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Vickers, L (2009) Religion and belief discrimination and the employment of teachers in faith schools . *Religion and human rights*, 4 (2-3). pp. 137-156.

DOI: 10.1163/187103109X12459002443655

This version is available: <http://radar.brookes.ac.uk/radar/items/ec96987d-d52e-1205-73fc-c4252e68878e/1/>
Available in the RADAR: 31st January 2012

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Religion and Belief Discrimination and the Employment of Teachers in Faith Schools

Lucy Vickers¹

Abstract:

This article considers the extent to which the right to freedom of religion of teachers is adequately protected in English schools under the Employment Equality (Religion and Belief) Regulations 2003 and the Schools Standards and Framework Act 1998. It first considers the context in which religious schools operate, then considers the legislation that protects the religious freedom of teaching and non-teaching staff in state schools. It concludes that the legislative framework provides inadequate protection for the right of teachers to enjoy freedom of religion and belief, and, further, that the protection may not comply with EU standards protecting employees against religious discrimination.

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The British state school system contains a very large number of schools with a religious ethos. The continued and growing profile of faith schools in the sector raises a number of issues relating to the role of religion in our society, which have been widely debated in the media,² in particular the way in which religion can affect the admission of pupils. September 2008 saw the launch of *Accord*, a

¹ Oxford Brookes University, Professor of Law.

² Polly Curtis 'Big rise in parental complaints about school admissions' *The Guardian* 3 November 2008.

coalition of organisations working to end the special treatment of religion in schools in terms of admissions, syllabus and the employment terms of teachers.³

This issue has received less attention than questions about admissions to faith schools but it remains very important, particularly when viewed as a matter relevant to the human rights of staff. The status of a school as a faith school has the potential to effect the freedom of staff to exercise the right to freedom of religion and belief, and it is this which is the focus of what follows. First, the legislation that protects the religious freedom of teaching and non-teaching staff in state schools is examined, and then an assessment is made of the extent to which the legislation provides adequate protection for teachers' human right to freedom of religion and belief. The interests of staff with and without a religious faith are considered.

Before assessing the current law a number of contextual issues will be considered in Section I, such as the make up of state schools, the history of religious ethos schooling and the current trend towards greater involvement of religious organizations in the provision of state education. The focus is on the state or 'maintained' sector for two reasons: first because the state has a special role in promoting equality and human rights, and protecting against discrimination; and second, because the state sector educates 93% of the school population in England,⁴ and so most teachers spend their careers within the state sector. The

³ See the website of Accord, at <http://www.accordcoalition.org.uk/> accessed 12 December 08. See also Philip Petchey, 'Legal issues for faith schools in England and Wales' (2008) *Ecc. L. J* 174

⁴ 6.4% of children were in independent schools in 2007. See Hansard, 3 July 2007: Column 981W

career prospects of a significant number of teaching staff are likely to be affected if they are unable to teach across the full range of state schools, yet this is the potential effect if a large proportion of schools are free to discriminate against staff on religious or belief grounds (henceforth 'religious grounds' is to be taken to refer also to belief). These are considered in Section II.

The article then moves on to consider the legislative protection against religious discrimination for staff in faith schools in Section III. It considers, in Section IV, whether the special provisions covering schools are appropriate in the context of state employment, and assesses the extent to which the provisions comply with EU standards. It is argued that in the context of public sector employment, the protection for religious discrimination takes on a special significance given that public sector employment practices carry with them the implied endorsement of the state, and that the state may be said to owe a duty to encourage social cohesion by employing individuals who reflect the range of communities which make up our society. Indeed, the Education and Inspections Act 2006 imposes a duty on state schools in England to promote community cohesion. This is particularly significant given that the vast majority of faith schools in England are Christian.

Section I Faith Schools Within the State Sector

Over 30% of the 22,000 maintained schools in England have a religious character.⁵ Most of the faith schools are primary schools (6,384) but a significant number are secondary faith schools (589). The existence of a such a large number of faith schools reflects the fact that many schools were

⁵ Over 7000 schools. <http://findoutmore.dfes.gov.uk/2006/02/religious_educa.html> accessed 3 January 2008.

founded as church schools prior to development of the public provision of education. It is arguable that the linkage between schools and religious institutions is merely a product of their history, and that the links to faith groups are merely historical. However, the number of faith schools is currently expanding, and the active involvement of the Church in their governance indicates that the involvement of faith organisations in state schooling is more than merely nominal. Since 1997, the provision of faith schooling has expanded with other faith groups apart from those traditionally involved in education (including Muslim, Sikh, Seventh Day Adventist and Greek Orthodox) becoming involved.

The predominance of faith schools at the primary level in particular means that the effect on primary teachers in terms of their freedom to work outside the faith-school system is significant. These schools are largely funded by the state,⁶ although they may also receive some additional funding from the Church.⁷ Thus although they have a religious input in terms of some funding and aspects of their governance, they are effectively public sector organisations.

⁶ Faith schools receive grants (of up to 90% of the total cost) towards capital costs of the buildings and 100% of running costs (including teachers' salaries) from the State.

www.atl.org.uk/atl_en/education/postition_statements/faith_schools.asp accessed 17 January 2008.

⁷ In addition, the school site and buildings will be owned by the Church.

A. History of Faith Schools⁸

Prior to 1944, public education was provided by the Church or by local authorities. The Church had been involved in providing education for centuries, and during the nineteenth century there was a particular drive towards the provision of education for the poor. By 1851 the Church of England had established 17,000 schools. When the state introduced public education in 1870, it supplemented that offered by the Church, in effect beginning the process of shared provision of public education between the state and faith bodies.

The Education Act 1944 changed the arrangements for the provision of publicly funded schooling, and Church schools were brought within the state system, as voluntary schools.⁹ This enabled the education within the church schools to benefit from the greater funding available from the state. Schools were able to opt to become either ‘voluntary controlled’ (with land and buildings owned by the church, but the local education authority funding the school, employing staff and controlling admissions) or ‘voluntary aided’ (with land and buildings owned by the church, the governing body employing staff and controlling admissions, but the school funded largely by the local education authority). The Education Act 1944 also required all schools, whether or not they retained a religious foundation, to have a daily act of collective worship, and to teach religious education.

⁸ The information for the section is based on information contained in *The Way Ahead: Church of England schools in the new millennium* (Church House Publishing, London, 2001). See also Philip Petchey, ‘Legal issues for faith schools in England and Wales’ (2008) *Ecc. L. J* 174.

⁹ JCD Harte, ‘The Development of the Law of Employment and Education’, in *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002)

Although some Christian denominations, such as the Methodists, have, since 1944 reduced their involvement in state education, other denominations such as the Catholic church have increased their involvement, particularly in secondary schools, usually using Voluntary Aided status. Anglican schools have reduced in number, and about half of them are in the Voluntary Controlled category. Although the number of church schools has decreased overall, the large number still remaining reflect the continued strength of faith schooling, largely of a Christian nature, and within that, predominately Church of England.

B. Current Trends for Religious Schooling

Faith schools are said to deliver high quality education, achieve good academic results and are popular with parents.¹⁰ Anecdotal evidence abounds about the lengths to which parents will go to get children into faith schools, including demonstrating religious adherence by a period of regular church attendance and involvement in church activities in the absence of any actual faith. The question of whether it is the religious ethos of these schools which makes them successful (as opposed to the admissions criteria, support from parents, additional church funding etc.) is, of course, highly contentious, and will not be discussed here. Suffice it to say, the link between religious ethos *per se* and success would probably be impossible to prove.

Although the numbers of faith schools have reduced since 1944, the level of involvement of the Church in the state school sector remains very high as shown above, with nearly a third of state schools having a religious character. Moreover,

¹⁰ See *Building on Success*, (London: DFES, 2001)

this cannot merely be seen as a historical anomaly reflecting the earlier provision of public education by the Church, as both the Government and faith groups are actively pursuing the increased involvement of faith groups with the provision of state education.

Evidence of this trend on the part of the Government can be seen in two documents, the 2001 Green Paper, *Building on Success in Schools*¹¹ and *Faith in the System* a report published in 2007 jointly by the Department for Children, Schools and Families and a number of faith organisations involved in the provision of state education.¹² The promotion of the provision of education by faith groups can also be seen as part of an overall Government commitment to the use of faith groups in the provision of public services more generally.¹³

In the 2001 Green Paper, the DFES¹⁴ extolled the good record of faith schools in delivering high quality education, achieving good academic results and in being popular with parents. It states:

We therefore wish to welcome more schools provided by the churches and other major faith groups ... where there is a clear local demand from parents and the community....

¹¹ Published by the Department for Education and Skills.

¹² *Faith in the System* (London: DCSF, 2007).

¹³ See, for example, Press Release, 11/1/07 by The Department for Work and Pensions, in which the Minister for Employment and Welfare Reform, Jim Murphy, said he wants to see a greater role for faith based groups in UK welfare delivery.

¹⁴ The Department for Education and Skills, replaced by the Department for Children, Schools and Families in 2007.

We intend to change the capital funding arrangements to make them more favourable to enable this to occur.¹⁵

This is echoed in 2007 in *Faith in the System* which states:

This dual system of voluntary schools supported by faith organisations and schools without a religious character is therefore at the heart of the school system in England. The Government continues to support the benefits to society that this system brings for parental choice and diversity...The Government remains committed to supporting the establishment of new schools by a range of providers – including faith organisations.¹⁶

It is recognised that faith schools are predominantly Christian, and within this predominantly Anglican. In order to redress the balance between Christianity and other religions, the proposal is not to reduce the input of the Church of England, but to increase the input of other faiths. *Faith in the System* states

we recognise that with the changes in society, it is only fair that pupils of all faiths and none have the opportunity to be educated in accordance with the wishes of their parents¹⁷

and points out that since 1997 Muslim, Sikh, Seventh Day Adventist and Greek Orthodox schools have also joined the maintained sector.¹⁸

¹⁵ *Building on Success in Schools* (London: DFES, 2001) p. 48

¹⁶ *Faith in the System*, (London: DCSF, 2007) p.3

¹⁷ *Faith in the System*, p. 3

¹⁸ *Faith in the System* p. 2.

These policy statements make it very clear that a commitment to the involvement of faith groups in the provision of education remains active. Moreover, it is expected that the involvement of such groups should not be nominal; active involvement is expected. What is more, faith groups seem to be responding to the call from government very positively, with new faith schools being opened all the time. Of 47 academies¹⁹ opened between 2000 and 2007, 16 had a faith designation.²⁰

C. Attitude of Faith Groups to Faith Schools

The attitude of faith groups to the provision of schooling also suggests that the association between faith and education is of more than merely historical or nominal importance. The faith groups involved in education view their involvement in very active terms. The focus of this section will be on the Anglican church, as it has by far the greatest involvement in schooling in terms of the number of schools involved.

The Church of England has a Board of Education which oversees Anglican faith schools, and each diocese has an education office, with education advisors. The Church also has its own separate school inspection system, which works alongside the Office for Standards in Education, Children's Services and Skills (OFSTED). However, the involvement of faith groups extends beyond overseeing the governance of schools and their academic and pastoral standards. There is evidence also that schools are viewed as a good way to enhance the religious

¹⁹ A type of publicly funded independent school, introduced by the Learning and Skills Act 2000.

²⁰ Three were Church of England, one Roman Catholic, one Anglican/Roman Catholic and 11 non denominational Christian. See *Faith in the System* (London: DCSF, 2007) p. 3.

reach of the Church. Evidence for this can be seen in the Church of England document, *The Way Ahead*,²¹ and the supplementary strategic document setting out strategy for 2007-11.

The strategies set out in these documents indicate that the Anglican Church intends to use Church schools as a vehicle for out reach to the local communities in which the schools are situated, in order to provide an experience of Christianity, and teach the Christian faith. For example, *The Way Ahead* states

3.3 The Church has a major problem in attracting young people to its services as a means of discharging its mission, and one that causes much concern. This bears directly on the future of the Church.

3.4. In contrast, the Church has some 900,000 young people attending its schools....

3.8. We have also noted that through the children attending its schools, the Church has an opportunity to reach out to parents.

3.9.... whether they come into the Church or not, Church schools are giving them the opportunity to know Christ, to learn in a community that seeks to live by his work, and to engage in worship... the justification for Church schools lies in offering children and young people an opportunity to experience the meaning of the Christian faith.

It is clear that the Anglican church sees its involvement in church schools as more than merely an historical accident, and also as more than just an opportunity to put into practice a commitment to practical service to others by providing education for all. The provision of education is viewed explicitly as an opportunity to reach to a wide range of individuals with the Christian message. It would seem that the strategy is to use its involvement in schools to bring an experience of Christianity

²¹ Church House Publishing, London, 2001

to a section of the population that it could otherwise not reach. This is echoed in the later strategy document for 2007-11, which suggests that church schools should be “at the centre of the local church’s outreach.”²² *The Way Ahead* is careful to state that churches should not be agents of proselytism,²³ but nonetheless, it is also clear that it sees the current role as distinct from the role it espoused 30 years ago when “the emphasis was on the Church’s mission of service to the community, through education, rather than on the role of the Church schools as combining a mission of service with that of nourishing children of the faith in their faith”.²⁴ It is interesting to see the restriction here to ‘children of the faith’ when in other parts of the same chapter the point is made clear that many of these children will have no other contact with the church apart from through the school.

In terms of the effect such a strategy may have for the employment of staff, *The Way Ahead* is equally clear, and it aims actively to encourage Christians enter the teaching profession. It states that it agrees with the diocese which said that the Church should promote teaching “as a vocation of equal status to the priesthood”²⁵ and suggests that churches should encourage a vocation to teach among Christians, by providing opportunities for work experience. It also suggests that ways need to be found to offer “enhanced opportunities for Christians

²² Available at <http://www.cofe.anglican.org/info/education/schools/schoolsstrategy2007-11.doc>

(accessed 1 February 08)

²³ at para. 3.12

²⁴ at para 3.15

²⁵ at para 6.26 although it goes on to note that this does not mean it should not be properly remunerated!

seeking Qualified Teacher Status” by offering additional qualifications for new entrants to work in Church schools.²⁶ This commitment to ‘enhancing opportunities’ for Christians who may then have additional qualifications needed to teach in Church schools suggests that the Church wishes to see its schools employing Christians, and does not suggest a strong commitment to giving all teachers equal access to Church schools.

This commitment to staffing its schools with Christians is repeated in relation to heads of schools. It is seen “as a major concern of the Church... to identify, develop and recruit committed leaders from Christian teachers in all schools” and recommends “action to identify... Christian teachers ... who have the potential to provide the necessary leadership ... dioceses must see that these teachers have the in-service development needed to move on to senior positions.”²⁷ Again special treatment for Christian teachers seems to be suggested, and the fact that the diocese will be ensuring some teachers are given training for leadership must amount to creating ‘enhanced opportunities’ for career development for these staff.

The commitments set out in *The Way Ahead* are reiterated in the Church of England’s strategy document for 2007-11²⁸ where the Church aims “to embrace Education Improvement Partnerships, Federations, joint trusts and other government initiatives so as to increase (not reduce) the Church’s influence and scale of provision”, “to promote the concept of teaching as a Christian vocation

²⁶ At paras 6.26-6.29.

²⁷ at para 6.16 and 6.18

²⁸ See n 18 above.

amongst children and young people”, “to appoint and support Christian teachers and leaders in Church schools”, “to implement effective succession strategies to ensure that Christian leadership is nurtured and sustained in Church schools” and “to support Teach First initiatives that enable Christians as potential teachers to enter the profession.” The strategy also suggests that “Church schools can themselves be important centres of worship and the teaching of Christian faith.”

Viewed from the perspective of the Church of England such policies and strategies make good sense: it is certainly the case that involvement in the education of nearly 20% of the primary school population²⁹ provides a massive opportunity for outreach, and it is unsurprising that a church committed to spreading its faith would wish to take up that opportunity and exploit its potential. However, viewed from a perspective concerned with equality and human rights of members of the teaching profession, and in the light of the fact that these schools form part of the public sector, such a strategy may be more problematic. In the next section, the role of the religion in the public sector will be considered in more detail, and an attempt made to determine its proper scope.

Section II Issues raised by faith schools in the maintained sector

A. The Role of Religion in Public Sector Employment

There are a number of reasons why, where the state acts as an employer, it should remain religiously neutral, and the arguments apply across the public sector, not just to education. Given the increasingly multi-cultural nature of modern Britain, it

²⁹ 18.6% of all primary pupils attend Church of England schools. See

<http://www.cofe.anglican.org/info/education/schools/> (accessed 1 February 08)

is strongly arguable that the state should remain neutral on religious issues. This remains the case, notwithstanding the fact that England has an established Church (discussed further below), and can be seen in the commitment of the Government to promote multi-faith dialogue, to introduce legislation to prohibit religious discrimination, and in its commitment to international human rights standards which protect religious freedom and freedom from religious discrimination.³⁰ It is arguable that state neutrality on religious issues should also take effect in to its role as employer, as this is an area in which it has significant potential to ensure that a commitment to religious pluralism can become a reality. Indeed, both the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights guarantee a right of equal access to the public service.³¹

The state as employer may also wish to remain neutral as regards religious interests so that it can encourage equal participation in the work force for a range of religious groups.³² This enables the state to encourage social cohesion by improving access to employment, and improving integration between social groups who make up the society. It is also important for the state to reflect the full range of its citizenry in some jobs to reflect the inclusive nature of the society, sending the symbolic message to the rest of society that all citizens are equal and

³⁰ Articles 9 and 14 ECHR.

³¹ Morris, 'Employment in Public Services: The Case for Special Treatment' (2000) 20(2) *OJLS* 167. Article 21(2) of the Universal Declaration of Human Rights provides that '[e]veryone has the right of equal access to public service in his country'; Article 25 of the ICCPR is in similar terms. Teachers are not civil servants in the UK, but similar principles arguably apply.

³² See John Rawls, *A Theory of Justice* (Oxford, OUP, 1999, revised edition) 196 where he argues that justice as fairness requires equal participation in the state.

valued. Hence ensuring equal participation in significant areas of the public services, including schooling, can be said to serve a legitimate aim of public policy.³³

Another reason for maintaining religious neutrality in the public sector is that in some sectors, the state is effectively a monopoly employer. For example, if an individual wishes to work for the police, the armed forces, in criminal justice or social work, or in health care³⁴ he or she has little option but to work for in the public sector. The same can be said for careers in education, where the vast majority of primary, secondary and tertiary education comprises state provision. Of course, staff in these sectors remain free to choose other forms of employment, but nonetheless, the monopoly position of the state should not be underestimated, and it is clear that the religious freedom of staff in these sectors will be significantly restricted if whole employment sectors are barred to them on grounds related to religion.

³³ In the context of another area of public employment, the police force, see further, Peter W. Edge 'Religious rights and choice under the European Convention on Human Rights' [2000] 3 *Web JCLI*, who cites the MacPherson Report's recommendation that those responsible for staffing 'should seek to ensure that the membership of police authorities reflect so far as is possible the cultural and ethnic mix of the communities which those authorities serve' (The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson, London, The Stationery Office, Cm 4262-I 1999 Recommendation 7).

³⁴ Although there is a developing role for private medicine in the UK, the overwhelming majority of health related careers operate in the context of the National Health Service.

B. The Established Status of the Church of England

It might be argued that the distinctive role of the Church of England as an established Church explains and justifies its involvement in the provision of state education, and the consequent implications for teaching staff. However, it is equally arguable that, notwithstanding the establishment of the Church of England, the close involvement of the Church in the provision of publicly funded education is problematic. Although England has an established Church it also has a commitment to the equal protection of the religious rights of all its citizens. Providing enhanced employment prospects some state funded staff on the basis of religion, for example, is not suggestive of equal treatment, notwithstanding the context of the special constitutional position of the Church of England. Moreover, the special treatment of staff in religious schools in the School Standards and Framework Act 2001 (discussed below) applies to other denominations and religions, and so the problems that arise with regard to the involvement of the state in the provision of faith schooling cannot all be answered on the basis that it is justified special treatment for the established church.

It would seem that given its position of dominance in public life as a result of its established status, the Anglican Church has two options, if it is to justify its privileged position in the light of the state's international human rights obligations to protect religious equality, and in the context of the development of an increasingly multi-cultural society in Britain. The options before the Church are either to extend its privilege, so that it can be enjoyed by other faith groups, for example, by allowing other faith groups to operate state schools; or to ensure that its privilege is used for the good of all faith groups in a non-partisan manner, for

example by reducing the religious input in its schools and justifying its involvement only on the basis of public service, as it has done in the past.³⁵

With regard to these two options, it is instructive to compare the approach of the Church of England with regard to schooling with its approach with regard to other areas of public life in which it enjoys privilege as a result of its constitutional status. For example, with respect to its role in the Parliament where the archbishops and another 24 senior bishops sit in the House of Lords, the Church presents itself as representing all faith groups, and does not seek to use its position to proselytise or to spread the influence of the Anglican Church. For example, the bishops in the House of Lords claim to represent all faiths and beliefs and take especial care of spiritual matters in a general sense;³⁶ the fact that the Queen is head of state and head of the church and prayers are said at the start of the parliamentary day is not used in an active way to promote a Christian or Anglican agenda in the political process, or to require religious adherence for those who are present in Parliament. Such an approach taken to schooling might involve churches being involved in a 'light-touch' way by providing buildings and some support by way of governance but without using the access this brings to influence the content of the education, or to require religious adherence by children, parents

³⁵ See text at note 22 above.

³⁶ “Bishops will be found speaking not just for the Church of England but for its partners in other Christian churches, and for people of other faiths and none”, Church of England, The role of Bishops in the Second Chamber, (London: Archbishops Council, 1999) at 4, cited by Peter W. Edge and Augur Pearce, Religious representation in a democratic legislature, A case study of the Lord Bishop of Sodor and Man in Tynwald, (ESRC project R000223633). Final Report, September 2003 p. 109.

or staff. However, while in areas of public life such as Parliament we see the Church taking a multi-faith approach, in relation to education we see the opposite. In the context of schooling, the fact that the Christian church (and the Anglican church in particular) enjoys privilege is instead addressed by allowing a wider range of faiths to run schools, as shown above in relation to the increase in the number of faith groups involved in the provision of education. In effect, the result is to end the privilege of the Anglican church, and the response of the Church seems to have been to make more active its religious involvement in the schools which it runs, as evidenced by the terminology used in both *The Way Ahead* and the 2007-11 strategy discussed above.

Officially the privileged position of the Church of England in the provision of schools has reduced, as all faith groups can now run schools. However, the vast majority of faith schools remain Anglican or Catholic and so the privilege of Christianity remains in practice. This means that for many staff, particularly in the primary sector, the choice of whether to teach in a religious school or not is more apparent than real. A choice to remain outside the faith school sector means reduced job opportunities, and a lack of access to the 'enhanced opportunities' for Christians in the faith sector referred to in *The Way Ahead*. This is particularly the case outside of large urban areas, where the choice of where to work may be more limited and there may be a small range of options available. In general teaching staff progress in their careers by moving school. Where local schools are church schools, teachers who are unwilling or unable to teach in church schools will have significant limits placed on their career progression.

Section III Legal Provisions relating to staff in Faith Schools

Having set out the current context in which faith schools operate, it is now necessary to consider the legislative rules which govern the extent to which faith schools are able to discriminate on grounds of religion with regard to the employment of teachers.

A. The Employment Equality (Religion and Belief) Regulations 2003

The position of staff generally in non-faith schools and in other sectors is governed by the Employment Equality (Religion and Belief) Regulations 2003 SI No. 1660. These Regulations prohibit direct and indirect discrimination, harassment and victimisation. Direct discrimination is defined as less favourable treatment on grounds of religion or belief, and examples could include refusal to employ, train, or promote staff on the basis of religion. Indirect discrimination covers the application of a provision, criterion or practice which is applied equally to those not of the same religion, but which puts persons of the religion in question at a particular disadvantage compared to others, and which cannot be shown to be a proportionate means of achieving a legitimate aim.³⁷

An example of the operation of these rules in the non-faith school sector can be seen in the case of *Azmi v. Kirklees Metropolitan Council*³⁸ where a teaching assistant was dismissed for refusing to remove a veil (which covered her face

³⁷ Regulation 3(1)(b).

³⁸ [2007] ICR 1154

while leaving her eyes visible), when providing bilingual language support in class. The EAT decided that the dismissal could be potentially indirectly discriminatory, as the requirement of the school that Azmi have her face visible in class was particularly disadvantageous for a female Muslim to comply with. However, the refusal to allow Azmi to wear the veil was justified, and so indirect discrimination was not made out. The requirement to remove the veil was proportionate given the need to uphold the interests of the children in having the best possible education. The school had investigated and concluded that the quality of her teaching was reduced when she wore the face covering. It had also found that it was not possible to rearrange her timetable to enable her to assist only in classes with a female teacher. The EAT held that the school had done enough to show that the restriction on wearing face coverings was proportionate.

The Regulations contain a two-tier *genuine occupational requirement* exception. Regulation 7(2) relates to genuine and determining occupational requirements to be of a particular religion. To be 'determining' a requirement should be a defining element of the job. In effect this exception is limited to those whose job involves teaching or promoting the religion, or being involved in religious observance, and is unlikely to apply in most schools, unless the school employs a chaplain or other religious personnel. However, the second genuine occupational requirement exception may be of more relevance to schools. Regulation 7(3) creates a broader exception for organisations with a religious ethos, where being of a particular religion or belief is a genuine occupational requirement and the use of the requirement is proportionate, a concept that is likely to be interpreted in the same way as the proportionality of any justification of indirect discrimination. This will

mean that the imposition of an occupational requirement must not only be genuine, but will need to serve a legitimate aim. However, any requirement does not have to be *determining*, so being of a particular religion or belief does not have to be a defining element of the job. This allows greater freedom to religious organisations to maintain a religious ethos where the staff are not engaged directly in religious work.

One significant case has arisen regarding the GOR exceptions, in relation to a religious school in Scotland, where the matter was governed by the Religion and Belief Regulations.³⁹ *Glasgow City Council v. McNab*⁴⁰ involved an atheist teacher in a Catholic school who applied for a post as a pastoral care teacher, but was not offered an interview. The legal question essentially was whether the post of pastoral care teacher was covered by the Genuine Occupational Requirement exception. The Tribunal found that it was not essential to the post that the holder be Catholic, as the responsibilities of the job involved giving advice on a large number of issues only a few of which required knowledge of Catholic doctrine, and those could be assigned to a different teacher. Thus being a Catholic was not a “genuine and determining” requirement. With regard to Reg 7(3), the Tribunal held that as the employer was Glasgow City Council, it could not have a religious ethos.

³⁹ Although the case also involved the Scottish rules allowing for some roles to be designated as religious, the job in issue in *McNab* was not so designated, and so the case fell to be considered under the Religion and Belief Regulations.

⁴⁰ UKEAT/0037/06. The case is complicated by the existence of an agreement with the local education authority only to appoint Catholics to positions as ‘guidance’ teachers, and the interaction of that agreement with the Education (Scotland) Act 1980.

Where the employment of school staff is governed by the Religion and Belief Regulations, then, the extent to which schools can impose religious requirements on staff are significantly restricted. Any requirements must be objectively justified, and proportionate to a legitimate aim. As illustrated by *McNab* it will be difficult to convince a tribunal that being of a particular religion or belief is a genuine and determining occupational requirement for being a teacher, as it is rare (apart from where religious instruction is given) for religion to be a defining element of the teacher's role. Where the employer is the state, including where schools are voluntary controlled, the wider exception for religious ethos employers is not applicable.

However, the position in England with regard to the employment of teachers in faith schools is not governed by the Religion and Belief Regulations. Faith schools are expressly subject to an alternative set of rules contained in the Schools Standards and Framework Act 1998 (SSFA), as amended by the Education and Inspections Act 2006, to provide even greater freedom to voluntary aided faith schools to impose religious requirements on staff.

B. School Standards and Framework Act 1998

The SSFA protects teachers in non-faith schools from religious discrimination,⁴¹ but allows faith schools to impose requirements regarding religion and belief on teaching staff, as well as allowing voluntary aided schools to impose religious

⁴¹ Section 59 SSFA.

requirements and require certain standards of conduct from teaching staff and non-teaching staff.⁴²

Teachers and some support staff in faith schools are governed by the SSFA, and religious discrimination is allowed in some circumstances. The SSFA generally protects teaching staff in non-faith schools from discrimination on grounds of religion, but it provides exceptions for schools with a religious character which are allowed to discriminate in favour of staff who share the religious ethos of the school. The provisions of the SSFA are complex because the rules vary depending on the type of school involved, voluntary aided, voluntary controlled, community schools and foundation schools.⁴³ The differences were outlined above, but will be briefly reiterated. All types of school are run by school governors, but there is variation in who funds the school and who employs the staff.⁴⁴ In Voluntary Controlled church schools, the land and buildings are owned by a church, but the local education authority funds the school and employs the staff. In contrast, in Voluntary Aided church schools, although the land and buildings are owned by the church, and the school is funded by the local education authority, the governing body employs the staff.⁴⁵ In community schools, the local education authority owns the buildings, provides funds, and employs staff. In Foundation

⁴² See Section 37(2) Education and Inspections Act 2006.

⁴³ Other schools which receive state funding are academies, set up under the Learning and Skills Act 2000. These are partly funded by the business sector. In addition, there are City Technology Colleges, funded directly by the Government, rather than via a local education authority.

⁴⁴ There are also differences in terms of who controls admissions, but this issue is not within the scope of this article.

⁴⁵ Some funding may come from the voluntary organisation, usually a church.

schools, funding is provided by the local education authority, but buildings are owned by the governing body, and the governing body employs the staff.

The distinctions between different types of schools therefore relate to questions of funding and the legal question of who employs staff. They are not based on the level of religious input, or the extent to which a Christian ethos is promoted within the school.⁴⁶ For example, a school may be voluntary aided, but its ethos may be very multi-cultural, and the school may embrace and celebrate many faiths. As long as it complies with the legal obligations with regard to the Christian content of assemblies, this will be perfectly lawful, and not inconsistent with its voluntary aided status. Similarly a voluntary controlled school may, in practice, have a very Christian ethos, for example having prayers said at the start and end of each day, regular attendance at church for Christian festivals, and the presence of significant numbers of religious symbols displayed around the school. Again, as long as the correct Religious Education syllabus is followed in terms of covering other faiths, this is perfectly lawful, and not inconsistent with the voluntary controlled status.

Yet the distinction between voluntary controlled and voluntary aided status, while not necessarily of significance in terms of the ethos of the school, are of great significance in terms of the extent to which staff are free to exercise their freedom of religion, as the status of the school effects the extent to which schools can

⁴⁶ However, as a general rule, faith schools are usually Voluntary Aided or Voluntary Controlled.

Foundation schools (many of which were formerly Grant Maintained schools) may or may not be faith based, and Community schools are rarely faith based.

discriminate in favour of religious members of staff and against those who do not share the religion of the school.

The main distinction within the SSFA is between schools with a religious character and those without. With regard to schools which do not have a religious character, the SSFA provides that teachers cannot be refused employment, dismissed or deprived of promotion or other advantage by reason of their religious beliefs, for failure to attend religious worship, or refusal to give religious education.⁴⁷ To that extent the SSFA provides similar protection to teachers in non-Faith schools as is provided under the Religion and Belief Regulations.

With regard to schools with a religious character, the main distinction is between voluntary aided schools, which have greater freedom to impose religious requirements on staff, and voluntary controlled and foundation schools, where the extent to which religion can be used as a factor in employment decisions is more limited.

1. Voluntary Controlled and Foundation Schools

In religious voluntary controlled or foundation schools, religion can be taken into account in appointing the head teacher, and regard may be had to his or her “ability and fitness to preserve and develop the religious character of the school.”⁴⁸ In addition the school can “reserve” up to a fifth of its teaching staff

⁴⁷ Section 59 SSFA 1998 The provision applies to working as a teacher, and being employed for the purposes of the school otherwise than as a teacher.

⁴⁸ Section 60 SSFA 1998, as amended by section 37 of the Education and Inspections Act 2006.

who can be “selected for their fitness and competence” to give religious education in accordance with the tenets of the faith of the school.⁴⁹ The SSFA protects other (non-reserved) teachers and support staff in voluntary controlled schools from discrimination on grounds of religious opinion, failure to attend religious worship, or refusal to give religious education at the school.

The regulations also allow that failure to comply with the tenets of the religion can be grounds for dismissal. Thus, the SSFA allows for religious discrimination in the appointment of the head teacher and reserved staff, and allows for the imposition of requirements on them that they live in accordance with the tenets of the religion. This suggests that under SSFA, teachers can be dismissed because of a failure to comply with the religious teaching on lifestyles. Thus a “reserved” teacher or a head teacher in a voluntary controlled school could potentially be dismissed for living in a relationship outside of marriage, or marrying a divorcee, even though this may have no relation to his or her ability to teach. This provision stands in strong contrast to the requirements under the Religion and Belief Regulations that religious requirements be genuinely “occupational”, in that they must relate to the conduct of the job. The distinction between what would be lawful under the Religion and Belief Regulations and under the SSFA is even more stark when one takes into account the finding in *McNab* that voluntary controlled schools are not to be treated as “religious ethos organisations” as the

⁴⁹ Section 58 SSFA 1998. After amendment by section 37 of the Education and Inspections Act 2006, if the head teacher is appointed to teach religious education, the headteacher counts as a reserved teacher. This means that the extra religious requirements can be imposed on the head teacher.

employer is the local authority, not the church. This means that occupational requirements to be of a particular religion would need to be '*genuine and determining*' (i.e. defining) requirements of the job, not the lesser "genuine" standard for religious ethos employers. Moreover, under the Religion and Belief Regulations any genuine occupational requirement exception to the non-discrimination principle must be proportionate. The SSFA has no proportionality requirement. As a result, the ethos of the organisation, and the question of whether the requirement is really necessary, or could be achieved through less discriminatory means is not addressed. In effect, the SSFA imposes greater restrictions on the religious freedom of teaching staff than would be the case under the Religion and Belief Regulations.

2. Voluntary Aided Schools

The freedom of voluntary aided schools to discriminate on grounds of religion is even greater, as religious requirements can be imposed on all teaching staff, not just the head and "reserved teachers"; and special protection against discrimination in employment on grounds related to religion or religious observance has been removed.⁵⁰ Preference can be given in connection with the appointment, remuneration or promotion of all staff on the basis of religious belief and attendance at worship. Moreover, in decisions to dismiss, regard can be had to conduct which is incompatible with the precepts of the religion, or with the upholding of its tenets.⁵¹ As with the provisions governing the voluntary controlled schools, this means that staff could be dismissed for failing to comply

⁵⁰ See section 37(2)(b) Education and Inspections Act 2006.

⁵¹ Section 60 SSFA 1998.

with requirements relating to religious lifestyles as well as dismissal for failure to share the faith of the school in question. However, in contrast to the situation in voluntary controlled schools, in voluntary aided schools this freedom to discriminate applies to *all* staff, not just teaching staff, and not just the one fifth reserved teachers and head teachers.

The possibility of applying faith and lifestyle requirements to all teachers⁵² in such schools, whether or not they are engaged in teaching religion, seems to go well beyond what might be lawful under the Religion and Belief Regulations were they to apply to such schools. Clearly voluntary aided church schools would be covered by the exception to the non-discrimination principle in Regulation 7(3), which applies where being of a particular religion or belief is a genuine occupational requirement for the job and it is proportionate to apply the requirement to the case. But with regard to teaching subjects other than religion, it is hard to see that being of a particular religion or belief would be a genuine occupational requirement of the job. It is also difficult to see that such requirements are proportionate when compared with requirements imposed in other maintained schools. Moreover, the SSFA does not have a requirement that any religious requirements imposed on staff should be proportionate. There is thus no requirement to consider the proportionality of any religious requirement having regard to the ethos of the school, nor having regard to whether any less discriminatory means to achieve the schools aim could be found. This is concerning given that voluntary aided status reflects the legal constitution of the school, rather than their practical commitment to a religious ethos, and the fact

⁵² and some support staff.

that voluntary aided church schools may be no more religious in nature than voluntary controlled ones.

The effect of the SSFA on teaching staff who do not meet requirements to be Christian (Anglican or Catholic, as these are the main denominations involved in state schooling, but also Muslim, Sikh, Seventh Day Adventist and Greek Orthodox schools where applicable) could be significant. Although many schools do not use their powers under the SSFA to recruit exclusively or predominantly Christian staff, the option is there for them to do so, and there is some evidence that some schools do require religious adherence from staff.⁵³ Moreover, it is quite open to schools to take account of the “enhanced opportunities” in terms of training which the Anglican Church suggests should be developed in *The Way Ahead* in decisions which are made regarding advancement or promotion of staff in faith schools. Thus Christian teachers may come to enjoy significant advantages in career terms over staff of other faiths, or those with no religion. Given that non-faith schools are not allowed to discriminate on grounds of religion, and that the numbers of faith schools for non-Christian faith groups are so small, it is not sufficient answer to any claim that Christians teachers may enjoy significant advantage that those of other faiths or none may find equal advantage elsewhere.

Furthermore, it should not be forgotten that whether the employer is the local authority or the school governors, in all cases, these schools operate in the maintained sector: the vast majority of funding comes from the State and the

⁵³ See for example McNab’s case at note 36 and ‘My lack of faith stopped me being accepted’ *The Guardian*, 4 December 2007.

schools operate within the public sector. Enabling state funded employers to discriminate on religious grounds does not help achieve diversity and a commitment to equality that might be expected in the state sector. Indeed the freedom of state schools to discriminate against staff on grounds of religion sits somewhat uncomfortably alongside their duty to promote community cohesion.⁵⁴

Section IV The SSFA: proportionate protection for teachers?

If the position of school teachers were to be covered only by the Religion and Belief Regulations, the level of discrimination allowed on grounds of religion would be reduced. Voluntary controlled schools, along with most other types of state school, would need to be able to show that any discrimination on religious grounds was the result of a genuine and determining occupational requirement. Voluntary aided schools would only need to meet the lower “genuine occupational requirement” standard, but in both cases any such requirements would need to be proportionate. Instead, the SSFA allows such discrimination on grounds of religion without the need to consider whether such a requirement is proportionate in the circumstances.

The lower level of protection against religious discrimination available for staff under the SSFA raises the question of whether the provisions of the SSFA are compatible with the requirements of the Employment Equality Directive 2000/78. Article 4(2) of the Directive allows for exceptions allowing religious organisations

⁵⁴ Section 38 Education and Inspections Act 2006.

to maintain a religious ethos and require loyalty of staff to that ethos. However, it is arguable that the breadth of the exceptions allowed under the SSFA, for voluntary aided schools in particular, are too broad to comply with the requirement in Article 4(2) that exceptions be legitimate and justified. Moreover, following the decision in *McNab* that voluntary controlled schools are not religious ethos organisations, it is questionable whether the exception in Article 4(2) should apply to voluntary controlled schools at all. This would mean that the failure of the SSFA to include a proviso that any religious discrimination in schools must be proportionate may make the protection of the SSFA incompatible with that provided for in the Directive.

The position of staff would be improved if the provisions of the SSFA with regard to religious discrimination were to be replaced by the provisions which cover the protection against religious discrimination in other sectors of employment, namely the Religion and Belief Regulations. These provide a good level of protection for employees who are religious as well as for those who are not. They also provide protection for religious organisations, enabling them to discriminate on grounds of religion where necessary in order to preserve their special religious character. They provide an appropriate level of protection for the religious rights of religious groups, as required by international human rights law, as well as providing adequate protection for the religious rights of individuals, similarly protected by the same international laws.⁵⁵

⁵⁵ The Religion and Belief Regulations and the extent to which they meet human rights norms are discussed in detail in Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008).

The key distinction between the rules contained in the SSFA and those in the Religion and Belief Regulations is that the SSFA contains no proportionality requirement. The protection of the religious rights of staff in schools in the UK would be improved if proportionality were to be required and such a requirement could bring the SSFA back into line with the EU Equality Directive.

Such a requirement would enable courts to consider a wide range of issues in order to determine an appropriate balance between upholding the rights of religious organisations to discriminate in order to maintain a religious ethos, and the rights of teachers to be pursue their careers free from religious discrimination. A number of factors may be relevant to the question of proportionality, not least the extent to which teachers' freedom of religion, or freedom not to be religious, is infringed in practice by religious requirements imposed by schools. A consideration of proportionality might entail considering whether there are other options available to a teacher to teach or look for promotion elsewhere. For example, where there is only one religious school among several others in a particular location such as a city, the practical effect of discrimination by an employer may differ from where either a faith is the only maintained school in a locality, or where a large proportion of schools in an area are faith schools. It is suggested that for these purposes a third of schools would count as a large proportion, as it is sufficient to have a significant effect on the job opportunities of teachers.

A consideration of proportionality might also enable a tribunal to assess a school's actual ethos, based on current practice, rather than basing the employment rights of teachers on the constitutional arrangements of the school, which are likely to be related to the settlement made in 1944, often based on the wealth of a particular parish and the extent of its financial resources. However, even where religion plays a central and defining role in the ethos of the school, it may not be proportionate to allow religious discrimination against staff where a state school is the only school, or one of a few in a particular area, thus reducing effective choice of employer for staff. It is one thing to allow some discrimination in a small number of faith schools, in large urban area where staff enjoy a real choice of schools in which to work. It is quite another to allow religious discrimination in up to a third of schools, many of which are in towns and villages which contain just one or two schools, so that teachers choice of employer and chances of career progression may be restricted because of their religion.

A number of other factors apart from the non-discrimination rights of staff would also suggest that a replacement of the SSFA by the Religion and Belief Regulations would be appropriate. The main factor here is the question of whether it is right for faith schools to be allowed to discriminate on grounds of faith, given that they are largely funded by the state. This leads to broader questions about the role of religion within the state, questions which are beyond the scope of this article. However, it is worth considering the employment rights of teachers as part of this debate. This is a question which is usually ignored, in favour of other more obviously contentious issues such as whether the state should fund religious schools, whether such schools should be free to discriminate on religious grounds

in terms of admissions, and whether it is the religious dimension of such schools that leads to success. However, from the point of view of the teaching profession, the fact that in so many schools teachers can face legitimate religious discrimination stands in stark contrast to the employment protection enjoyed in every other area of employment, as well as the protection available for other types of discrimination. Taking an analogy from other heads of discrimination, it is clear that a sector of employment in which one third of jobs were reserved for men, would clearly breach the equality rights of women, and attempts to argue that other employers accept women, or that this is a response to ‘customer choice’ would not cut much ice as a defence to a sex discrimination claim.

Section V Conclusion

Clearly it is always going to be difficult to balance the rights of faith organisations to retain a religious ethos with the rights of staff to be free from religious discrimination. In most contexts this difficulty is addressed by requiring proportionality in the imposition of any faith requirement, enabling employment tribunals to assess factors such as the nature of the job and the extent to which religious belief is a defining element, the size of the undertaking, the impact of the requirement on the job opportunities for other workers, the extent to which other employment opportunities are available to potential applicants, and many other contextual factors. In the case of schools covered by the SSFA the requirement of proportionality is not present. In effect, the SSFA deems religious discrimination to be proportionate in faith schools, regardless of other factors that might point towards such a requirement being a disproportionate.

This is a particularly important matter given the increasing number of faith schools, their increasingly religious nature (as suggested by the agenda set by *The Way Ahead* and other church strategy documents), and the fact that the SSFA is probably incompatible with the EU Directive protecting all workers from religious discrimination. A solution would be to repeal the special protection for faith schools provided in the SSFA and leave teaching staff with the same protection as that provided for all other workers against religious discrimination, namely the protection of the Employment Equality (Religion and Belief) Regulations. This would have the benefit of providing protection for teachers which conforms to EU standards.

The Regulations would to allow religion to be taken into account in the employment decisions of faith and non-faith schools, where appropriate and proportionate. Thus a tribunal considering the legality of a requirement that a teacher hold a particular religious view or conform to a particular lifestyle, would be able to assess its proportionality, taking into account a range of factors including, but not limited to, the right to religious freedom of teaching staff within the state education sector. Such a step would mean that employment decisions affecting teachers would be approached with due respect for the right to freedom of religion.