

Commentary on the Department for Education's *Guidance for schools and awarding organisations about the Religious Studies GCSE*

Summary and background

1. Earlier this year I produced legal guidance¹ on the High Court judgment on Religious Education (RE),² setting out both the law as clarified by the judgment and what it entails for schools and those responsible for setting RE syllabuses. Since then, the Department for Education (DfE) has stated that this guidance is 'inaccurate', but more significantly that the 'judgment should not be taken as having any broader impact on any religious education curriculum' and the Department's own guidance³ remains 'correct'.⁴ I do not believe any of these things to be the case, and given the risk that schools and others may well use the Government's statements to inform their understanding of the law, I have now felt it necessary to provide some commentary on the DfE's own guidance and the areas in which I think it is lacking.
2. In what follows I set out how the Government's guidance should be properly interpreted, and the ways in which it is likely to mislead schools and ASCs. The guidance is quoted in full. Each section is emboldened and indented, and is followed by the commentary on it.

Commentary

DfE Guidance for schools and awarding organisation about the Religious Studies GCSE

The Department for Education's view has always been that schools should be free to determine their own approach to the teaching of RE, in line with the statutory requirements.

3. This is a simple and uncontroversial statement of Government policy and nothing else.

Following a recent Judicial Review of the Religious Studies GCSE, the Administrative Court found against the Department for Education on a narrow, technical point.

4. Once more, this is a simple statement detailing the Government's view on the outcome of the case, albeit a somewhat subjective one.

¹ *High Court Judgment on Religious Education: Legal guidance on what it means for local authorities, academies, schools, teachers, Agreed Syllabus Conferences, and SACREs*, April 2016: <https://humanism.org.uk/wp-content/uploads/2016-04-28-FINAL-High-Court-ruling-on-Religious-Education-legal-guidance.pdf>

² *R (Fox) v Secretary of State for Education* [2015]: <https://humanism.org.uk/wp-content/uploads/R-Fox-v-SSfE-2015-EWHC-3404-Admin-251115.pdf>

³ *Guidance for schools and awarding organisation about the Religious Studies GCSE*, Department for Education, December 2015:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488477/RS_guidance.pdf

⁴ As stated in *The Advice of Dr Satvinder Juss, King's College, University of London re: the High Court ruling on Religious Education, joint NASACRE and AREIAC statement*, May 2016:

<http://www.nasacre.org.uk/file/nasacre/1-290-nasacreareiacresponsetodrsatvinderjussadviceupdated.pdf>

This does not affect how schools are teaching religious education.

5. This statement, while not necessarily incorrect in all circumstances, is misleading. Schools with no religious character will now have to teach RE that affords 'equal respect' to different religions and non-religious worldviews,⁵ so if they are not currently doing that then the judgment does affect how schools teach RE. There are ambiguities here, however, that are worth spelling out:
 - a. Many schools do not set their own RE syllabus but are legally obliged to follow an agreed syllabus and must still follow that syllabus. The impact of the judgment is that RE syllabuses must treat religions and non-religious worldviews with equal respect, but until agreed syllabuses are amended to reflect this, it is arguable that schools must go on teaching the syllabus provided. In a literal sense, then, the judgment perhaps does not *immediately* affect how these schools teach RE, as the new requirements bite directly on the agreed syllabus conferences, not the schools. But it is misleading to suggest that nothing must change.
 - b. However, many schools with no religious character are not bound to follow their agreed syllabus. They *should* be amending their syllabuses, if such amendment is required to bring it in line with the law as clarified by the judgment. So, contrary to the above statement, the judgment does immediately affect how such schools are teaching RE.
 - c. On a particularly literal reading, there may also be some ambiguity over use of the phrase 'how schools are teaching RE' as opposed to '*what* schools are teaching *in RE*'.

The Government considers the judgment to have no broader impact on any aspect of its policy in relation to the RE curriculum or the RS GCSE subject content for schools with or without a religious character, nor on the current inspection arrangements.

6. This statement merely refers to Government *policy* on RE and RS. It should not be taken as anything more than that, and schools should not rely on it to inform their understanding of the law. However, it does encourage the view that nothing must change as a result of this judgment, and so is misleading.

Specifically, the Government's policy remains that:

7. This preface says that the bullet points which follow are simply statements of Government policy or opinion and, therefore, are not necessarily a reflection of the judgment or the law. But once again, in what follows a different view is encouraged. The wording in some of these bullet points almost seems to be impossible to read as merely statements of Government policy. In my view this may well have been deliberate.

⁵ Paragraph 39: 'the state must accord equal respect to different religious convictions, and to non-religious beliefs'; see also paragraph 38, quoting from Lord Nicholls submission in *Williamson v Secretary of State for Education*: '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 equal footing for the purposes of this guaranteed freedom'.

- **Schools and Agreed Syllabus Conferences (ASCs) should be free to determine their own approach to the teaching of RE and the selection of the appropriate RS GCSE.**
8. This is misleading. The suggestion is that schools and ASCs *are* free to determine their own approach to the teaching of RE and therefore, by implication, that they are free to treat non-religious worldviews however they wish. But the judgment makes clear this is not the case. It may remain *the Government's view* that schools and ASCs *should* be free to determine their own approach. But this is a distinction that, in my view, will not be made by all schools and ASCs.
- **There is no requirement for an individual school's curriculum to mirror the make-up of the national or local population, curriculums should continue to be locally determined.**
9. This statement could be said to be correct in the sense that RE curricula do not have to *precisely* afford 'equal air-time' based on the make-up of populations. However, the judgment is clear that curricula must reflect the make-up of the population (local or national) to a significant degree. For instance, with regard to non-religious worldviews specifically, it states that it would not be lawful for a syllabus to '*give priority to the study of religions (including some with a relatively very small following and no significant role in the tradition of the country) over all non-religious world views (which have a significant following and role in the tradition of the country)*'.⁶ But this bullet point of the guidance implies that curricula do not have to take the make-up of the population into account at all, and it is therefore misleading.
- **Schools and ASCs are at liberty to use a range of relevant factors to determine their RE curriculum, including the intellectual rigour it presents and its role in supporting pupils' development as world citizens.**
10. This is a general statement of Government policy and is not particularly relevant to the judgment.
- **There is no obligation for any school or ASC to give equal air time to the teaching of religious and non-religious views.**
11. I believe the use of the term 'equal air time' is designed to mislead here. Paragraph 74 of the judgment says that '*the Strasbourg jurisprudence shows that the duty of impartiality and neutrality owed by the state do not require equal air-time to be given to all shades of belief or conviction*' (underlining added). But this was not challenged by the claimants in the case, and it was even acknowledged by them (and is by the judgment) that the greater priority afforded to Christianity in statute complies with human rights law, given Christianity's '*prominent place in the history and demography of the state*' and the fact that '*an RE syllabus can quite properly reflect the relative importance of different viewpoints within the relevant society.*'
12. What the judgment does say, however, at paragraph 39, is that '*the state must accord equal respect to different religious convictions, and to non-religious beliefs*' (underlining added). And as above, relegating non-religious worldviews ('*which have a significant following and*

⁶ Paragraph 77

role in the tradition of the country') below religions ('including some with a relatively very small following and no significant role in the tradition of the country') fails to accord this equal respect.⁷ I have explained what the requirement of 'equal respect' entails for schools and ASCs in the legal guidance produced previously.

- **Curriculum balance (and, therefore, compliance with statutory requirements) can be achieved across the key stages. There is no obligation on any school to cover the teaching of non-religious world views (or any other particular aspect of the RE curriculum) in key stage 4 specifically. Rather it is for schools and ASCs to determine how they meet their wider obligations across the key stages.**

13. This may well be the Government's policy, but it entirely contradicts the judgment. Quoting paragraph 78 of the judgment in full illustrates this:

'I have not overlooked Ms White's submission that the two years of Key stage 4 should not be considered in isolation, but within the context of the RE curriculum as a whole. I accept the point, but it is obvious that GCSE is a vitally important stage in the development of a young person's character and understanding of the world. I do not consider it could be said that a complete or almost total failure to provide information about non-religious beliefs at this stage could be made up for by instruction given at earlier stages. Nor do I overlook Ms White's final point: that if it turns out that the schools attended by the Children adopt a GCSE specification as the entirety of RE provision at Key stage 4, and the Parents do not want this form of RE for their children, they have the unqualified right to have their Children excused from that education. This point fails on the ground identified above: it would deprive the Parents and Children of rights they enjoy, which the state is bound to deliver.' (underlining added)⁸

It is surprising, to say the least, to see a Government attempt to maintain as policy something that cannot be the case while we are a party to the European Convention on Human Rights. This contradiction occurs throughout the guidance the Department produced but is illustrated most directly by the above bullet point.

- **Schools are, therefore, not obliged to choose a GCSE specification that meets the entirety of their wider obligations, as long as they are satisfied that they will meet them through their RE curriculum across the key stages.**

14. On a particularly tight reading the term 'across the key stages' could be interpreted to mean 'all the key stages, including key stage 4' and would therefore not necessarily be incorrect. Needless to say, however, this is not how it will be read by most and it is therefore an incredibly unhelpful and misleading statement.

15. The Government is right to say that schools are not required to choose a GCSE specification that meets the entirety of their obligations, and indeed, given the content of the GCSE specifications it would be very hard, or even impossible, for them to do that. But the judgment states that '*GCSE specifications could be compliant with The Subject Content and yet fall short of delivering the RE obligations. In that event, the state would need to afford*

⁷ Ibid.

⁸ Paragraph 78

some additional educational provision or fail in its duties'.⁹ What is misleadingly suggested in the Government's guidance, as in the previous bullet point, is that no additional content is required at Key Stage 4 provided there is sufficient content on non-religious worldviews at other key stages. For reasons given above, this is not correct.

- **For schools without a religious character, the RE curriculum needs to 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**

16. This is a statement of the statute, but 'religions' must be interpreted as meaning 'religions and beliefs', including non-religious worldviews. It is likely that schools may not properly interpret this, however, and this statement is therefore misleading.

17. Finally, we come to page two of the document, which constitutes the portion that is designed to fulfil the requirements of the court order following on from the judgment:

The judgment identifies a technical, legal concern with paragraph 2 of the introduction to the Religious Studies (RS) GCSE subject content:

"By setting out the range of subject content and areas of study for GCSE specifications in religious studies, the subject content is consistent with the requirements for the statutory provision of religious education in current legislation as it applies to different types of school."

The Court concluded that this amounted to an assurance to all schools without a religious character that they could always wholly rely on any and all possible routes through the RS GCSE to ensure compliance with their statutory responsibilities.

This was not how the paragraph was ever intended to be read. We intended it simply to reflect that the subject content is not incompatible with those statutory responsibilities and may act as a possible element in complying with those responsibilities.

Paragraph 2 is now to be understood and applied in the sense set out in the previous two paragraphs. The Government's clear view is that schools following this approach will be fully in line with their statutory requirements.

18. On the whole, this accurately reflects the judgment on this point, albeit with the subjective description of the judgment as merely 'technical [and] legal'. But when taken with the preceding paragraphs, schools and agreed syllabus conferences will, in my view, almost certainly be misled as to the extent to which the curriculum must be inclusive of non-religious worldviews.

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⁹ Paragraph 81