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# Welcome to the first edition of our new Education Sector publication...

The lawyers in our Education Sector Team have amassed experience acting for local, regional, national and international Colleges, Universities, Independent Schools, Academies and other education bodies, including various Government agencies and departments. They are all committed to the Education sector and regularly speak at sector events and conferences. We also spend time on the ground with our clients and contacts. Accordingly, we hope that the following articles reflect some of the current issues occupying the sector.

This edition begins by capturing our recent experience in the Safeguarding arena. We share the feedback gained from our dialogue with the Department of Children, Schools and Families (DCSF) Policy Unit regarding the duty to make an Independent Safeguard Authority (ISA) referral; how high up the chain of command employees are caught and the steps an employer can take when dealing with an employee who has triggered a referral. This is particularly topical in light of the recent Vetting and Barring roadshows.

We then turn to explore recent Religion and Belief Discrimination cases and their interaction with other Discrimination claims.

Next up, a piece particularly relevant for our Project, Estates and Construction readers which considers the use of, and pitfalls in, Letters of Intent.

Finally, we cover the recent introduction of stricter measures by the UK Border Agency for overseas students and touch upon extremism and radicalisation on campus.

The opposite page introduces our Education core team and I would now like to say a few words about our approach.

## Our approach

We are committed to building lasting partnerships with our Education clients and are prepared to invest time in learning about your institution and its issues, how you operate and your priorities so that we can provide better informed and tailored practical advice to meet your needs.

In addition to providing the full range of Education legal services, we deliver general seminars or bespoke in-house training designed to meet your specific training requirements.

Our advice and training incorporates and reflects latest legal and best practice developments, is pro-active. We provide guidance that is practical and pragmatic with plenty of tips and pointers and includes lessons learned in past cases.

## Publications and Briefings

We issue a number of free publications and email briefings. To join our mailing list please fill in the enclosed form or go to [www.birketts.co.uk](http://www.birketts.co.uk) and visit the News and Seminars section.

It goes without saying that if you wish to speak or meet with us about our Education offering, any training needs or, indeed, in relation to any specific issues your institution may be facing then do let us know as we would be delighted to assist.

We hope you enjoy this publication. If there are any issues that you would like covered in our next edition then do let us know.

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# “The hallmark of a civilised society is its treatment of the vulnerable.”

There is a view that the introduction of the recent Safeguarding and Vulnerable Groups Act 2006 (SVGA) has missed a prime opportunity to codify and simplify the safeguarding regime.

In particular it could have incorporated definitions and law in one place. Despite reviews (Singleton’s December 2009) there is still a lack of clarity regarding the roles of, and interaction between, Independent Safeguard Authority (ISA) and Criminal Records Bureau (CRB) and the reach of the new system.



Birketts has assisted several clients with safeguarding issues and has referred uncertainties to ISA, CRB and the Department of Children, Schools and Families (DCSF) policy unit. Difficult issues clients have faced include assessing the duty to make an ISA referral and how high up the chain of command employees are caught and what steps an employer can take when dealing with an employee who has triggered a referral.

## Referrals – Are they necessary for management or policy failures?

The SVGA requires a regulated activity provider (a provider) to make a referral to ISA where a person undertaking a regulated activity has:

- i). been removed from the regulated activity or left of their own volition;

and

- ii). the ‘relevant conduct’ has occurred or the ‘harm test’ is satisfied (defined in S35 SVGA).

It is not clear, from the broad definitions, whether a referral is triggered only in respect of the person who is actually and directly responsible for the conduct or risk of harm, or whether there is a duty to refer errant managers/supervisors where responsibility could be attributed to poor management and supervision. We have recently

received written confirmation from the DCSF that a referral would only be triggered where the employee consciously either harmed a child or wished for the child to come to harm. As such, it is extremely unlikely that a management failure would constitute either relevant conduct or satisfy the harm test.

## Termination of employment

It is very likely that circumstances which trigger a referral to ISA (compulsory from 12 October 2009) will also lead the employer to consider dismissing the employee concerned for misconduct. The SVGA and accompanying guidance will affect the options open to the employer.

The current guidance relating to safeguarding children in education, issued by the Department for Education and Skills (DfES) in 2007\*, has yet to be updated post SVGA. However it makes clear that where an employee resigns or is dismissed amidst issues that trigger a referral, the employer is prohibited from entering into a compromise agreement with the employee, where the effect of such an agreement is to secure the employee’s departure in return for the employer not pursuing disciplinary action (and/or not making a referral).

So what reference should an employer provide if an employee leaves in such circumstances? As yet there is no guidance on this. An employer is not obliged, in law, to provide a reference.

They could refuse and leave it to any prospective provider employer to satisfy itself of the potential employee’s suitability to work with children or vulnerable adults. In the absence of guidance we urge caution against a bland “tombstone reference”, as this may be deemed to misrepresent the circumstances of the employee’s departure suggesting there have been no concerns.

Sector staff need to be alive to safeguarding issues and concerns. Procedures and management structures need to be in place for the identification, assessment and management of such risks.

More information can be found at <http://www.isa-gov.org.uk/>

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by  
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\*Safeguarding Children and Safer Recruitment in Education. 1 January 2007, Department of Education and Skills

# Do other forms of discrimination trump discrimination on the grounds of religion or belief?

Whilst the definition of “belief” appears to have been extended by recent case law, the courts do not seem to view as favourably employees whose religious beliefs impact upon their ability to perform their duties or comply with their employers’ policies.

Under the Employment Equality (Religion or Belief) Regulations 2003 an employee is protected from less favourable treatment on the grounds of their religion or belief. “Religion” is defined as “any religion”, and “belief” as “any religious or philosophical belief”. In *Grainger plc v Nicholson 2009*, the EAT held that a belief in climate change was capable of being a “philosophical belief”.

However, case law suggests that when looking at whether an employee has been treated less favourably on grounds of their religion and belief, there is a clear distinction between the right to hold a belief and the right to manifest it in the workplace.

In *Ladele v The London Borough of Islington [2009]* Ms Ladele was a registrar who was required to register civil partnerships as part of her job. Ms Ladele objected. She was unable to reconcile her Christian faith with actively enabling same sex unions. She claimed religious discrimination after her employer disciplined her for her refusal to officiate over civil partnerships.

The case was heard by the Court of Appeal which held that she had not suffered indirect discrimination. The court found that the council had a legitimate aim, as an employer and public authority, in being committed to promoting equal opportunities and non discrimination by its employees in respect of all the services it provided, including civil partnerships.



As Ms Ladele refused to comply with this aim, the council had acted proportionately in disciplining her.

This case, together with *McFarlane v Relate Avon Ltd 2009* (in which the EAT held that Mr McFarlane had not suffered religious discrimination when he was dismissed for refusing to counsel same sex couples due to his Christian faith), suggests that it will be very difficult for an employee to complain of discrimination on the grounds of religion or belief, where the employee refuses to carry out duties they find objectionable, resulting in a breach of an internal equal opportunities procedure.

It seems unlikely that Tribunals will find discrimination when it is an act (or omission) arising out of the employee’s manifestation of their belief rather than the belief itself which influences the employee’s behaviour.

In summary, while a wide range of beliefs now fall within the ambit of a “religion or belief” it will not be discriminatory to discipline the holders of such beliefs if they are manifesting them in

such a way as to breach an employer’s equal opportunities policy and/or to discriminate against others. Allowances should be made, however, if the policy has the effect of directly or indirectly discriminating against an employee on the ground of their religion or belief but only if it is discriminatory against the employee due to a requirement of their faith.

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by  
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# Letters of intent: Handle with care

Lord Clarke in his judgment in the recent case of *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Company KG (2010)* confirmed the Supreme Court's views on letters of intent and the inherent "... perils of beginning work without agreeing the precise basis upon which it is to be done."

by  
**Stefan  
Harris-Wright**  
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A letter of intent is a commonly used instrument in construction projects. The letter is issued to the contractor to enable it to start work without the full building contract being entered into. The most common reason for using a letter of intent is that there are some details of the building contract that are still to be agreed, but the employer is keen for the works to start in order to keep to the programme. This can be of particular relevance for education institutions, such as schools, colleges and universities, where ensuring that completion and handover of a new teaching facility or accommodation block occurs before the start of the new academic year is key. However, the consequences of a carelessly drafted letter of intent can throw a project significantly over budget and behind schedule.

If a letter of intent is deemed necessary in the circumstances, there are certain key provisions that in most cases it will be important for the employer to include, such as the following:

1. **Financial cap** - the authorisation granted by the letter should contain a financial limit. Without a financial limit, the contractor may be entitled to carry out all of the works under the letter of intent and therefore has little or no incentive to sign the main contract;
2. **Scope** - the letter should clearly explain the nature of the works that are authorised. Often a letter of intent is used for preliminary/mobilisation works, but to avoid argument later, a detailed description of the works covered by the letter should be provided. This can be set out in a specification attached to the letter, and/or by reference to specific drawings;
3. **Payment** - the basis of valuing payments for the work carried out under the letter of intent and the process for applying for and making payments should be clearly set out. This can simply be by reference to the payment process under the main contract, if that part of the contract is agreed; and
4. **Termination/Suspension** - the employer should have the benefit of immediate rights of both (i) suspension; and (ii) termination, with a clear explanation of what payment the contractor will be entitled to in those circumstances.

Letters of intent can be a helpful tool in assisting with meeting a required programme where the negotiation of the main contract has fallen slightly behind its intended timescale. However, they should not be entered into lightly or without the benefit of professional advice. Working under a letter of intent is no substitute for entering into a formal contract. In the aftermath of the Learning and Skills Council Capital Funding Projects episode, there may be a temptation for education institutions (once they have secured funding) to use letters of intent as a quick fix means of commencing or re-commencing works that have fallen behind schedule. However, letters of intent should be avoided unless absolutely necessary and an employer should always consider whether the benefit of commencing the works early outweighs the potential risks involved. As confirmed by Lord Clarke in his judgment in the RTS case, "The moral of the story is to agree first and to start work later."

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# Suspected bogus colleges spark stricter rules for overseas students



## Government figures in December 2009 showed that suspected bogus colleges are being discovered at a rate of almost two a month.

The student visa route under Tier 4 of the points based system which was launched in March 2009 introduced a requirement for educational establishments to be formally licensed and approved by the UK Border Agency (UKBA) in order to sponsor students from outside the European Economic Area or Switzerland. Since Tier 4 has come into force, approximately 2,000 institutions were refused sponsorship powers in 2009.

There are still difficulties with Tier 4, many of which have hit the headlines in recent months. The Home Secretary Alan Johnson recently said:

**“We want foreign students to come here to study, not to work illegally, and ... we have set out necessary steps which will maintain the robustness of the system we introduced last year.”**

This is reflected in steps taken by the UKBA who have announced stricter measures for overseas students partly due to a surge of suspected bogus applications. These new measures came into effect on 3 March 2010 and include:

- Successful applicants for English language courses and those who are studying any other course below degree level, to speak English to a level just below a GCSE in a foreign language, rather than the former beginner level.
- Students studying below a foundation degree or first degree level will be allowed only to work ten hours a week during term time, instead of twenty hours.
- Students who are on courses which last less than six months will not be allowed to bring dependants to the UK.
- Dependants of those who are studying a course lower than foundation or undergraduate degree level will not be allowed to work and they will face removal from the UK if found to be working.

In addition, visas for foreign students studying A-Level courses and equivalent will be restricted to ‘highly trusted sponsors’. This category of highly trusted sponsors is in force from 6 April 2010 and publicly funded colleges and universities will automatically be granted the highly trusted status. However, privately funded institutions will need to apply to the UKBA to become highly trusted.

## Extremism and radicalisation

There has also been much media coverage of Muslim extremists and their presence and influence at various British Universities and the seeming increase in radicalisation. A number of those involved in terror attacks have attended UK Universities including the individual who attempted to bomb a plane over Detroit on Christmas Day.

As a result, Universities UK has established a working group, chaired by the UCL Provost, Professor Malcolm Grant, to look at how universities can best protect academic freedom whilst taking appropriate action to prevent violent extremism.

## Existing guidance:

The Universities UK “Promoting good campus relations: dealing with hate crimes and intolerance” from 2005 still contains some useful material and guidance:

<http://www.universitiesuk.ac.uk/Publications/Documents/promotinggoodrelations.pdf>

The Equality Challenge Unit (ECU) produced an update to the guidance in 2007:

<http://www.ecu.ac.uk/inclusive-practice/promoting-good-campus-relations-imperative>

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