Conformity of various UK laws with Article 4 of Directive 2000/78/EC
16 July 2013

Response from the British Humanist Association to the observations of the United Kingdom Government

EU Pilot file: 3800/12/JUST

Introduction

1. The United Kingdom Government has been kind enough to pass on to us their observations, dated 14 June 2013, with respect to the questions you submitted to them in a letter dated 11 March 2013. In that letter, you questioned whether various UK laws breach Article 4 of Council Directive 2000/78/EC of 27 November 2000 establishing the general framework for equal treatment in employment and occupation ('the Directive'). The letter was prompted by a complaint we (the British Humanist Association, or 'BHA') submitted on 16 April 2010.

2. We would like to take this opportunity to further submit to you comments on the UK Government's response. In that response, the UK Government's Department for Education (as well as the Scottish Government and Northern Ireland Office of the First Minister and Deputy First Minister) broke their comments down into four different areas of concern:

    (A) the School Standards and Framework Act 1998 ('the 1998 Act');
    (B) the Education Act 2011 ('the 2011 Act');
    (C) the Education (Scotland) Act 1980 ('the 1980 Act'); and
    (D) the Fair Employment and Treatment (Northern Ireland) Order 1998.

    We will follow their general structure in our own comments, although have nothing to say on (D).

(A) The School Standards and Framework Act 1998 and related matters

3. The general argument in this section can be summarised as that the UK Government believes that sections 58 and 60 of the School Standards and Framework Act, and relevant exceptions in the Equality Act 2010, are compatible with the Directive as they only allow discrimination in religiously designated schools to the extent that it is permitted by the Directive.

4. We do not agree with this and would like to begin by highlighting one major omission from the UK Government's argument, namely the effect of the exception in the Equality Act. From there we will move on to consider the specifics of the School Standards and Framework Act.

Schedules 9 and 22 of the Equality Act 2010

5. In paragraph 37, the UK Government draw your attention to paragraph 4 of schedule 22 of the Equality Act 2010. This says that

'A person does not contravene this Act only by doing anything which is permitted for the purposes of—

(a) section 58(6) or (7) of the School Standards and Framework Act 1998 (dismissal of teachers because of failure to give religious education efficiently);

(b) section 60(4) and (5) of that Act (religious considerations relating to certain appointments);

(c) section 124A of that Act (preference for certain teachers at independent schools of a religious character).

(d)section 124AA(5) to (7) of that Act (religious considerations relating to certain teachers at Academies with religious character).'

The Government comments that '*The effect of paragraph 4 is to permit designated faith schools to act in accordance with the provisions of sections 58 and 60 of the 1998 Act (i.e. to the effect described at paragraphs 20 – 31 above).*' Paragraphs 20-31 set out that the Government believes that UK schools are required to follow the Directive on genuine occupational requirements ('GORs').

6. With all due respect, this is not an honest statement by the Government of the meaning of paragraph 4. It actually exempts religiously designated schools from having to follow schedule 9 of the Equality Act 2010. Paragraph 1 of this schedule says:

'*OCCUPATIONAL REQUIREMENTS*

General

1(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—

(a) it is an occupational requirement,

(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and

(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

(2) The provisions are—

(a) section 39(1)(a) or (c) or (2)(b) or (c);

…'

Paragraph 3 adds:

'Other requirements relating to religion or belief

3 A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work—

(a) it is an occupational requirement,

(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and

(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).'

The relevant portions of section 39 say:

> '*(1)An employer (A) must not discriminate against a person (B)—*
> *(a) in the arrangements A makes for deciding to whom to offer employment;*
> *…*
> *(c) by not offering B employment.*
> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
> *…*
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> *(c) by dismissing B;*
> *…*'

The explanatory notes for paragraph 3 add:

> '*This paragraph allows an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if, having regard to that ethos:*
>
> - *being of that religion or belief is a requirement for the work (this requirement must not be a sham or pretext); and*
> - *applying the requirement is proportionate so as to achieve a legitimate aim.*
>
> *It is for an employer to show that it has an ethos based on religion or belief by reference to such evidence as the organisation's founding constitution.*'

7. Put simply, paragraph 1 of schedule 9 is recreating in UK law article 4(1) of the Directive. They do not map very closely to this article, requiring that '*having regard to the nature or context of the work… the application of the requirement is a proportionate means of achieving a legitimate aim*' but not requiring that any occupational requirement is '*genuine and determining*' (which may in itself be a breach of the Directive, as per Infringement No 2006/2450). But this is clearly the intent.

8. Paragraph 3 of schedule 9, on the other hand, seems suited to map to article 4(2) of the Directive. It requires that the organisation has a religious ethos, and '*having regard to that ethos and to the nature or context of the work… the application of the requirement is a proportionate means of achieving a legitimate aim*'. Again, it does not state that the occupational requirement must be '*genuine, legitimate and justified*', and it also does not limit itself to '*national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive*'. However, due to its limited application (i.e. referring to a religious organisation and its ethos), and in separating itself from paragraph 1, paragraph 3 seems intended for article 4(2) (otherwise, article 4(2) is not incorporated into UK law at all).

9. Indeed, if it were not for the exception in schedule 22, then sections 58, 60, 124A and 124AA of the 1998 Act would presumably have to sit under schedule 9. This would limit religious discrimination in employment to that which is allowed by schedule 9, which includes all differences of treatment permitted by article 4 – exactly what the UK Government is arguing is (de facto) the case in its observations. The fact that there is an exemption for these four

sections from having to follow the UK's laws on occupational requirements seems to be a strong indication that the legislative intent was to allow wider discrimination than is just permitted by GOR.

10. If paragraph 4 of schedule 22 is repealed, we think that sections 58, 60, 124A and 124AA would in add nothing to what is already in law through schedule 9 (indeed, if they *did* add something, then that would inevitably be a Directive breach) and so should also be repealed: this is the only clear way to set out that religiously designated schools fall under the same rules as every other employer.

Section 60(5)(a) of the 1998 Act

11. We consider section 60(5)(a) first as this seems to be the most general version (as well as the most widespread in practice) of the issues being considered. In particular, paragraph 25 makes an argument that seems to be applicable to all of the different subsections of the 1998 Act that are being debated:

> '*if a teacher brought a claim against a school (on the basis that the school, as an employer, had discriminated against them in their remuneration, for example), then the court or tribunal would consider the legislation in this wider context. There is a well-established principle in English and European law that legislation, to the extent possible, must be construed as being consistent with the requirements of European law. If that is not possible, it is to be dis-applied to the extent required for consistency with European law. Bearing this in mind, section 60(5)(a) could and would, if necessary, be construed and applied by a court or tribunal as permitting preferential decisions on grounds of religious belief, only to the extent that such decisions were consistent with genuine, legitimate and justified occupational requirements.*'

12. We have two responses to this. First of all, it is not at all clear that a court or tribunal *would* consider the Directive, as this would require the complainant to think to raise it as an issue: something that seems unlikely given the complete absence of any previous statements by the Government to match the one given here. Indeed, the case provided by the Scottish Government as annex 1 is a complicated one, but it is notable that there is no discussion at all as to whether the claimant in that case (a supernumerary drama supply teacher provided to a Catholic school by her employer, the local authority) was a victim of discrimination not permitted by article 4.

13. Secondly, and more importantly, it is not considered acceptable by the European Court of Justice for a national Government to inadequately implement a Directive, instead relying on domestic courts to resolve the difference. In Infringement No 2006/2450,[1] the European Commission ruled:

> '*As the Commission pointed out in the letter of formal notice, the European Court of Justice has consistently held that the provisions of Directives must be implemented with sufficient clarity and precision to satisfy the requirements of legal certainty (se in particular cases 29/84 Commission v Germany [1985] ECR 1661 paragraph 23, C-159/99 Commission v Italy [2001] ECR I-3541 paragraph 24, case C-365/93 Commission v Greece [1995] ECR I-499, paragraph 9; and C-144/99 and case Commission v The Netherlands, [2001] ECR I-3541, paragraphs 17 and 21).*'

[1] http://www.secularism.org.uk/uploads/ec-reasoned-opinion.pdf

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

14. It is surely also important whether or not faith schools believe that they '*have an unfettered discretion in terms of being able to give unrestricted preference in respect of any teacher*'. The Catholic Education Service for England and Wales, the largest provider of secondary schools in the UK and second largest provider of primary schools, believe they do have such unfettered access. Their standard teacher (i.e. other than for senior staff) application form asks applicants to give their 'Religious Denomination / Faith'. It later adds '*Schools/Colleges of a Religious Character are permitted, where recruiting for Teaching posts, to give preference to applicants who are practising Catholics and, therefore, one [referee] should be your Parish Priest/the Priest of the Parish where you regularly worship.*'[2] The notes to applicants that stand alongside this add:

    '*Schools/Colleges of a Religious Character in England and Wales are permitted by law to require certain posts to be filled by practising Catholics.*

    '*Senior Leadership posts – Applicants are advised that the 'Memorandum on Appointment of Teachers To Catholic (Voluntary Aided and Independent) Schools' (October 2012), provides that 'the posts of Headteacher, Deputy Headteacher and Head or Coordinator of Religious Education are to be filled by baptised and practising Catholics'. The Memorandum may be viewed by visiting the CES's website at www.catholiceducation.org.uk.*

    '*Teacher posts – Applicants are advised that schools/colleges are entitled to give priority to practising Catholic applicants*.

    '*Support Staff posts [i.e. non-teacher posts not covered by the 1998 Act] – Applicants are advised that schools/colleges (in England only) are entitled to give priority to practising Catholic applicants where it can be demonstrated that it is a proportionate means of achieving a legitimate aim (commonly known as a "genuine occupational requirement").*'[3]

    Finally, *Christ at the Centre*, published by the Catholic Education Service for England and Wales earlier this year, says that '*The Bishops require that the Headteacher or Principal, Deputy Headteacher or Vice-Principal, and Head of RE/RE Co-ordinator must be practising Catholics. Preferential consideration should also be given to practising Catholics for all teaching posts and for non-teaching posts where there is a specific religious occupational requirement, i.e., chaplaincy post. In England and Wales statutory provision allows for such preferences to be made.*'[4]

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[2] http://www.catholiceducation.org.uk/schools/application-forms/item/download/18824_dc918232f36d6226695a48a40b4dd74e - pages 3 and 12

[3] http://www.catholiceducation.org.uk/schools/application-forms/item/download/18825_25c73869ea08b101dafec4d50c0e90c1

[4] http://www.catholiceducation.org.uk/catholic-education/publications/item/download/18680_d176c293fbf2a5bb46e2eb21e9b72970

The Catholic Education Service's meaning is clear: every teacher in every Catholic school can be required to be a Catholic. It is also stated that schools should give preferential treatment to Catholics for every teaching post in the first instance.

15. In paragraph 27 the UK Government says it '*is not aware of any legal proceedings ever having been brought in relation to an employment decision made under section 58 or 60.*' This is likely because many teachers are put off applying to religiously designated schools in the first place, due to their stating (as above) that they can religiously select their staff; also because if an applicant is rejected, they may not know it was for this reason; but finally, even if a teacher is rejected for this reason, they may well believe that this was not a breach of the law because they almost certainly would take a straight reading of section 60(5)(a).

16. In paragraph 17, the UK Government essentially acknowledges that the 1998 Act provides wholesale exceptions for schools to discriminate for all teaching posts, and perversely argues that they do not need to '*work on a case by case basis*'. This seems to detract from/deny the need to decide for any given job whether there is a genuine occupational requirement for that job before attempting to recruit someone to it while requiring them to hold a particular protected characteristic.

17. In paragraph 28, the UK Government says that '*a school with a genuine and substantial religious ethos may well successfully contend that it is legitimate to be able to give preference in respect of appointment to any teaching position because of the pastoral responsibilities of all teachers, regardless of subject or seniority, and the importance that such pastoral responsibilities are discharged consistently with the tenets of the school's specified religion.*' We do not agree that any state funded school can genuinely argue that there is such a requirement on all its teachers, either to maintain its ethos or to meet pastoral responsibilities. Surely an occupational requirement can only be said to be genuine if it is genuinely unavoidable for a given role, and any school with a strong religious ethos could appoint a minority of its staff with a view to this minority having specific responsibility for maintaining that ethos and providing pastoral support, thus leaving the majority of staff unaffected. In our opinion, no school can genuinely require all its teachers to share its faith.

18. Finally, we note that the difference of treatment described in Article 4.2 is on the grounds of 'a person's religion or belief'. Section 60(5)(a)(i) considers an individual's religious opinions, in line with this. But section 60(5)(a)(ii)-(iii) also allows consideration of an individual's attendance at religious worship and their willingness to give faith-based religious education (*as alternatives to* consideration of their beliefs). This seems to be another breach of the Directive.

Section 60(5)(b) of the 1998 Act

19. The BHA has nothing to add on section 60(5)(b) beyond what was said in its comments about the Equality Act 2010 and section 60(5)(a), except that once more, the grounds on which termination is permitted are far broader than simply 'a person's religion or belief'. We made these points in our original 2010 submission.

Section 58 of the 1998 Act

20. Again, the BHA refers back to its comments about the Equality Act 2010 and section 60(5)(a): if the law allows nothing but genuine occupational requirements to be used, why is there a need for this section at all, and the exception from the Equality Act?

21. However, the BHA also would like to clarify why, exactly, 'reserved teachers' exist. Section 58 says that reserved teachers are '*persons who—(a) are selected for their fitness and competence to give such religious education as is required in accordance with arrangements under paragraph 3(3) of Schedule 19 (arrangements for religious education in accordance with the school's trust deed or with the tenets of the school's specified religion or religious denomination), and (b) are specifically appointed to do so.*' Paragraph 3 of Schedule 19 of the 1998 Act sets out the required provision for religious education at foundation and voluntary controlled schools with a religious character. Paragraph 3(3) says:

> '*(3) Where the parents of any pupils at the school request that they may receive religious education—*
>
> *(a) in accordance with any provisions of the trust deed relating to the school, or*
>
> *(b) where provision for that purpose is not made by such a deed, in accordance with the tenets of the religion or religious denomination specified in relation to the school under section 69(4),*
>
> *the foundation governors shall (unless they are satisfied that because of any special circumstances it would be unreasonable to do so) make arrangements for securing that such religious education is given to those pupils in the school during not more than two periods in each week.*'

22. In other words, reserved teachers exist for parents who request that their children receive religious education in accordance with the faith of the school (instead of the standard provision in accordance with the locally agreed syllabus, which is not faith-based).

23. It is extremely rare for parents to make use of schedule 19 paragraph 3(3). In fact the BHA is not aware of a single instance of it.[5] Therefore quite aside from whether or not this provision is compatible with the Directive, it seems to the BHA that for the stated purpose of this provision, its allowance is grossly excessive.

24. The UK Government, on the other hand, submit that '*If a school were unable to identify persons to provide religious education in accordance with the tenets of its specified religion, it would not fairly or accurately be able to describe itself (for example, to the parents of pupils or prospective pupils) as a faith school.*' This ignores the exceptional nature of this provision being used. It also ignores the fact that there is a category of Academy known as a 'faith ethos' Academy that is considered by the Government to be a form of faith school but is not designated as such and so cannot provide religious education in accordance with the tenets of a specified religion.[6]

25. Finally, the UK Government's response neglects to mention the fact that section 58(4) of the 1998 Act (which precluded the head teacher of a school from being reserved) was repealed by the section 37 of the Education and Inspections Act 2006. As the UK Parliament's Joint Committee on Human Rights concluded, '*Other provisions of Section 37 of the 2006 Act have also widened the ability to reserve certain posts filled by non-teaching staff. These provisions*

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[5] To strengthen this point, the BHA is currently submitting Freedom of Information requests to a large sample of Voluntary Controlled and Foundation schools with a religious character, asking them how many parents have made use of schedule 19 paragraph 3(3). However, as schools are not obliged to respond to FOI requests outside of term time, we are unlikely to get replies to these requests until October at the soonest.

[6] See the definition of faith ethos given on page 38 at http://media.education.gov.uk/assets/files/pdf/f/free%20school%20how%20to%20apply%20guide.pdf

[the repeal of s58[4] and the other provisions] may constitute a breach of the principle of non-regression in EU law.'[7] We made the same argument in our original submission in 2010.

Section 60(4) of the 1998 Act

26. Following on from this point, we turn to section 60(4). First of all, this once again allows for consideration wider than someone's religion or belief.

27. Given that head teacher posts can now be reserved, it is worth considering where this section would apply. It seems to us that it would either apply when the school has 'filled up' its one-fifth quota and wants to give some consideration to a further member of staff as well; or where schools wish to give some consideration to a head's 'ability and fitness to preserve and develop the religious character of the school' in situations where they would not wish to reserve the headship. Both of these situations seem less justified than the practice of reserving teaching posts in the first place.

Section 124A of the 1998 Act

28. Nothing has been said on section 124A of the 1998 Act.

29. Broadly speaking, section 124A recreates section 60(5), but for independent schools. This includes private schools (which receive no state funds), as well as Academies (schools not maintained by the state but 100% state funded) and Free Schools (a type of Academy). Academies now constitute the majority of secondary schools in England, as well as a sizeable and rapidly growing proportion of primary schools. Many Academies used to be maintained schools and 'converted' to being Academies. Others (such as Free Schools) are brand new state schools.

30. The concerns we have about section 60(5) also apply to section 124A. Furthermore, section 124A was introduced by The Independent Schools (Employment of Teachers in Schools with a Religious Character) Regulations 2003, which came into force on 1 September 2003. This therefore means that section 124A represents a regression. It is a particularly serious regression for private schools and for Academies which are not former maintained schools, as these schools did not previously have an equivalent right to discriminate.

(B) The Education Act 2011

31. Once again, we fear the UK Government has brushed over the important details in comparing Academies to maintained schools in two areas: (i) the designation procedures; and (ii) how an Academy/school moves from only being able to discriminate against one-fifth of teachers to being able to religiously select all staff. We consider these cases in turn.

(i) The ability of Academies and Free Schools to gain a religious character without consultation

32. A maintained school with no religious character cannot legally gain one: this is prohibited by section 18(4)(b) of the Education and Inspections Act 2006, which says '(4)None of the following alterations may be made to a maintained school— …(b)any change whereby the school would acquire or lose a religious character'. In practice, however, schools can close

[7] Joint Committee on Human Rights, 'Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill. Fourteenth Report of Session 2009–10', 2 March 2010: http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/73/73.pdf

and re-open overnight as brand new schools with a religious character gained. Both these changes require consultations, the requirements for which are extensively set out in that Act and also The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2007. By comparison, if an Academy or Free School is to gain a religious character, then its funding agreement specifies that:[8]

> '*c) the Academy Trust*[9]*:*
> *(1) agrees that before making an application pursuant to the Religious Character of Schools (Designation Procedure) (Independent Schools) (England) Regulations 2003 for the Academy to be designated as a school with religious character it shall seek the prior written consent of the Secretary of State*[10]*;*
> (2) *hereby acknowledges that the Secretary of State may in his absolute discretion refuse or consent to the Academy Trust making such an application.*' [note the footnotes appear in the original source]

If the Secretary of State agrees to such a conversion, s/he makes an Order/statutory instrument.

The Secretary of State can therefore prevent an application for whatever reason s/he sees fit, but subsection (c) is there in case the Secretary of State thinks the consultation held by the school is inadequate, or disagrees with its interpretation of the results. With that said, the current Secretary of State envisages that such consultations are carried out by the school and that the school itself assesses the results (whereas for maintained schools this would be someone other than the proposer – typically the schools adjudicator). In addition, there are no requirements on what form the consultation must take, who must be consulted or how.

The consequence is that this is a much less burdensome process than the necessity for maintained schools to close and re-open, having followed a consultation the requirements for which are specified in statute. In addition, as Academy funding agreements are not statute, there is nothing to stop an Academy and Secretary of State from choosing to unilaterally change the Academy's funding agreement, or to stop the Secretary of State choosing to ignore a requirement, or to stop a Secretary of State from changing the funding agreement s/he applies to future new Academies. Therefore it is legally possible for a school to gain a religious character without consultation. This seems to us to consequently represent a regression in protection afforded to teachers at Academies without a religious character.

(ii) Section 124AA of the 1998 Act (as inserted by section 62 of the 2011 Act)

33. The concern with section 124AA(2) is the lack of any requirements on the Secretary of State before s/he makes an order to lift the one-fifth teacher limit. A Secretary of State could decide, if he or she wishes, to make such orders for all schools: nothing prevents this. A Secretary of State has no equivalent power with regards to lifting the one-fifth limit for voluntary controlled or foundation schools. This seems to us to be comparably inadequate protection and therefore a regression.

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[8] See, for example, the Academy model funding agreement at http://media.education.gov.uk/assets/files/doc/s/single%20model%20fa%20mainstream%20v7.doc

[9] *This is required in order to ensure that the process by which an Academy becomes designated as a school with a religious character is comparable to that which applies for maintained schools.*

[10] *The Academy Trust must undertake consultation on the proposal for designation prior to seeking the Secretary of State's consent.*

34. In paragraph 51, the UK Government says that '*For the Secretary of State to make such an order, the Academy Trust must make an application and must (by means of consultation with interested parties) demonstrate to the Secretary of State's satisfaction that there is sufficient support for the proposed change.*' This is not set out in statute, but is merely the policy of the current Government. Indeed, an amendment was put down to the 2011 Act during its passage through the House of Lords to specify that 'the Secretary of State shall not make such an order unless there has been consultation with such persons as he or she considers appropriate on the question of whether an order should be made and having regard to the responses given in that consultation'.[11] Following debate, this amendment was rejected by the Government.[12]

35. In paragraph 52 the UK Government discusses transitional provisions for teachers. Again, while in maintained schools the requirements are set out in the regulations they cite, for Academies there are no rules (just the Government's word).

36. We are reassured to hear that no orders have so far been made, but are concerned that this is legally possible at all.

(C) The Education (Scotland) Act 1980

37. Our general points with regard to section 21(2A) of the Education (Scotland) Act 1980 are firstly that it requires every teacher to go through an approval process as regards their religious belief and character, which seems excessive: surely not every teaching post in a Scottish denominational school has a GOR attached to it?

38. Secondly, in considering 'religious character' as well as 'religious belief', it is again permitted for a school to take into account something other than a person's religion or belief, namely their character with regards to religion or belief. This is what we saw being done in the McShane case, where it was not sufficient to merely ask for the person's religion or belief, but a reference to 'provide the name of a suitable referee who can testify to your personal "religious belief and character".' For someone who is not religious, this obviously doesn't make sense.

39. More generally, the same points we have made throughout this document apply to the need for this section of the 1980 Act, given the existence of the general provisions in the Equality Act 2010, from which this section was specifically exempted. We once again highlight that there was no consideration of the Directive in the McShane case, which shows that it is not sufficient to rely upon tribunals – Directives must be fully transposed. In our opinion, there is clearly no genuine occupational requirement for a supernumerary drama supply teacher provided by her employer, the local authority to a Catholic school (where 50% of the staff are non-Catholic) to be a Roman Catholic.

[11] Amendment 134 at http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0067/amend/ml067-ix.htm

[12] Debate (along with other amendments) at http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110914-gc0001.htm#11091513000581