THE CHRISTIAN INSTITUTE

ADVICE ON THE EFFECT OF PROPOSED NEW INDEPENDENT SCHOOL STANDARDS

1. I have been asked to advise on the likely effect and interpretation of the proposals to amend the Education (Independent School Standards) (England) Regulations 2010 ("the Regulations").

The scope

2. As the title implies, the proposals only relate to independent schools, which include the state funded academies and free schools (apart from part 1 of the Regulations which only apply to private independent schools). The primary aim of the Government is expressed to be "to ensure that extremism does not form part of the curriculum or teaching" but the legislation may have other unintended consequences. The Regulations will apply to schools which have their own religious foundation as to all others.

3. The focus of the concerns of The Christian Institute is the impact of the regulations on free speech and the curriculum in *all* independent schools (including academies[1]). The Institute responded to the consultation on 4 August 2014 but has complained vociferously about the short time for consultation.

The proposals

4. The general context in which the proposals operate include the First Protocol of the European Convention on Human Rights. Under the second sentence of Article 2 of the First Protocol parents have a right to have their children educated in accordance with their own religious or philosophical beliefs. As a matter of European human rights law, attendance at school does not deprive the parents of their right to "*exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions"* (Konrad v Germany, Kjeldsen, v Denmark, (1979–80) 1 E.H.R.R. 711 at [54]; Efstratiou v Greece (2006) 43 E.H.R.R. 24 at [32]).

5. Part 2 of the proposals amend the Standards relating to the "spiritual, moral, social and cultural development of students". Paragraph 1.1 of the Consultation document summarises the changes to the ISS Regulations as *to "respect other people and no student is discriminated against contrary to the Equality Act 2010"*.

[1] According to official Department for Education figures, in January 2014 there were 3,827 academies educating some 2,423,535 pupils (out of a total of 6,238 independent schools): see https://www.gov.uk/government/statistics/schools-pupils-and-their-characteristics-january-2014.

6. A flavour of the proposals may be seen from these extracts from the Government Consultation Documents:
   a. Para 3.2.2 "Schools will be expected to focus on and be able to show how their work with pupils is effective in embedding fundamental British values";
   b. "The new requirement for schools to actively promote principles which encourage respect for persons with protected characteristic (as set out in the Equality Act 2010) is intended to allow the Secretary of State to take regulatory action in various situations: for example… failure to address homophobia; or where prejudice against those of other faiths is encouraged or not adequately challenged by the school".

7. Part 2 relates to "spiritual, moral, social and cultural development of pupils". Paragraphs 5(a)(v) and (vi) of the existing Regulations provide that the "standard about the spiritual, moral, social and cultural development of pupils at the school is met if the proprietor ensures that principles are promoted which - …

   (v) Assist pupils to acquire an appreciation of and respect for their own and other cultures in a way that promotes tolerance and harmony between different cultural traditions; and

   (vi) Encourage pupils to respect the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs.

8. The proposals would amend the existing Regulations to provide:

a. In Part 1 of Schedule 1, as part of the definition of the "standards about the quality of education provided" at paragraph 2(b) that the written policy plans and schemes of work at the school:

> *(ii) do not undermine the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs*[2]*…"*

b. Paragraph 2(d)(ii) requires the teaching of personal, social, health and economic education ("PSHE") which;

> *(i) Reflects the school's aim and ethos and*
> *(ii) Encourages respect for other people*[3] *paying particular regard to the protected characteristics set out in the Equality Act 2010."*

c. In Part 2 of Schedule 1, the requirements of "spiritual, moral, social and cultural development" of students mean that the proprietor has these obligations;

> *(i)* By para 5(a) "*actively promotes the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs*[4]*…"*
>
> (ii) By para 5(b) "ensures that principles are actively promoted which:

[2] My emphasis

[3] My emphasis

[4] My emphasis

(v) further tolerance and harmony between different cultural traditions by enabling [deleted assist] pupils to acquire an appreciation of and respect for their own and other cultures [deleted in a way that promotes tolerance and harmony between different cultural traditions]; and

(vi) encourage respect for other people, paying particular regard to the protected characteristics set out in the Equality Act 2010[5]*;*

(vii) encourage respect for democracy and support for participation in the democratic processes, including respect for the basis on which the law is made and applied in England".

9. The protected characteristics set out in the Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (s4 Equality Act 2010). Importantly, by s10 (1) Equality Act 2010 religion includes a lack of belief. I will refer to the wide extent of beliefs covered later.

10. I will approach the issues under these broad headings:

A. The meaning of the Amendments

A1 The protected characteristics

A2 Politicization of the curriculum

A3 The universality of the provisions

A4 The meaning of active promotion

[5] My emphasis

A5 Examples of the width of the provisions

B. The policing regime.

A. The meaning of the Amendments

Transplanting the protected characteristics

11. There is one overarching point I wish to make at the outset. The Regulations are not framed as a duty to *promote* the protected characteristics but instead as a duty to *promote respect of people*, having particular regard to those protected characteristics. It adopts much of its language from the human rights case law (tolerance, respect etc). It is however a small step as a matter of interpretation to elide the *respect for a person* to respecting the *beliefs and practices* of the group to which that person belongs and this is especially so given the reference to active promotion, a concept to which I refer below in more detail. It may also be said that the words "paying particular regard" shift the duty beyond that of merely respecting people since otherwise it could have been framed simply as a duty to respect persons.

12. The provisions of the Equality Act relate primarily to equal treatment. This use of the principles under the Equality Act in the new amendments in relation to "paying particular regard to the protected characteristics" is not in itself about equal treatment but about how children are to *think* and

express themselves and how teachers should encourage them to do so. This is to permeate all teaching of the curriculum in independent schools. Indeed, further the Consultation Document talks about schools *challenging* students, staff and parents which may relate to respect for the various protected characteristics. This stresses the active nature of the duties which are now to be imposed.

Politicization of the curriculum

13. More generally, there is a danger that the curriculum becomes politicized not least because respect for some protected characteristics (or more correctly respect of those with different protected characteristics including faiths and beliefs) may be highly contentious. The law has thus far stayed steadfastly outside the classroom door (and indeed from promoting respect in the classroom) and this has been the policy of governments of each political colour. Usually issues of academic judgment whether at school or university are treated by the courts as not being matters for the courts to adjudicate upon (e.g. *Clark v University of Lincoln* [2000] 1 WLR 1988).

14. At present as a matter of UK law, S89 (2) Equality Act 2010 provides that "Nothing in this Chapter applies to anything done in connection with the content of the curriculum". This seal cannot be broken save as a matter of human rights law.

15. It has almost been an article of faith of successive governments that the curriculum should not be a political football and certainly that teachers should not even potentially be the subject of litigation. It may be said that

this is to be swept away possibly as an unintended consequence of the amendments.

16. This may be seen as a Rubicon which is now being crossed in terms of curriculum. The provision of the Regulations which appears to show the greatest potential for an overbroad reading is Regulation 5(b)(vii) which requires that principles are *actively* promoted which "*encourage respect …including respect for the basis on which the law is made and applied in England*." Whilst part 2 (unlike part 1) does not explicitly mention the curriculum, it is difficult to envisage how part 2 could be implemented by independent schools without it permeating what is taught in schools and therefore the content of the curriculum.

17. One question which may be posed: Could this be interpreted as requiring teachers to promote the idea that principles enshrined in the law as enacted (including the Marriage (Same Sex Couples) Act 2013) are in some way "better" than principles which are not enshrined in law (but may be part of genuinely held religious beliefs)? Arguably yes. This may not be the intended interpretation. What this provision appears to be intended to envisage however as a paradigm is that teachers should instil a respect for the process of the English legislative process but it may naturally be extended to what that legislative process produces.

18. A further example is that it may limit the extent to which a teacher can refer adversely to the bedroom tax which has been passed by Parliament into law. This may affect the freedom of speech of teachers.

19. Clearly, there is no place for indoctrination in schools as the European Court of Human Rights has stated several times. However, simply

requiring that all that is currently enshrined in statutory law should not be questioned does not amount to indoctrination, although it would restrict academic freedom[6]. Were this provision to be interpreted as requiring a teacher to teach that the Christian definition of marriage is "worse" than a definition which includes same sex marriage, this could engage:

a. the Article 9 rights of that teacher to the free exercise of their religious belief or
b. potentially those rights of the pupil (and their parents') under Article 2 of the First Protocol.

The universality of the provisions

20. Several of the duties under s85 (2) (a to d) Equality Act 2010 in relation to education provision already include a requirement not to discriminate against a pupil in the way that education is provided but there is a disapplication in relation to religion and belief for schools with a religious character or those schools which are listed in the register of independent schools for England if the school has a religious ethos. These new provisions take a more universal approach (albeit only for independent schools) and tread on ground (at least in relation to *respect* as distinct from treatment) to which the Equality Act 2010 does not currently apply.

[6] The ECtHR at paragraph 62 of *Lautsi* stated:

> *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 the states must not exceed."*

Active promotion

21. There is some vagueness in the proposals arising from the concept of *active* promotion, which goes beyond the need to have "due regard" to certain factors which are currently enshrined in the public sector equality duty as currently defined.

22. For example, the Consultation states that "'Actively promote' also means challenging pupils, staff or parents expressing opinions contrary to fundamental British values". The Government are clearer about what active promotion is not, rather than what it is. For example, para 3.2.2 of the Consultation says "putting up posters on a notice board and organizing an occasional visit to places of worship would fall short of 'actively promoting'". Visits to places of worship of other faiths may be too much for those of some religious persuasions to bear.

23. The public sector equality duty in section 149 Equality Act 2010 as currently drafted does include the language of "promotion" but this is in the context of the public body merely having "due regard" to the need to "foster good relationship between persons who share a relevant protected characteristic and persons who do not share it." Section 149(5)(b) Equality Act 2010 states that "having due regard to the need to foster good relations….involves having due regard in particular to the need to ….promote understanding[7]" (my emphasis). This is somewhat less than actively to promote and the public sector equality duty has been subject to some creative interpretation.

[7] There is another curiosity in the difference between promote and actively promote.

Public sector equality duty

24. Indeed there may be some concern about the way in which these provisions will be interpreted from the experience with interpretation of what may be seen to be that parallel duty. This does not apply to independent schools (other than most academies). Section 149 of the Equality Act 2010 requires a public authority:

> *. . . in the exercise of its functions,[to] have due regard to the need to--*
>
> *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
>
> *(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

Advancing equality of opportunity involves (by section 149(3))

> *(3) .... having due regard, in particular, to the need to—*
> *(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
> *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
> *(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

25. The "due regard" to the statutory objectives must be "in the exercise of *its functions*" (s. 149(1) of the EqA). These provisions have been interpreted in such a way as to in effect require an equality impact

assessment before any decision is taken and to restrain the putting into effect of administrative matters. I will give just two examples of many where pressure groups have challenged decisions.

26. In *R (ota Harjula & Hamza) v London Councils* [2011] EWHC 861 Admin the Claimants were users of a service provided by the Roma Support Group which was funded by London Councils to voluntary organizations. A number of London boroughs wanted to provide the funding themselves rather than through the central organisation. A consultation was conducted with various groups in the category of those organisations which essentially appeared to be local, but where the services were currently commissioned on a pan London basis. The decision was challenged by the Roma Support Group. The Administrative Court held that in order for a public body to comply with the public sector equality duty in a case where large numbers of vulnerable people, many of whom fell within one or more of the groups protected under equality legislation are to be affected, the degree to which it needs to have due regard to the need to eliminate discrimination is very high. The whole consultation was quashed.

27. In *R (ota JM & NT) v Isle of Wight Council* [2011] EWHC 2911 Admin the decision by Isle of Wight Council to restrict the eligibility threshold for access to the adult social care it provided was unlawful because the reports to the Council Cabinet and to the member of the council making the decision contained insufficient information required to discharge the equality duty (see also e.g. *R (ota Green) v Gloucestershire CC* [2011] EWHC 2687 Admin).

Examples of the width of the provisions

28. It is relatively easy to consider examples which may be unintended consequences of the amendment provisions. This may cut across ideas which are considered offensive by many people. Thus an atheist teacher who suggests that all Islamic concepts of jihad are anathema to Western values (and expresses the same in class) may fall foul of the standards because it represents a lack of respect for what some hold jihad (interpreted as "striving in the way of God" rather than necessarily as a concept of "holy war" or interpreted as requiring military means) to be a core value of Islam.

29. Another concern is the differences in theology between various groups within a religion. For example, many mainstream Muslims object to the suggestion that Ahmadiyya Muslims are real Muslims. A teacher in the classroom may go out of her way to promote respect so she acknowledges Ahmadiiyya Muslims alongside Sunnis and Shiites. Some Muslim children in the class may however take grave offence at what they see as disrespect shown to their faith. An alternative example is a Jewish teacher in an orthodox Jewish school who professes tolerance for those of a progressive or reform Jewish perspective (or vice versa) which may again be anathema to the children's religious feelings.

30. Many may feel that teachers should not be drawn into the niceties of theological debates/distinctions and there should not be mechanisms in the law for disgruntled pupils, parents and campaigners to challenge their academic freedom by legal action. Inevitably, teachers often need to present concepts or beliefs in a simplistic way for children but they

should not be challenged for failing to promote respect because their attempt at simplicity is deemed to undermine respect for some people's beliefs.

31. Another example might be where a teacher is said to be showing lack of proper respect for dismissing man made climate change as a concept or makes jokes about veganism only for a child or their parent to make a complaint about the teacher's failure to respect their protected beliefs. Such jokes may be in bad taste but it may be considered that they should not form the basis of legal action.

32. A secular campaign group may say that a religious school is not doing enough to respect those who pursue secularism and to respect the views of those who are anti-religion if it did not for example have anything connected with secularism on its curriculum.

33. This aspect is of particular note because the scope of the doctrines which fall within the rubric of religion and belief is wide. The Government's Explanatory Notes to the Equality Act at para 52 set out the criteria for a "philosophical belief" as that "it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behavior; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others". This was given ample scope in *Grainger plc v Nicholson* [2010] ICR 360 (belief in climate change). In other cases under European human

rights law, moon sect, Divine Light Zentrum, Druidism, Krishna consciousness and veganism.

34. This may also mean actively promoting respect for a belief system, such as scientology, which many view to be a dangerous cult. This was however found to be a religion by the Supreme Court in *R (on the application of Hodkin) Registrar General of Births, Deaths and Marriages* [2014] AC 610. This case considered whether a Church of Scientology could be a "place of meeting for religious worship" within the meaning of section 2 of the Places of Worship Registration Act 1855. Hodkin provided a chance for the Supreme Court to revisit the decision in the Court of Appeal in *R v Registrar General ex parte Segerdal* where Lord Denning described Scientology as a philosophy on the existence of man rather than a religion.

35. The court held that the definition of religion had expanded from "faith in a god and worship of that god" that had been set out in *Segerdal*. Lord Toulson held that in the absence of "some compelling contextual reason for holding otherwise, religion should not be confined to religions which recognise a supreme deity" since this would be a "form of religious discrimination unacceptable in today's society".

36. The definition of religion provided in Hodkin can be summarised as:

> *"A spiritual or non-secular belief system, held by a group of adherents which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system"*

B. The policing regime

The inspection regime

37. The proposed new standards will form the basis for whether schools are registered by the Department for Education and their future inspection, and this does not differentiate between schools which do and do not have a religious ethos. Paragraph 34 of the proposed new regulations states that leadership, management and governance of schools will be assessed by how effectively schools fulfil their responsibilities under the independent schools standards. The role of inspector is in effect changed from one at present of assessing only the rigour and quality of education (which is appropriate to the background of inspectors most of who are ex teachers) to policing how equality law concepts are being promoted within each independent school. Further this may require them to be *au fait* with various belief systems and theological divisions such as those referred to above. This is a big ask for the inspectorate and there could be major consequences if mistakes are made (as there may well be). It will be interesting to see what training the inspectorate are given to assist them. It is also significant that an otherwise outstanding inspection could be lost because a school has not been deemed to actively promote equality[8]. Many teachers and parents will find this a surprising result.

[8] It should be noticed that s114 Education and Skills Act 2008 allows the Secretary of State to exercise a discretion as to whether to take regulatory action in the case of minor failings.

38. The impact on teachers themselves may be great. No doubt they will be expected to keep records of how they actively promote the required issues at a time when there is great concern about the pressures under which teachers operate. Further it opens teachers further to complaints from parents, pupils and pressure groups. It may politicize their role.

Litigation

39. There is a risk of a spate of litigation by all manner of pressure groups under these proposals. The experience under the public sector equality duty has been that the courts have given a wide remit to locus standi to bring claims and there has been a profusion by many interest groups. Given the number of philosophical beliefs which are covered and the number of active (sometimes well funded) pressure groups, there is scope for frequent major litigation in an area which has traditionally not been subject to the courts.

Conclusion

40. I draw these points from the Advice as the key points by way of conclusion:
    a. It is a small step to elide the respect for a person required by the amended Regulations to respecting the beliefs of the group to which that person belongs, and in effect to become a requirement to promote the protected characteristics themselves.
    b. There is a danger with these proposals that the curriculum in independent schools becomes politicized because respect for some

protected characteristics may be highly contentious; in effect the seal on the curriculum (created by section 89(2) of the Equality Act 2010) will be thereby broken. To mix the metaphor, a Rubicon preserved by successive governments will be crossed.

c. The danger of litigation is exacerbated by the vagueness in the proposals arising from the concept of *active* promotion.

41. The inevitable result is to open teachers up to increased scrutiny, pressures and complaints. There is a real risk of major litigation over what happens in the classroom. Further the contents may undermine their academic freedom.

JOHN BOWERS Q.C.

Littleton Chambers
3 King's Bench Walk North
Temple
London EC4Y 7HR

22 September 2014