that representatives of non-religious beliefs (worldviews or lifestyles) such as Humanism are equally eligible with those of religions for membership of the group or committee of SACREs and ASCs, so giving humanists the right to be full members alongside the religious representatives.

The law

Not only is this extension of the syllabus to include Humanism and of the membership of SACREs and ASCs to include humanists required on educational grounds: it is also what the

law demands. The present draft guidance fails to fulfil the DCSF's obligations under the Human Rights Act sections 3 and 6 and the Equality Act 2006 section 52.

The latter prohibits the DCSF from doing "any act which constitutes discrimination", and the exception at subsection 4(k) plainly does not apply to membership of SACREs and arguably not to the scope of the syllabus.

More particularly the Human Rights Act at section 6 prohibits the DCSF from "act[ing] in a way which is incompatible with a Convention right". By virtue of reading Article 9 with Article 14, this encompasses discrimination between religions and beliefs.

Moreover, section 3 positively requires that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." That this section needs to be given a wide and powerful interpretation has been underlined by the House of Lords (*Ghaidan v. Godin-Mendoza (FC)* [2004] UKHL 30)¹.

However, to bring the law on RE and on membership of SACREs and ASCs into compatibility with the European Convention on Human Rights requires no serious or violent re-interpretation of the legislation. If section 3 means anything at all, it must mean that discrimination between religious and non-religious worldviews or lifestyles should be eliminated by reading references to 'religions' in the present law on RE as references to 'religions or beliefs' in the new guidance.

In particular,

(a) in references to the content of RE, 'principal religions' must be read as 'principal religions or beliefs' so that Humanism is made very clearly a wholly legitimate worldview for study; and

(b) in references to membership of SACREs and ASCs, 'religions' must be read as 'religions or beliefs', giving humanists the right to be full members alongside the religious representatives.

Not only is such a reading of the law now required by the Human Rights Act – as, of course, it was not in 1994 – but it is wholly in line with the developing consensus in the Council of Europe, the OSCE and other international bodies to which the United Kingdom is committed. We refer, for example to the OSCE's *Toledo Guiding Principles* and the Council of Europe's Committee of Ministers recommendation CM/Rec (2008)12 and the fact that even the United Nation's Special Rapporteur on freedom of religion or belief has singled out the UK's discriminatory approach in RE as an issue of concern.

In Annex A we give further justification for our argument here and in Annex B we attach further advice on the question received from David Wolfe of Matrix.

¹ "Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation." (per Lord Nicholls of Birkenhead at para. 30)

C: Comments on the draft guidance

Preface

The fifth bullet point on this page is the first time that 'religion and belief' is used as a phrase, but it is not defined. It remains undefined throughout the guidance. Generally, the guidance uses the language of 'religions or beliefs', which is to be welcomed, but the guidance – unlike the draft primary RE area of learning and current secondary RE programme of study – never actually defines the phrase in the legal context from which it derives. We urge that it must be defined for its full inclusive force to be felt. The phrase is not so embedded in the public consciousness that it can be assumed they will take from it the meaning that is intended. A footnote is required, that will define this crucial phrase, as 'parents' is defined. We suggest:

In this document the phrase "religion or belief" is used in relation to the content of RE. This phrase is also used in the National Framework and in human rights and equalities laws to do with "religion or belief" such as the Human Rights Act 1998 and Equality Act 2006. It is a translation of the phrase used in the European Convention on Human Rights, which from German translates into English as 'worldview', from French as 'convictions' and from Dutch as 'lifestances'. "Belief" in this context includes non-religious philosophies, worldviews or lifestances such as Humanism. As defined in the (non-statutory) programme of study for RE in the new secondary curriculum, the phrase "religion or belief", "include(s) systems of thought that are religious and non-religious, theistic and non-theistic, Western and Eastern, Abrahamic and dharmic." Many agreed syllabus conference have chosen to incorporate this understanding of 'religions and beliefs' into their syllabuses.

1: Introduction

1.2.1

We very much agree that changes in legislation have a profound effect on RE and that all the Acts listed are relevant, but this paragraph gives no indication of what effect the legislation has had. Nor, extraordinarily, is there any further reference, implicit or explicit, to the effect of the new law in the guidance that follows. In fact, we contend that despite this reference to the Equality Act and the Human Rights Act, no account has been taken of their requirements in the draft guidance. We believe the effect of the legislation must be stated here, including the implications for the inclusion of Humanism in RE and humanists on SACREs and ASCs.

1.2.2

We fail to see the particular significance for RE of the second paragraph, to do with new VA schools and believe it should be removed.

In the third paragraph, PSHE education is a notable omission – particularly given the concurrent consultation on making PSHE statutory. PSHE education should certainly be

included in this paragraph, since the links between it and RE and their implications are just as evident as those between RE and Citizenship.

In the fourth paragraph, the duty to promote community cohesion and the new national curriculum are conflated. It would be better for these to have separate paragraphs. The relevance of the duty to promote community cohesion is not clear and we suggest the addition of 'which includes as one of its dimensions "religious and non-religious beliefs"' after 'community cohesion'.

1.2.3

Third line, first para: In the list 'religious, moral and social questions' we believe 'philosophical' should be added.

Fourth line, first para: 'religion on society' should be 'religions and beliefs on society'

Fifth line, first para: 'learning about a range of beliefs' should be 'learning about a range of religions and beliefs'

First line, second para: 'diversity of religion' should be 'diversity of religions and beliefs'

Second para generally: We do not believe the claim that the census 'confirmed that religion plays a role in the identities of many British people' can be supported because of the widely recognised inadequacy of the question in determining religious rather than cultural affiliation². Reliance on the census when many other polls and surveys give very different and more consistent data is untenable. Indeed, in the 2001 Home Office Citizenship Survey (March 2004), when the 10,015 respondents were asked "Which of the following [fifteen] things would say something important about you, if you were describing yourself?" and were allowed to name one or more factors in their responses (on average each person named four factors), only 20% of the sample named religion at all. (Home Office Research Study 274: Religion in England and Wales)

In addition, we object to the wording of 'others who identify themselves as being of no religious faith' and recommend a more positive wording of 'others who have non-religious beliefs'.

2: Religious Education – the legal framework

In this section generally, as stated above, we believe that references to religion in the primary legislation should be read as references to 'religion or belief' given the DCSF's obligations under the Human Rights Act, the government's international commitments.

Various changes should be made as a consequence of this, which we lay out below, as well as our additional comments.

2.3

As a consequence of the need for the guidance to be compatible with the HRA In the third line, 'religious tradition' should read 'religious or belief traditions.' In the fourth line, 'principal religions' should be 'principal religions and beliefs'. In the penultimate line, 'religious denomination' should be 'religious denomination or belief'.

² For example, in a paper on plans for the 2011 census the Office of National Statistics identifies the mere fact of having been christened or having been married in church as an adequate reason for answering "Christian" to the question "What is your religion?" – see "Information Paper: Recommended Questions for the 2009 Census Rehearsal and 2011 Census – Religion", March 2009.

Even if such a reading is not to be made, it should be acknowledged in this section that the syllabus will include study of non-religious beliefs such as Humanism in addition to religious ones and that nothing in the law prevents this. This could be neatly inserted after the third sentence, about defining principal religions. A suitable sentence would be: 'Likewise, the law does not prevent ASCs from including non-religious beliefs such as Humanism in agreed syllabuses and ASCs can decide to do so.'

2.4.2

The ordering of the statements in this paragraph is not logical and hence it is difficult to follow. The final sentence should logically come first, since it is the parents who have requested religious instruction who are the exception to the rule. The last sentence of this section should be deleted and a new second sentence inserted: 'Ordinarily, RE is to be provided in accordance with the locally agreed syllabus.'

2.6

This section states: 'The syllabus is arrived at as a result of local teachers, members of different religions and beliefs and representatives of the LA working together on SACREs and ASCs.' First, SACREs do not have a role in deciding the syllabus. Second, if in the Act the term 'religion' is being read as excluding belief systems such as Humanism then who are the "members of beliefs" (as distinct from those of religions) here referred to as members of ASCs? It cannot be humanists for there is no mechanism for them to be members. If, on the other hand, the intention is that humanists could be members of an ASC, then the term 'religion' in the Act is here being construed to include Humanism. The present draft is unclear.

The third paragraph in this section states that the dual system is 'at the heart' of the school system. We believe such comments are out of place in guidance on RE. It is repetitive of information given under 2.4.2 and 2.4.3 and is contentious. It includes a statement from religious people agreeing to teach about 'other faiths', which is exclusive of non-religious beliefs. We strongly object to this paragraph.

'Case Study – A Large LA'

We agree with many other stakeholders that this case study is highly objectionable. It describes a quasi-confessional approach to RE that is totally out of place in community schools. It also endorses an inequality of groups on SACREs which is totally out of keeping with the guidance's own praise of the 'partnership' involved in RE and quite counter to the law. It is an example of *bad* practice that, if it were emulated, would greatly damage RE in English schools. If RE were to be organised in practice as this case study suggests, it would realise the worst fears of those who see RE as religious instruction.

3: The importance of Religious Education

3.1

This paragraph is generally welcome. We strongly support and welcome the third sentence: 'RE should be taught in an objective and pluralistic manner, and not as indoctrination into a particular faith or belief' although for consistency this should read 'religion or belief'; we would also add: 'nor a category of religions or beliefs e.g. atheistic over theistic, Abrahamic over dharmic, religious over non-religious'. In the penultimate sentence, 'religion and belief' should be plural: 'religions and beliefs'.

3.2

Spiritual development

The word 'God' is used in the first paragraph but this is an unduly theistic and monotheistic way of phrasing the points being made here. Because this paragraph is concerned with spiritual development – an area where it is especially important to be open – we believe a change should be made to both 'beliefs about God' in the second sentence and 'and with God' in the penultimate sentence. We would recommend something like 'God, gods, or other transcendent principles'. To give the impression that RE today is approached through a Christian – or even monotheistic – filter, rather than being open, is wrong.

In the last sentence of the first paragraph, 'views and ideas on religious and spiritual issues' should either be extended to include 'belief' or (better) reduced to 'views on and ideas about spiritual issues' – that is after all what this paragraph is about.

Moral development

The third sentence of the second paragraph includes the phrase 'studying the key beliefs and teachings from religion about a range of ethical issues' but this use of 'beliefs' is confusing in the context of usage in the wider document and the phrase also excludes non-religious beliefs. We recommend 'studying perspectives from a range of religions and beliefs on a range of ethical issues.'

Social development

In the first sentence, the phrase 'investigating social issues from religious perspectives' is not inclusive. We recommend 'investigating social issues from the perspectives of religions and beliefs.'

Cultural development

In the second sentence, 'religion and cultures' should be 'religions and beliefs and cultures.'

3.3

In the penultimate sentence on page 13 of the draft guidance, we recommend 'philosophical' should be added to the list after 'religious'.

In the first sentence at the top of page 14 of the draft guidance, we recommend 'evaluating beliefs and religious practice' should read 'beliefs and practices.'

The *Every Child Matters* box on this page is excellent.

3.4

In the first sentence of the second paragraph, 'religion and belief' should be 'religions and beliefs'.

The text on pages 14 and 15 is generally inclusive and we welcome it, but it makes the exclusivity of the box on page 15 which quotes from a very discriminatory and controversial DCLG document, 'Face to Face and Side by Side' all the more noticeable. We strongly object to the inclusion of this extract, not only because it demonstrates total ignorance of the educational imperative for including non-religious beliefs in RE and excludes the non-religious (who are a large majority of young people as well as a substantial minority of the population as a whole), but because it recommends a role for SACREs that goes well beyond their statutory role and is therefore entirely undesirable as a statement of DCSF policy.

On pages 16 and 17, the text becomes regrettably less inclusive. We realise that this may be because it is only religions that are actually being observed in the school practice recorded here, but that does not mean that the terminology we use in the guidance has to be similarly exclusive.

In the text box on page 16:

The first bullet point says 'misrepresentations of religion' but should say 'religions and beliefs'

The second bullet point says 'religious communities' but should say 'religious communities or belief groups'

The third bullet point says 'faith or belief' but should say 'religion or belief'

The fourth bullet point says 'diversity (sic) religion and belief' but should say 'diversity of religions and beliefs'

Outside the text box on pages 16 and 17:

In the second bullet point 'religious and cultural diversity' should be 'the diversity of cultures and religions or beliefs' (thus reflecting DCSF guidance on Community Cohesion).

The third bullet point is highly problematic as it assumes that all pupils will have a 'tradition' – a concept left undefined. The phrase 'within their own tradition' is presumptuous and pedagogically controversial and should be omitted.

In the penultimate bullet point 'cultural and religious diversity' should be 'the diversity of cultures and religions or beliefs' (thus reflecting DCSF guidance on Community Cohesion)

4: The non-statutory National Framework for RE

We support the national framework of 2004 as having represented great progress in RE. However, we regret that the 'evolved framework' of the new secondary and draft primary curricula is not referenced and quoted in this section of the guidance. That repackaging of the framework has consensus and will become increasingly well known to the audience for this guidance so we do not believe an opportunity to reference them and make them better known should be lost.

We acknowledge that the Framework, as is said on page 18 of the guidance, 'represent[ed] an agreement on RE between all the major faith and belief communities and RE professional bodies in England' in 2004 but an expectation exists now as then that it will one day be

reviewed once more (it is now five years old). In light of that, we do believe that reference to the evolved framework, and quotation from it would be of value.

4.2

In the second sentence, 'faith schools' gives the false impression that all schools with a religious character may determine their own RE, contrary to earlier statements of the law. This should be amended. We recommend 'faith schools' be replaced with 'schools where the syllabus is drawn up under different mechanisms' or 'voluntary aided schools with a religious character.'

We find a statement from 'Faith in the System' in the context of a section on the national framework totally out of place. Why quote from a contentious document such as 'Faith in the System', which does not have consensus in the RE community, in a section about a more inclusive document which does? We believe that at least the first quote ('The Government...other faiths.') should be removed, containing as it does unwarranted and discriminatory assumptions about the religion or belief of pupils who may attend maintained schools with a religious character.

In the fifth bullet point 'religions and belief' should be 'religions and beliefs'

In the sixth bullet point 'Decisions about the religions to be studied should take account of the balance of religion within:' should be 'Decisions about the religions or beliefs to be studied should take account of the balance of religions and beliefs within:'

On page 20 using extracts from the evolved framework in the secondary curriculum and draft primary curriculum would be better than an extract from the National Framework.

5: What SACREs and local authorities need to know

In this section generally, we believe that references to religion in the primary legislation should be read as references to 'religion or belief' given the DCSF's obligations under the Human Rights Act, the government's international commitments (for example to the OSCE's *Toledo Guiding Principles* and the Council of Europe's Committee of Ministers recommendation CM/Rec (2008)12) and the fact that even the United Nation's Special Rapporteur on freedom of religion or belief has singled out the UK's discriminatory approach in RE (and especially in ASCs) as an issue of concern.

Various changes should be made as a consequence of this, which we lay out below, as well as our additional comments.

If this is not to be done, then we recommend at the very least the addition of case studies specifically catering for the wide variety of ways in which humanists are and have been included in practice.

5.1

In the second sentence, we recommend that ‘belief groups’ should be ‘non-religious belief groups’.

5.2

As a consequence of the need for the guidance to be compatible with the HRA, we recommend that:

In the first bullet point ‘other religions and religious denominations’ should be ‘other religions, religious denominations, and beliefs’;

In the fourth bullet point ‘religious traditions’ should be ‘religious or belief traditions’.

We welcome the inclusive wording of the fifth bullet point.

5.3

5.3.1

In the final paragraph, we recommend that ‘inter-religious bodies’ should be ‘inter-religious and –belief bodies’ or ‘bodies that bring together people of different religions and beliefs for dialogue’. This is not just for the sake of inclusive terminology – it is the case that there are relevant bodies bringing together people of religions and beliefs, not just of religions, and these should not be excluded. We also recommend that ‘combating of religious prejudice and discrimination’ should be ‘combating of prejudice and discrimination based on religion or belief’ – this is the correct terminology in anti-discrimination law as well as in principle.

5.3.2

We welcome this paragraph for its inclusive intent and wording.

In the last sentence on page 25, ‘inter-religious dialogue’ should be ‘dialogue between people of different religions or beliefs.’

The case study on page 26 is not what we would consider an instance of good practice in that it is entirely exclusive of those with non-religious beliefs. We recommend either that an inclusive case study is sourced or that the five uses of ‘faith’ in the text should become ‘religion or belief.’

5.4

We wish to object in the strongest possible terms that, under this section of the guidance, no humanist may be a member of an ASC as a humanist. This creates a palpable inequality between religious representatives, who have the right to a full say in how their religion is treated in an agreed syllabus, and humanist representatives, whose beliefs may be studied (and it is recommended by the guidance that they are) but who will have no right to a say in how those beliefs are treated.

5.4.2

As a consequence of the need for the guidance to be compatible with the HRA, we recommend that 'other religions and religious denominations' should be 'other religions, religious denominations, and beliefs'

5.4.3

In the case study on page 29, we welcome the reference to Humanism.

In the penultimate sentence of the case study, 'religion and belief' should be 'religions and beliefs'.

In the final sentence, 'study of religion and belief' should be 'study of religions and beliefs'

6: What School Governors and head teachers need to know

6.2

In the fourth bullet point, 'religion and belief' would be better as 'religions and beliefs' but in fact we recommend it should be 'religious and non-religious beliefs' so as to be more compatible with the DCSF's guidance on community cohesion.

6.3

In the last sentence of the first paragraph, the use of 'beliefs' should be 'religion or belief' as otherwise it is not clear what beliefs are being taught about and is a confusing use of 'belief' in a context different from the rest of the document.

The first sentence of the third paragraph says 'In certain schools with a religious character there *must* be...' We do not accept this and believe this sentence should begin 'In certain schools with a religious character there *may* be...'

7: What those who manage, plan, teach and support RE need to know

We generally welcome this section and particularly the content of 7.1 and 7.2. Our few comments which follow mostly relate to inclusion of those with non-religious beliefs.

7.3

In the first bullet point on page 35 'religion' should be 'religions and beliefs'

In the second bullet point 'religion' should be 'religions and beliefs'

7.4

In the penultimate sentence, 'religion and ethics' should be 'religions and beliefs and ethics'

7.5.1

We believe the heading of this section should be 'Members of religions or belief organisations' (or 'groups') not 'Faith and belief communities'. Not all religious or belief groups would describe themselves as communities, and the use of 'faith' introduces an inconsistency into the document.

In the second sentence of the first paragraph, 'faith and belief representatives' should be 'representatives of religions or beliefs', both for consistency and accuracy.

In the final sentence of the first paragraph 'inter-religious' should be 'inter-religious or -belief' or 'dialogue between people of different religions and beliefs.'

In the second sentence of the third paragraph, 'religious or belief tradition' should be 'religion or belief.'

In the final sentence of the third paragraph, 'community members' should be 'members of religions and belief organisations' (or 'groups') and 'their own community' should be 'members of their own religion or belief organisation' both for consistency and accuracy.

7.5.4

'All major faith communities and professional RE associations' should be 'All major religions and belief organisations and professional RE associations'.

10: For further reference

We believe that the Toledo Principles should form a section by themselves, and the current section 10 become section 11. They are remarkably useful and should be more prominent in the document as a whole.

We believe the National Framework should be the first document referenced, owing to its particular significance.

We believe that the secondary national curriculum non-statutory programme of study for RE and the primary national curriculum programme of learning for RE should be given for further reference.

We do not believe that circular 1/94 should be given for further reference or, if it is, then only those portions which are to remain extant should be referenced. It should certainly not appear first in the list given that one of the main rationales for the present draft guidance is to replace that document.

We do not believe 'Face to Face and Side by Side' and 'Faith in the System' should be referenced as we regard them as contentious and unhelpful.

ANNEX A

a. Human Rights Act 1998

Section 3 of the HRA requires that legislation written before it was adopted should be interpreted to meet its requirements; ‘so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. We believe that this means that the DCSF can read references to ‘religions’ in the Education Act 1996 as references to ‘religions and beliefs’.

Section 6 makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right” which – taken with Articles 9 and 14 – arguably applies in the same way as the Equality Act section 52 (below).

b. Equality Act 2006

Section 52 (‘Public authorities: general’) of the Equality Act 2006 says:

- (1) It is unlawful for a public authority exercising a function to do any act which constitutes discrimination.
- (2) In subsection (1)—
 - (a) “public authority” includes any person who has functions of a public nature (subject to subsections (3) and (4)), and
 - (b) “function” means function of a public nature.

As we read it, ‘discrimination’ in section 52 refers to the definition of ‘discrimination’ given in section 45 (‘Discrimination’):

- (1) A person (“A”) discriminates against another (“B”) for the purposes of this Part if on grounds of the religion or belief of B or of any other person except A (whether or not it is also A’s religion or belief) A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).
- (2) In subsection (1) a reference to a person’s religion or belief includes a reference to a religion or belief to which he is thought to belong or subscribe.
- (3) A person (“A”) discriminates against another (“B”) for the purposes of this Part if A applies to B a provision, criterion or practice—
 - (a) which he applies or would apply equally to persons not of B’s religion or belief,
 - (b) which puts persons of B’s religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),
 - (c) which puts B at a disadvantage compared to some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances), and

(d) which A cannot reasonably justify by reference to matters other than B's religion or belief.

Section 44 makes it clear that Humanism is covered:

In this Part—

- (a) “religion” means any religion,
- (b) “belief” means any religious or philosophical belief,
- (c) a reference to religion includes a reference to lack of religion, and
- (d) a reference to belief includes a reference to lack of belief.

It is true that section 52 also provides that:

- (4) The prohibition in subsection (1) shall not apply to—
 - ...(k) action in relation to—
 - (i) the curriculum of an educational institution...

But we would argue that the section on membership of SACREs at least is not about the curriculum & arguably none of the guidance is *per se*.

Section 66 of the Act (‘Claim of unlawful action’) reads:

(1) A claim that a person has done anything that is unlawful by virtue of this Part may be brought in a county court (in England and Wales) or in the sheriff court (in Scotland) by way of proceedings in tort (or reparation) for breach of statutory duty.

...

(4) In subsection (1) the reference to a claim that a person has done an unlawful act includes a reference to a claim that a person is to be treated by virtue of this Part as having done an unlawful act.

(5) In proceedings under this section, if the claimant (or pursuer) proves facts from which the court could conclude, in the absence of a reasonable alternative explanation, that an act which is unlawful by virtue of this Part has been committed, the court shall assume that the act was unlawful unless the respondent (or defender) proves that it was not.

We believe that the Equality Act 2006 may therefore be used in action over the draft guidance.

c. UN Special Rapporteur on freedom of religion or belief on RE in the UK

The UN Special Rapporteur on freedom of religion or belief in her 2008 report on the UK (A/HRC/7/10/Add.3) made a recommendation to the UK authorities in light of the current discriminatory situation for humanists (emphasis added):

69. With regard to religious education, the authorities should pay specific attention to the contents of syllabuses in publicly funded schools. **Furthermore, a non-discriminatory membership of relevant committees preparing such syllabuses**

seems vital to adequately represent the various theistic, non-theistic and atheistic approaches. The Final Document of the International Consultative Conference on School Education in Relation to Freedom of Religion or Belief, Tolerance and Non-Discrimination deemed that each State should promote and respect educational policies aimed at strengthening the promotion and protection of human rights, ensuring respect for and acceptance of pluralism and diversity in the field of religion or belief as well as the right not to receive religious instruction inconsistent with his or her conviction (E/CN.4/2002/73, appendix, para. 4). Most recently, the Office for Democratic Institutions and Human Rights (ODIHR-OSCE) Advisory Council of Experts on Freedom of Religion or Belief has prepared the “Toledo Guiding Principles on teaching about religions and beliefs in public schools” which may provide further useful guidance in this regard.

d. ODIHR Advisory Council of Experts on Freedom of Religion or Belief on the drawing up of curricula to do with religions and beliefs

Toledo Guiding Principles on teaching about religions and beliefs in public schools (2007), the ODIHR-OSCE document to which the Special Rapporteur refers, among its other recommendations to OSCE participating states (which, of course, includes the UK) recommended that they should:

4. Assess the process that leads to the development of curricula on teaching about religions and beliefs to make sure that this process is sensitive to the needs of various religious and belief communities and that all relevant stakeholders have an opportunity to have their voices heard.

And included amongst the guiding principles themselves were (emphasis added):

4. Efforts should be made to establish **advisory bodies at different levels that take an inclusive approach to involving different stakeholders in the preparation and implementation of curricula** and in the training of teachers.

7. **Preparation of curricula, textbooks and educational materials for teaching about religions and beliefs should take into account religious and non-religious views in a way that is inclusive, fair, and respectful.** Care should be taken to avoid inaccurate or prejudicial material, particularly when this reinforces negative stereotypes.

8. Curricula should be developed in accordance with recognized professional standards in order to ensure a balanced approach to study about religions and beliefs. **Development and implementation of curricula should also include open and fair procedures that give all interested parties appropriate opportunities to offer comments and advice.**

It is made clear that this advice is to deal with very real discrimination (pp.41-2):

Curricula should be sensitive to different local manifestations of religious and secular plurality found in schools and the communities they serve. Such sensitivities will help

address the concerns of students, parents and other stakeholders in education, especially with regard to a fair and balanced coverage of different religions and philosophies. The negative impact on the self-esteem and sense of belonging of students who feel excluded has been well documented. Parents who feel that their (religious) beliefs are not respected in the school and school curriculum are also less likely to feel a sense of engagement with the learning that takes place in the schools their children attend. An impartial and inclusive approach should therefore be reflected in the general policy and outlook of the school as well as throughout the curriculum.

e. OSCE/ODIHR Guidelines for Review of Legislation Pertaining to Religion or Belief, (Warsaw, ODIHR, 2004)

On page 20 of the *Toledo Principles*, it is said that:

belief refers to deeply held conscientious convictions that are fundamental about the human condition and the world. See the working definition given in OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief, *Guidelines for Review of Legislation Pertaining to Religion or Belief*, (Warsaw, ODIHR, 2004)

These guidelines state (p.8):

International standards do not speak of religion in an isolated sense, but of “religion or belief.” The “belief” aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as religious beliefs. It is very common for legislation not to protect adequately (or to not refer at *all* to) rights of non-believers. Although not all beliefs are entitled to equal protection, legislation should be reviewed for discrimination against non-believers.

f. Concluding Document of the Vienna Meeting 1989 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe

This sets out a number of key principles concerning the enjoyment of the freedom of religion and belief, these being that:

(16) In order to ensure the freedom of the individual to profess and practise religion or belief, the participating States will, *inter alia*,

(16.1) – **take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and to ensure the effective equality between believers and non-believers;**

(16.2) – foster a climate of mutual tolerance and respect between believers of different communities **as well as between believers and non-believers;**

g. Final Document of the International Consultative Conference on School Education in Relation to Freedom of Religion or Belief, Tolerance and Non-Discrimination

Recommended for the attention of the UK government by the UN Special Rapporteur as above. In this document, the conference (emphasis added):

4. Deems that each State, at the appropriate level of government, should **promote and respect educational policies aimed at strengthening the promotion and protection of human rights, eradicating prejudices and conceptions incompatible with freedom of religion or belief, and ensuring respect for and acceptance of pluralism and diversity in the field of religion or belief** as well as the right not to receive religious instruction inconsistent with his or her conviction;

6. **Condemns all forms of intolerance and discrimination based on religion or belief** including those which promote hatred, racism or xenophobia, and **deems that States should take appropriate measures against those which manifest themselves in school curricula, textbooks and teaching methods** as well as those disseminated by the media and the new information technologies, including Internet;

7. Considers favourably the following objectives:

(a) The **strengthening of a non-discriminatory perspective in education and of knowledge in relation to freedom of religion or belief** at the appropriate levels;

(b) The **encouragement of those engaged in teaching to cultivate respect for religions or beliefs**, thereby promoting mutual understanding and tolerance;

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

In this recommendation, the Committee of Ministers:

1. Recommends that the governments of member states, with due regard for their constitutional structures, national or local situations and educational system:

a. draw on the principles set out in the appendix to this recommendation in their current or future educational reforms;

...

Appendix to Recommendation CM/Rec(2008)12

1. The recommendation's aim is to ensure taking into account the dimension of religions and non-religious convictions within intercultural education as a contribution to strengthen human rights, democratic citizenship and participation, and to the development of competences for intercultural dialogue, at the following levels:

– education policies, in the form of clear-cut education principles and objectives;

...

3. Religious and non religious convictions are diverse and complex phenomena; they are not monolithic. In addition, people hold religious and non-religious convictions to varying degrees, and for different reasons; for some such convictions are central and may be a matter of choice, for others they are subsidiary and may be a matter of historical circumstances. **The dimension of religions and non-religious convictions within intercultural education should therefore reflect such diversity and complexity at a local, regional and international level.**

Principles for taking the dimension of religions and non-religious convictions into account in the framework of intercultural education

4. The following principles should form the basis and define the perspective from which religions and non-religious convictions have to be taken into account in a framework of intercultural education:

- the principle of the freedom of conscience and of thought includes the freedom to have a religion or not to have one, and the freedom to practice one's religion, to give it up or to change it if one so wishes;
- agreement that religions and non-religious convictions are at least “cultural facts” that contribute, along with other elements such as language and historical and cultural traditions to social and individual life;
- information on and knowledge of religions and non-religious convictions which influence the behaviour of individuals in public life should be taught in order to develop tolerance as well as mutual understanding and trust;
- religions and non-religious convictions develop on the basis of individual learning and experience, and are not entirely predefined by one’s family or community;
- an interdisciplinary approach to education in religious, moral and civic values should be encouraged in order to develop sensitivity to human rights (including gender equality), peace, democratic citizenship, dialogue and solidarity;
- intercultural dialogue and its **religious and non-religious convictions dimension are an essential precondition for the development of tolerance and a culture of “living together”, as well as for the recognition of our different identities on the basis of human rights;**
- the manner in which the dimension of religious and non-religious convictions within intercultural education is introduced in practice could take into account the age and maturity of pupils to whom it is addressed as well as the already existing best practices of the respective member states.

Objectives of an intercultural approach concerning the religious and non-religious convictions dimension in education

5. Education should develop intercultural competences through:

– developing a tolerant attitude and respect for the right to hold a particular belief, attitudes based on the recognition of the inherent dignity and fundamental freedoms of each human being;

– **nurturing a sensitivity to the diversity of religions and non-religious convictions** as an element contributing to the richness of Europe;

– ensuring that **teaching about the diversity of religions and non-religious convictions is consistent with the aims of education for democratic citizenship, human rights and respect for equal dignity of all individuals;**

– promoting communication and dialogue between people from different cultural, **religious and non-religious backgrounds;**

...

– providing opportunity to create spaces for intercultural dialogue in order to prevent religious or cultural divides;

...

– addressing the sensitive or controversial issues to which the **diversity of religions and non-religious convictions** may give rise;

– developing skills of critical evaluation and reflection with regard to **understanding the perspectives and ways of life of different religions and non-religious convictions;**

– combating prejudice and stereotypes vis-à-vis difference which are barriers to intercultural dialogue, and educating in respect for equal dignity of all individuals;

– fostering an ability to analyse and interpret impartially the many varied items of information relating to the **diversity of religions and non-religious convictions**, without prejudice to the need to respect pupils' religious or non-religious convictions and without prejudice to the religious education given outside the public education sphere.

Requirements for dealing with the diversity of religions and non-religious convictions in an educational context

6. The following attitudes should be promoted in order to remove obstacles that prevent a proper treatment of the diversity of religions and non-religious convictions in an educational context:

– recognising **the place of religions and non-religious convictions in the public sphere and at school as topic for discussion and reflection;**

...

- recognising that **different religions and humanistic traditions** have deeply influenced Europe and continue to do so;
- promoting a balanced approach of the presentation of the role of religions and other convictions in history and cultural heritage;
- accepting that religions and non-religious convictions are often an important part of individual identity;

...

- **overcoming prejudices and stereotypes concerning religions and non-religious convictions**, especially the practices of minority groups and immigrants, in order to contribute to the development of societies based on solidarity.

Teaching aspects of an intercultural approach to religions and non-religious convictions in education

7. In order to encourage consideration of **the diversity of religions and non-religious convictions in the educational context**, and to promote intercultural dialogue, the following educational preconditions and learning methods can be seen as highly appropriate examples:

...

7.2 Various learning methods

...

- the development of appropriate pedagogical approaches such as:
- a phenomenological approach aimed at cultivating a **knowledge and understanding of religions and non-religious convictions as well as respect for other persons irrespectively of their religious and non-religious convictions**;
- an interpretative approach which encourages a flexible understanding of **religions and non-religious convictions** and avoids placing them in a rigid pre-defined framework;

ANNEX B

Re: Proposed guidance on SACRE membership and on the RE curriculum

ADVICE TO THE BHA

1. Section 375 of the Education Act 1996 provides that agreed syllabuses of religious education

“...shall 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.”

2. Section 390(4) of the Education Act 1996 sets out the eligibility for membership of the SACRE:

“The representative groups required by this subsection are—

(a) a group of persons to represent such Christian denominations and other religions and denominations of such religions as, in the opinion of the authority, will appropriately reflect the principal religious traditions in the area;
...”

3. Schedule 31, para 4 of the Education Act 1996 provides that:

“(1) A conference convened under this Schedule shall consist of such groups of persons (“committees”) appointed by the local education authority which convenes the conference as are required by sub-paragraph (2).

(2) Those committees are—

(a) a committee of persons representing such Christian denominations and other religions and denominations of such religions as, in the opinion of the authority, will appropriately reflect the principal religious traditions in the area;

...”

4. The DCSF is currently consulting on non-statutory guidance relating to those matters including guidance on the exercise of the statutory functions in play (including thus the functions of producing the curriculum and of identifying members of the bodies in play).

5. It is well established that such guidance needs to get the law right and is amenable to judicial review if and insofar as it gets the law wrong. See thus Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112 per Lord Bridge of Harwich at pp 192-193.
6. In deciding whether the proposed guidance gets the law right here we are thus concerned (1) to construe the meaning of the term “religion” and (2) to consider what is required for the statutory functions in play (the function of producing the guidance and of identifying members of the bodies in play) to be lawfully exercised.
7. The Secretary of State must also, of course, act lawfully in the making of the guidance itself.

8. By section 3(1) of the Human Rights Act 1998 (page 235):

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

9. By section 6(1) of the Human Rights Act 1998 (page 235-236):

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”

As above, that here bites on the Secretary of State in the exercise of the power to make the guidance, and must thus (and in any event) be properly reflected in the guidance on how the functions in question are themselves to be discharged.

10. By Article 9 ECHR (page 239):

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

11. By Article 2 of Protocol 1 ECHR (page 241):

“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.”

12. In Williamson –v- Secretary of State [2005] AC 246 (which concerned the use of corporal punishment in schools in the name of religion) Lord Nicholls referred to the “the difficult question of the criteria to be applied in deciding whether a belief is to be characterised as religious” (paragraph 24) thus:

This question will seldom, if ever, arise under the European Convention. ... Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under article 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs. Article 9 is apt, therefore, to include a belief such as pacifism: *Arrowsmith v United Kingdom* (1978) 3 EHRR 218. The position is much the same with regard to the respect guaranteed to a parent's "religious and philosophical convictions" under article 2 of the First Protocol: see *Campbell and Cosans v United Kingdom* 4 EHRR 293. [underlining added]

13. At paragraph 54, Lord Walker said this:

“In his written and oral submissions Mr Dingemans (for the appellants) devoted quite a lot of time to the meaning of "religion" in article 9. In my opinion it is certainly not necessary, and is probably not useful, for your Lordships to try to reach a precise definition. Courts in different jurisdictions have on several occasions had to attempt the task, often in the context of exemptions or reliefs from rates and taxes, and have almost always remarked on its difficulty. Two illuminating cases are the decisions of Dillon J in *re South Place Ethical Society* [1980] 1 WLR 1565 and that of the High Court of Australia in *Church of the New Faith v Comr of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120, both of which contain valuable reviews of earlier authority. The trend of authority (unsurprisingly in an age of increasingly multicultural societies and increasing respect for human rights) is towards a "newer, more expansive, reading" of religion (Wilson and Deane JJ in the *Church of the New Faith* case at p 174, commenting on a similar trend in United States jurisprudence).” [underlining added]

14. In paragraph 54, he then said this:

“There are two reasons why it is unnecessary for the House to grapple with the definition of religion. One is that article 9 protects, not just the forum internum of religious belief, but "freedom of thought, conscience and religion". This is coupled with the individual's (qualified) freedom "to manifest his religion or belief, in worship, teaching, practice and observance". Similarly article 2 of the First Protocol refers not just to religious beliefs but to "religious and philosophical convictions". Plainly these expressions cover a

wider field than even the most expansive notion of religion. Pacifism, vegetarianism and total abstinence from alcohol are uncontroversial examples of beliefs which would fall within article 9 (of course pacifism or any comparable belief may be based on religious convictions, but equally it may be based on ethical convictions which are not religious but humanist:)” [underlining added]

15. In Folgero –v- Norway 29 June 2007 (Application No 15472/02) the ECtHR (Grand Chamber) set out general principles as to the interpretation of Article 2 of Protocol 1, thus (paragraph 84):

“As to the general interpretation of Article 2 of Protocol No. 1, the Court has in its case-law (see, in particular, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, pp. 24-28, §§ 50 to 54; *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, pp. 16-18, §§ 36-37; and *Valsamis v. Greece*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2323-24, §§ 25-28) enounced the following major principles:

(a) The two sentences of Article 2 of Protocol No. 1 must be interpreted not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, p. 26, § 52).

(b) It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching. The second sentence of Article 2 of Protocol No. 1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the “democratic society” as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, pp. 24-25, § 50).

(c) Article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, p. 25, §51). That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the “functions” assumed by the State. The verb “respect” means more than “acknowledge” or “take into account”. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term “conviction”, taken on its own, is not synonymous with the words “opinions” and “ideas”. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see *Valsamis*, cited above, pp. 2323-24, §§ 25 and 27, and *Campbell and Cosans*, cited above, pp. 16-17, §§ 36-37).

...

(e) It is in the discharge of a natural duty towards their children - parents being primarily responsible for the “education and teaching” of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education (ibid.).

(f) Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Valsamis*, cited above, p. 2324, § 27).

(g) However, the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era (see *Valsamis*, cited above, p. 2324, § 28). In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, p. 26, § 53).

(h) The second sentence of Article 2 of Protocol No. 1 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded (ibid.).

....” [underlining added]

16. In Zengin –v- Turkey 9 January 2008 (Application No 1448/04), the ECtHR reiterated those points and then said this:

“54. The Court reiterates that it has always stressed that, in a pluralist democratic society, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, judgment of 26 September 1996, *Reports* 1996-IV, p. 1365, § 47, and *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI). Further, the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership (see *Serif v. Greece*, no. 38178/97, § 51, ECHR 1999-IX).

55. Such an interpretation of the second sentence of Article 2 of Protocol No. 1 is consistent at one and the same time with the first sentence of the same provision, with Articles 8 to 10 of the Convention and with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 53). This is particularly true in that teaching is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils as well as their personal independence.” [underlining added]

17. Article 14 ECHR provides that (page 240):

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

18. As for the discrimination in play, in DH –v- The Czech Republic (Application 57325/00 13 November 2007), the Grand Chamber observed (paragraph 175) that:

“The Court has established in its case-law that [Article 14] discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations”

19. As for discrimination on the grounds of religious status, Lord Walker said this in Carson –v- Work and Pensions Secretary [2006] 1 AC 173

57 ... Where there is an allegation that article 14 has been infringed by discrimination on one of the most sensitive grounds, severe scrutiny is called for. As my noble and learned friend, Lord Nicholls of Birkenhead, put it in Ghaidan v Godin-Mendoza [2004] 2 AC 557, 568, para 19:

"where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified."

58 In its judgments the European Court of Human Rights often refers to "very weighty reasons" being required to justify discrimination on these particularly sensitive grounds. This appears, for instance (in relation to cases of discrimination on the ground of sex) in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, 501, para 78; *Schmidt v Germany* (1994) 18 EHRR 513, 527, para 24; *Van Raalte v The Netherlands* (1997) 24 EHRR 503, 518-519, para 39. When Harris, O'Boyle and Warbrick's valuable work, *Law of the European Convention on Human Rights*, was published in 1995, the authors recognised that the Strasbourg court had its own suspect categories, identifying them as discrimination on the grounds of race, gender or illegitimacy. Since then religion, nationality and sexual orientation have, it seems, been added: see *Jacobs & White, European Law of Human Rights*, 3rd ed (2002), pp 355-356, citing *Hoffmann v Austria* (1993) 17 EHRR 293, 316, para 36; *Gayqusuz v Austria* (1996) 23 EHRR 364, 381, para 42 and *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 1055, 1071, para 36." [underlining added]

20. In particular, in Hoffmann –v- Austria (1993) 17 EHRR 293, the ECtHR held that the decision of the Austrian court to award parental rights to a mother (a Jehovah's witness) rather than a father (a Catholic) was a breach of Article 14 ECHR (in conjunction with Article 8 ECHR) holding that:

"Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."

21. Putting those things together, my clear conclusion is that consistent with, among other things, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs, the Secretary of State must exercise the power of making guidance in a way which secures, and in any event produce guidance which itself correctly states, that (1) the word "religion" in the statutory provisions in play should be understood as meaning "religion or belief" (including, therefore, humanist beliefs), and (2) the functions in play should be exercised so that the RE curriculum and membership of the committees in play proceed on that wider understanding. The present draft guidance does not do those things.

David Wolfe

MATRIX

23 July 2009