

Equality and Human Rights Commission
Research report 97

Review of equality and human rights law relating to religion or belief

Peter Edge and Lucy Vickers
Oxford Brookes University



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Executive summary

This study reviews the interpretation and effectiveness of the current domestic legislative framework in relation to religion or belief under equality and human rights law. The review is based upon a detailed analysis of primary and secondary sources of British and European law, recent research carried out by the EHRC, the extensive body of academic literature in the field, and the insights of a diverse group of academics, legal practitioners, representatives of religion or belief organisations and representatives of other advisory and equality bodies.

The report explores the legal definitions of religion and of belief and the relationship between them; the legal protection for religion or belief at European level and its application in Great Britain; the balancing of rights and the exceptions to equality law duties on the basis of religion or belief; the idea of a duty of reasonable accommodation; and the public sector equality duty.

This report takes forward the EHRC's religion or belief strategy, **Shared understandings**. This committed the Commission to an extensive work programme including an assessment of the effectiveness of the existing legislative framework.

Key findings

The current domestic law in this area is comparatively recent, based as it is in the Human Rights Act 1998 and the changing body of equality law since the Employment Equality (Religion or Belief) Regulations 2003 (now consolidated in the Equality Act 2010). It addresses complex issues in a context where there is considerable difference of opinion as to how the law should be framed and applied. In particular, the manifestation of religion or belief carries with it the possibility of impacting on the rights and interests of others. For such a recent body of law, operating in such a complex field, it is generally clear and consistent. In particular, the legislation and decided cases make it clear that the law extends to a wide variety of religions and beliefs, including not only religions with a significant number of

adherents in Great Britain, but also those with much fewer members and belief systems which do not identify as religions.

Nonetheless, the review indicates that there are a number of areas which may require further consideration.

Firstly, the definition of belief, particularly in equality legislation, merits further assessment. The broad definition currently being applied by the courts is unclear, particularly for belief systems which are based upon scientific evidence. This results in apparent inconsistencies between judgments, particularly at Employment Tribunal level. Additionally, the relationship between “religion” and “belief” is also unclear.

Secondly, the impact on domestic law of some specific issues which have been tested at European level remains unclear. For example, despite the European Court of Human Rights (ECtHR) judgment in *Eweida and others v the United Kingdom*,¹ it remains unclear whether an individual bringing a claim will need to find a group of individuals who share his or her beliefs and, if so, what the size of this group should be.

Thirdly, the primary focus of the case law to date has been on the relationship of the religious employee and their employer. The position of the religious employer, and the religious service provider, has been relatively unexplored in the case law, but has the potential to be a significant area. Important underlying issues are whether the existing Equality Act exceptions on the basis of religion or belief may be too narrow, or too wide, and how these exceptions have been interpreted by the courts.

Fourthly, the role of the public sector equality duty (PSED) in this area may be worth exploring further as a way to mainstream religion or belief equality, by integrating religion or belief equality into the day to day practice of public sector organisations. To date, the research on the PSED has been focused either on the duty in general or protected characteristics, and it would be useful to assess its impact as it applies to religion or belief.

Finally, it would be helpful to assess the extent to which a duty to accommodate religion or belief might be beneficial to employees and employers. The position of employees who have religious objections to carrying out part of their duties, or to carrying out their duties in a particular way, is currently approached through the indirect discrimination model, through which a range of factors can be taken into

¹ *Eweida and others v the United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgment 15 January 2013.

account in determining whether a response is proportionate. Canada and the United States deal with similar issues through a duty of reasonable accommodation of religion or belief, and there have been calls for such a duty to be adopted in Great Britain. As the review shows, different views are held about the perceived advantages and disadvantages of such a duty. An alternative to both the indirect discrimination model and the duty of reasonable accommodation might be to introduce a mechanism similar to the current right for employees to request flexible working to cover those religion or belief workplace issues which are not covered by the right to request (for example, dress codes and uniforms). Again, the review showed that different views are held about whether or not this would be beneficial for employees and employers.

1 | Introduction

The Equality and Human Rights Commission (the EHRC) was established under the Equality Act 2006 to work towards the elimination of unlawful discrimination, to promote equality of opportunity and to protect and promote human rights. Its mandate covers nine protected characteristics (age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity). To take forward its work on religion or belief, the EHRC published **Shared understandings: a new EHRC strategy to strengthen understanding of religion or belief in public life** in October 2013 (EHRC, 2013; Perfect, 2014).

This strategy proposed the need to create a more informed, balanced and tolerant approach to religion or belief issues and is being implemented by a programme of EHRC work between 2014 and 2016. Its three main elements are to:

- Improve understanding and practice by employers in managing religious diversity in the workplace and in balancing the right to hold and manifest a religion or belief and the right to freedom of expression with other rights and freedoms.
- Create a more balanced and reasonable public dialogue on religion or belief issues.
- Assess the existing legal framework on religion or belief, equality and human rights and whether the law offers sufficient protection for people with a religious or other belief.

This report focuses on the third element in the strategy by reviewing the interpretation and effectiveness of the current domestic legislative framework in relation to religion or belief under equality and human rights law. It is intended for a primary readership of policy makers and organisations, including religion or belief organisations, with an interest in the implications of equality law for their members; and a secondary readership of academics and legal advisors and practitioners. It excludes areas such as criminal law relating to hate speech and hate crime, although these have been recognised as part of a broader equality agenda (Bakalis, 2015). The report identifies and discusses the detail of this legal framework and its change over time, explores the strengths and weaknesses of the current law, and

considers alternative approaches to the current framework, drawing where appropriate on the experience of other jurisdictions. The report focuses on the key areas of the definition of religion or belief, the broader legal frameworks of human rights and equality law within which it operates, the resolution of competing rights claims, exceptions to normal equality law duties in relation to both employment and the provision of goods and services, and the extent to which employees may be entitled to modify their duties on the basis of their religion. The report discusses alternative approaches to the current legal framework, in particular the possibility of a duty of reasonable accommodation of religion or belief by employers or an extension of the current right for employees to request flexible working to cover those religion or belief issues which are not covered by the existing right. However, it must be emphasised that discussion of alternative models in no way suggests that the EHRC prefers any of these to the current legal model. The EHRC plans to publish a report setting out its own views by the end of 2015.

1.1 Methodology and sources

Methodology

This report is based on a detailed analysis of primary and secondary sources of British and European law, as discussed below. These sources of law have been supplemented by consideration of the growing body of academic literature dealing with the interaction of law and religion or belief generally, and equality law in particular (Edge, 2015). It has in a number of instances been possible to make use of unpublished research papers and work in progress. These are important sources of detailed analysis, evaluation and critique of the existing law and possible paths of development.

Additionally, the report has made use of wider research and policy literature relevant to the project more broadly. This includes two major studies commissioned by the EHRC. Firstly, in August 2012, the EHRC published an extensive report on religion or belief equality and human rights in England and Wales which combined an analysis of some of the major legal cases with qualitative social research (Donald, 2012). Secondly, in March 2015, the EHRC published the findings of a large scale call for evidence from individuals and organisations about how their religion or belief, or that of other people, may have affected their experiences in the workplace and in using the services and facilities they need in everyday life (Mitchell and Beninger, 2015). This project has not, however, engaged with the extensive theological literature within particular religious traditions.

To supplement this written material, the project team led four workshops in Oxford, London and Edinburgh between November 2014 and February 2015, to explore the critical issues in the field with a diverse group of academics, legal practitioners, representatives of religion or belief organisations and representatives of other advisory and equality bodies. The workshops focussed on four key areas:

- What is protected under the law on religion or belief?
- How do the rights of freedom of religion or belief under the European Convention of Human Rights (ECHR) interact with the rights to equality under European Union (EU) law?
- When should there be exceptional treatment under these rights, both for those claiming them and for those bound to respect them?
- What special challenges are posed to the practical application of the law, not only to those responsible for adjudicating disputes, but for those implementing the law in practice?

The purpose of these workshops was to draw upon the expertise of participants to assist the project team in its analysis of published and forthcoming material, and to deepen its understanding of areas of current debate. Notes of each workshop were taken and circulated to all participants, as well as invitees who had been unable to attend. These notes are attached in Appendix One (hereafter Workshop 1-4).

Finally, we have also benefitted from the contribution of a core team of academics who were involved throughout the programme of workshops and in commenting on initial drafts of this report: Professor Maleiha Malik, Dr Russell Sandberg and Professor Paul Weller.

Sources

This report draws on the primary sources of British, EU and ECHR law, as well as on secondary sources which analyse and comment on these primary sources. To supplement these sources, we considered relevant international comparators, particularly common law jurisdictions; looked at more theoretical work on the interaction of religion or belief and law; and assessed work from other disciplines related to religion or belief equality and human rights.

The principal primary sources of British law are legislation, and decisions of the higher courts. The main contemporary legislation in this area is the Human Rights Act 1998 and the Equality Act 2010. The Equality Act 2010 simplified and harmonised a range of earlier legislation whose form and working is necessary to

understand the development of the law. Therefore, our discussion includes legislation which is no longer in force.

It should be noted that only decisions of a certain level of court are capable of binding future judges in, for instance, their interpretation of legislation. In Great Britain, the ultimate judicial authority is the Supreme Court, which replaced the House of Lords in 2009. The next level below the Supreme Court in England and Wales is the Court of Appeal and in Scotland is the Court of Session; below that, for employment matters, is the Employment Appeal Tribunal (EAT) and below that the Employment Tribunal (ET). In England, some important religion or belief cases have, however, originated in the County Court, where most non-employment civil cases are heard; decisions in the County Court can be appealed to the High Court and then to the Court of Appeal. In Scotland, civil cases would be heard in the Sheriff Court, with appeals then lying to the Sheriff Principal and the Court of Session. Other religion or belief cases, involving executive agency decisions, originate in the First-tier Tribunal, with appeals first to the Upper Tribunal and then to the Court of Appeal or Court of Session. Within the context of employment law, EAT decisions are capable of binding ETs, but ET decisions cannot generate binding precedent. Similarly, County Court and Sheriff Court decisions cannot generate binding precedent. Court decisions in England and Wales cannot bind Scottish courts and vice versa, though such decisions would be persuasive.

In practice, however, lawyers advising clients or preparing litigation will seek to make use of such precedents as are available, and so on occasion will even cite ET decisions as evidence of the state of the law. Academic analysis also makes use of ET decisions. Therefore, while this report discusses potentially binding precedents, non-binding decisions are also referred to in the absence of higher authority. Cases are discussed as sources of law, rather than as reliable accounts of the complex lives of the applicants (Peroni, 2014: 196), or as an indication of the normal resolution of a disagreement in this area. On the last point, contributors to Workshop 1 noted that the law emphasised conflict and reliance on rights, but disagreed over whether cases before the tribunals and courts reflected broader experiences (see Workshop 2).

Although the Human Rights Act 1998 is an Act of Parliament, and so a source of domestic British law, it gives effect to the existing obligations of the UK under the ECHR. The ECHR, an international convention, is an important source of law on religion or belief within the states which are bound by it, particularly in relation to Article 9, which deals with freedom of thought, conscience and religion. The ultimate arbiter of the meaning of the ECHR is the European Court of Human Rights

(ECtHR). This court can hear cases brought by individuals affected by the action of a Contracting Party (that is a state which has chosen to become bound by the ECHR). The ECtHR will normally hear such cases as a Chamber, but particularly important cases may be heard by the larger Grand Chamber, which can also choose to hear again a case which has already been decided by a Chamber. Thus, although the ECtHR does not operate the same system of binding precedent as the British courts, decisions of the Grand Chamber in particular are likely to be very influential in the ECtHR's future understanding of an area of law. Accordingly, this report considers decisions of the ECtHR at both Chamber and Grand Chamber level wherever relevant to understanding appropriate sections of the ECHR.

It is worth noting from the outset, however, that the ECtHR has given a particularly broad discretion to states to determine the precise relationship between law and religion or belief. It has done so by a broad application of the general principle of the margin of appreciation: a doctrine of the ECtHR which recognises that state authorities are in the best position to determine the application of the rights under the ECHR to particular situations, subject to ECtHR supervision (Donald et al, 2012: 17).² Looking at state practice, we can see a lack of consensus across Europe on how these issues should be approached (see Chapter 3). This needs to be borne in mind when considering the impact of a particular ECtHR decision on British law (Donald, 2012: 48). Within this range, however, so long as the UK is a party to the ECHR, it is bound to respect its obligations under the Convention. This is an obligation of the UK in international law to the other states which have joined the Convention. The duty of the UK to meet its obligations under the ECHR has, however, been given force in UK law by the Human Rights Act 1998. These are related, but distinct legal structures. The UK was one of the first states to ratify the ECHR, in 1951, but most of the Human Rights Act 1998 did not come into effect until 2000. Between 1951 and 2000, the UK was bound in international law to meet its obligations under the Convention but not bound to do so in UK law.

Another relevant (but distinct) source of European law is the developing body of EU law on discrimination, particularly but not exclusively that relating to discrimination on the grounds of religion or belief. The principal sources of EU law are the Treaties establishing the European Union, and legal instruments based on the Treaties. These are supplemented by the case law of the European Court of Justice (CJEU). The CJEU is the highest court of the EU on matters of EU law, but has no jurisdiction over national law. National courts, including those of Great Britain can, and in the

² For a recent illustration, see *S.A.S. v France*, app.43835/11.

case of final courts of appeal, must, refer unclear issues of EU law to the CJEU, whose ruling as to the content of EU law is binding across the EU. Cases can also be brought against Member States by the European Commission or other Member States. Similarly to the ECtHR, the CJEU does not operate a strict system of binding precedent, but in practice decisions of the CJEU on a particular point offer a strong guide to the future behaviour of the CJEU. This report considers decisions of the CJEU in interpreting EU law as it applies to Great Britain. It should be noted that there is considerable divergence of national anti-discrimination law within the EU (Lock, 2013), just as there is in relation to the application of the ECHR.

2 | Definitional issues

The EHRC's call for evidence found that definition of belief was frequently identified by legal advisors as one of the issues on which they had provided advice, representation or assistance (Mitchell and Beninger, 2015: 141). For legal advisors the most important definitional issue was the extent to which a contested practice needed to involve a core belief or doctrine in order to be protected (Mitchell and Beninger, 2015: 149). Donald (2012: 52) also identified 'the uncertainty that exists around the definition of "belief" as a significant issue, noting its frequent discussion in legal and academic commentary. She also noted that employers and equality and advice specialists found it difficult to define belief. As a result, she suggested there may be a 'need for more detailed and accessible guidance for decision-makers which might assist them to achieve clarity and consistency in matters of definition or belief' (Donald, 2012: 55).

The key ECHR and EU provisions do not adopt the same terminology. The Employment Equality Framework Directive talks about 'discrimination based on religion or belief, disability, age or sexual orientation',³ while referring in its preamble to respect for the principles of the ECHR. The Directive does not provide a definition of religion or belief, and implementing legislation of Member States 'has tended to follow the Directive in declining to define the terms' (Vickers, 2007: 27).

The main ECHR article which deals with religion or belief is Article 9. The freedom covered is of 'thought, conscience and religion', but this includes 'freedom to change ... religion or belief', and the qualified right to manifest 'religion or belief'. In practice, the ECtHR has seldom relied upon the definition of religion or belief to resolve a case, generally preferring to take a broad approach which, at least initially, provides protection to a broad range of individuals. There is a wide consensus, as seen in Donald, that a religion or belief must 'attain a certain level of cogency, seriousness,

³ Employment Equality Framework Directive 2000/78/EC.

cohesion and importance and be worthy of respect in a democratic society' (Donald, 2012: 42).⁴

Other provisions of the ECHR,⁵ although not directly relevant to the topics covered in this report, have provided the ECtHR and British courts with the opportunity to make statements as to the definition of religion or belief which other judges have then taken up.

Before 2003, religion was not generally protected by equality law. However, there were rules governing specific situations; some religious groups were classified as ethnic groups under the race discrimination legislation; and indirect discrimination could apply to religious practices disproportionately associated with an ethnic group (Edge, 2001: 248-55). The Employment Equality (Religion or Belief) Regulations 2003⁶ ('the 2003 Regulations') defined religion or belief as meaning 'any religion, religious belief, or similar philosophical belief', so leaving the definition to be clarified more precisely by case law (Sandberg, 2011a: 53). The Equality Act 2006 ('the 2006 Act') defined the key terms in section 44: it defined religion as meaning 'any religion', belief as meaning 'any religious or philosophical belief', and a reference to either including a reference to lack thereof. The 2006 Act removed the reference to 'similar' in relation to philosophical beliefs, and added reference to lack of religion or belief. The wording of the Equality Act 2010 is in line with the 2006 Act (Sandberg, 2011a: 54-55). The absence of a more detailed definition of religion or belief leaves the definition to be developed by case law. This approach is found in a range of legal systems (Doe, 2011: 21-22).

The definition of what is protected by the law dealing with religion or belief rights and equality is fundamental to the understanding and application of the law. If a court decides that a particular view, or practice, falls outside of the legal definition, a claim fails at that point. More significantly, given the relatively limited role of courts in resolving disputes, if the parties do not agree that a particular view or practice is covered, negotiations are unlikely to proceed within a shared understanding of the relevant legal framework. There are two distinct issues raised by the existing legislation regarding definitions: what is religion, and what is belief? The existence of

⁴ This consensus draws on the language used in the ECtHR decision in *Campbell and Cosans v UK*, App. 7511/76, 7743/76 on 'philosophical convictions' under the First Protocol, rather than religion or belief under Article 9.

⁵ For instance the provisions under the First Protocol to the ECHR which require the State to 'respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions'; and the Principal VAT Directive which requires states to exempt from VAT non-profits with aims of, inter alia, 'religious, patriotic, philosophical, philanthropic or civic nature'.

⁶ The Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660.

distinct definitions for the two terms leads to a third issue discussed below: how do religion and belief interact in this context? In particular, given that belief includes religious belief, is there a need for a separate category of religion?

2.1 Religion

The courts have interpreted religion in a way which is consistent with how scholars of religious studies would describe their field of endeavour. This approach includes various forms of Christianity, Islam, Judaism, Hinduism, Sikhism and Buddhism, as well as religions which have fewer adherents worldwide, such as Wicca.⁷ The Supreme Court decision in *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* (dealing with the registration of places of worship) is likely to be influential in the debate about the definition of religion (Sandberg, 2014a). In *Hodkin*, Lord Toulson found that Scientology was a religion as it was:

... 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. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word 'supernatural' to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.⁸

Hodkin is not only a decision of the highest British court, reversing the influential decision of the Court of Appeal in *ex parte Segerdal*⁹ (Edge and Corrywright, 2011; Edge and Loughrey, 2001), but also draws itself on a broader range of influential

⁷ *Holland v Angel Supermarket Ltd and Another* [2013] ET 3301005-2003 (20 September 2013).

⁸ *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 para. 57.

⁹ *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697.

decisions elsewhere in the common law world, most notably the decision of the High Court of Australia in *Church of the New Faith v Comr of Pay-Roll Tax (Victoria)*.¹⁰ The Supreme Court in *Hodkin* accepted that 'there has never been a universal legal definition of religion in English law',¹¹ and Lord Toulson placed his definition firmly in a context which distinguished between religion and 'essentially secular belief systems'.¹² Nevertheless, the case has already begun to be taken as a benchmark for the interpretation of 'religion' in other legal contexts, for instance in *United Grand Lodge of England v Commissioners of HM Revenue and Customs*.¹³ It is likely to form at least a starting point for a tribunal or county court considering 'religion' in the context of equality law.

2.2 Belief

There has been considerable debate about the definition of belief. Some commentators have argued that protecting too broad a set of religions or beliefs 'leads to a real danger of trivialising the equality principle' (Pitt, 2011), or watering down the concept of religion or belief so as to bring it into disrepute (Donald, 2012: 54).¹⁴ An alternative view of the breadth of the emerging definition of belief, as outlined by the Public and Commercial Services Union in the EHRC's call for evidence, is that it 'provides a broad level of protection and promotes tolerance more effectively than a narrower protection would' (Mitchell and Beninger, 2015: 156). Other participants in the call for evidence however, considered that the lack of a definition of belief was unhelpful and caused confusion (Mitchell and Beninger, 2015: 129-30).

As noted above, British law on religious discrimination originally defined belief as 'any religious or similar philosophical belief';¹⁵ but this was amended in 2006 by

¹⁰ *Church of the New Faith v Comr of Pay-Roll Tax (Victoria)* (1983) 154 CLR.

¹¹ *Hodkin*, para. 34.

¹² *Hodkin*, para. 57.

¹³ In *United Grand Lodge of England v Commissioners of HM Revenue and Customs* [2014] UKFTT 164, the case turned on whether the activities of the UGLE were of a religious, philosophical, philanthropic or civic nature so as to qualify for VAT exemption. The Tax Tribunal found, just, that the UGLE did not meet the criteria for religion, primarily because 'the canons of conduct promoted by Freemasonry are freestanding and not adopted to give effect to the belief' (para. 126). The idea of philosophical belief as being a rule of life, similar to 'religious' and 'political' was suggested, with some reference to the ECHR but interestingly little to equality law – where the cases are rather against a 'rule of life' requirement.

¹⁴ Donald was here citing the views of one of her research participants, David Pollock of the European Humanist Federation.

¹⁵ Employment Equality (Religion or Belief) Regulations (SI/2003/1660), s2(1).

deleting 'similar'. During the passage of this legislation, Baroness Scotland, the Attorney General, argued that 'the word 'similar' added nothing and was therefore redundant. This is because the term 'philosophical belief' will take its meaning from the context in which it appears; that is, as part of the legislation relating to discrimination on the grounds of religion or belief'. Some commentators have disputed Scotland's interpretation (Sandberg, 2014b: 40-41).

In the absence of a statutory definition, the meaning of 'belief' has to be established by case law. The starting point for discussion of the cases is *Grainger plc v Nicholson* (Donald, 2012: 50).¹⁶ Justice Burton rejected arguments that a belief needed to constitute or allude to a 'fully-fledged system of thought', as had been suggested by the British Humanist Association (2007: 8), for example.¹⁷ Burton also rejected the arguments that a political belief, as opposed to belief in a political party,¹⁸ could not be a philosophical belief (Hepple, 2011: 41);¹⁹ and that it could not be a belief based upon or by reference to science. Instead, he laid down five criteria, each of which could serve as a limit on the definition of belief by excluding claimants.

The criteria for a belief are:

- The belief must be genuinely held. This has not posed significant conceptual problems.²⁰ Whether a belief is held is ultimately a question of fact. Judges and tribunals have used a range of strategies to determine whether a belief has been genuinely held (Edge, 2012; Edge, 2002).
- It must be a belief, and not an opinion or viewpoint based on the present state of information available. This criterion was used to exclude the applicant in *McClintock v DCA*,²¹ where a belief that single-sex couples should not adopt was based on current research into the effects on children of same-sex parenting. It was not, however, used to exclude the claimant in *Grainger* itself, whose belief in man-made climate change might be seen as based upon scientific evidence. Justice Burton argued that 'if a person can establish that he holds a *philosophical belief* which is based on science, as opposed, for example, to religion, then there

¹⁶ See *Grainger plc v Nicholson* [2010] IRLR 4.

¹⁷ Participants in Workshop 1 noted that the most difficult cases were those which had gone beyond comprehensive worldviews.

¹⁸ See *Olivier v Department for Work and Pensions*, ET Case No. 1701407/2013 (discussed in <http://www.walkermorris.co.uk/belief-democratic-socialism-can-amount-philosophical-belief-purpose-religion-or-belief/>); *Fraser v University and College Union* [2013] ET 2203290/2011 (22 March 2013).

¹⁹ See further *Baggs v Fudge*, ET Case No. 1400114/2005, 23 March 2005; *Kelly and others v Unison*, ET Case No. 2203854-57/08; *GMB v Henderson*, EAT 73/14/DM, 13 March 2015.

²⁰ In *Streatfield v London Philharmonic Orchestra* [2012] ET 2390772/2011, the Court found that 'any lack of consistency is not fatal to a determination that those beliefs were genuinely held'.

²¹ [2008] IRLR 29.

is no reason to disqualify it from protection by the Regulations'.²² This apparent inconsistency suggests that this criterion is problematic, since it is potentially liable to very different interpretations by the courts.

- It must be a belief as to a weighty and substantial aspect of human life and behaviour. In *Lisk v Shield Guardian Co*,²³ this criterion was used to exclude a belief that one should wear a poppy to show respect to servicemen. Perhaps as a useful contrast, in *Hashman v Milton Park, Dorset Ltd*,²⁴ however, anti-hunting sentiments were included; while in *Maistry v BBC*,²⁵ a belief that public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion was found to be covered by the legislation. Sandberg (2014b: 43-44) considers that the reasoning used in *Lisk* and that used in *Hashman* are difficult to reconcile with each other. It is worth noting that both were ET decisions, rather than decisions of a higher court, and it may be that a higher court would develop a clearer approach.
- It must attain a certain level of cogency, seriousness, cohesion and importance. This criterion was perhaps most strikingly applied in *Farrell v South Yorkshire Police Authority*.²⁶ In that case, the claimant outlined beliefs about the existence of a New World Order, and its activities. The court found that the belief did not meet the minimum standard of cogency or coherence: 'the conspiracy theory he advances remains in the light of subsequent events and the weight of evidence, wildly improbable. There is no body of respected academic commentary in peer reviewed journals that supports the theory' Sandberg (2014b: 44-45), who analyses the case, describes the approach used by the courts as 'arbitrary and unprincipled'. The principal challenge in relation to this criterion is how the courts can evaluate cogency and coherence while remaining neutral between different belief systems. This is particularly the case if, as discussed below it is unclear whether religious beliefs need to satisfy this criterion: particularly as not all belief systems regard cogency and coherence as important.
- It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others. In *Arya v London Borough of Waltham Forest*, this criterion was used to exclude a belief that Judaism's teachings on the Chosen of God were incompatible with a

²² *Grainger*, para. 30.

²³ *Lisk v Shield Guardian Company Ltd* [2011] ET Case No. 3300873, 14 September 2011.

²⁴ *Hashman v Milton Park Dorset Ltd (t/a Orchard Park)*, ET Case No. 3105555, 4 March 2011.

²⁵ *Maistry v BBC*, ET Case No.1313142/10, 29 March 2011.

²⁶ *Farrell v South Yorkshire Police Authority*, ET 2803805/10, 16 June 2011.

meritocratic and multicultural society. This fifth criterion, particular with its reference to 'human dignity', seems to have considerable room to accommodate substantive judgments as to the content of a belief system, and so to act as a 'morality filter [which] runs the risk of resting on ethical premises which will substantially resemble the dominant religion' (Kenny, 2014: 20). Allowing restriction of the *manifestation* of beliefs by reference to the fundamental rights of others, dignity, or undemocratic content, does not seem particularly controversial and, as the recent case of *S.A.S. v France* demonstrates, is likely to be compatible with the ECHR.²⁷ This is not the same, however, as choosing to identify such belief systems as being entirely outside the scope of rights and protection from discrimination on the grounds of religion or belief.²⁸ Opinion is divided on whether a legal definition of belief should act as this sort of filter, and whether it is possible to do so while retaining some form of judicial neutrality between religions and beliefs. Lady Hale, writing extra-judicially, has suggested that 'We may have to respect all faiths equally even if not all faiths are equally respectable' (Hale, 2014b). This sort of substantive decision making was alluded to during the passage of the 2003 Regulations,²⁹ and in the Explanatory Notes to the Equality Act 2010, which noted that 'any cult involved in illegal activities would not satisfy these criteria'. This was also discussed in Workshop 1. The difficulty of applying the respectability criteria in a way which gives proper weight to diversity of religion and belief has led to some concern, as expressed by the House of Lords in *R v Secretary of State for Education and Employment ex parte Williamson*, that to it is inappropriate to limit protection only to beliefs which are respectable or of which the court approves³⁰ (Vickers, 2010: 284-85). Others have argued that because protecting a religion or belief constitutes a burden on those required to observe the protection, some form of 'quality control' is legitimate (Jones, 2015).

²⁷ In the light of *S.A.S. v France*, App. 43835/11, (2014), where living together was seen as a legitimate state goal, protecting dignity seems comparatively conservative. It remains uncertain whether the *SAS* case will have a significant impact on domestic cases in the UK, given that the contexts in the UK and France are very different.

²⁸ As is suggested in *Hashman v Milton Park (Dorset)*.

²⁹ Gerry Sutcliffe, Minister for Employment Relations, Competition and Consumers, said that 'It is not for the Government to decide on a religious doctrine, or decide whether a cult is sensible. That question is for the tribunals to decide' (Hansard HC, Fourth Standing Committee on Delegated Legislation, cols. 03-07, 17 June 2003).

³⁰ E.g. in *R (Williamson and others) v Secretary of State for Education and Employment* [2005] UKHL 15 Lord Walker stated 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals', para. 60.

The interaction of these criteria is potentially inconsistent. The second criterion, that a belief must be a belief and not an opinion or viewpoint based on the present state of information, potentially contradicts the fourth criterion, that it must attain a certain level of cogency, seriousness, cohesion and importance. A stance based on the present state of information available, and subject to change in line with the evidence, is excluded; but the stance must be cogent and coherent. The claimant in *Farrell* lacked academic peer-reviewed work supporting his belief, but if he had based his stance on such peer-reviewed work, his stance may have ceased to be a belief and become an opinion. The existence of peer-reviewed work supporting a belief in man-made climate change, however, did not prove fatal to the claimant in *Grainger* itself. The relationship between evidence and belief, therefore, remains complex.

2.3 The relationship between religion and belief

Some of the academic literature regards religion or belief as a single umbrella term, and in practical terms the crucial distinction has been described as 'not between religion and belief, but between protected beliefs and those that are too ill-defined to warrant protection' (Donald, 2012: 52), so that the difference 'will seldom, if ever, arise under the European Convention'.³¹ Nonetheless, consideration of the relationship between religion and belief suggests the possible importance of the use of two separate terms (Kenny, 2014).

Firstly, is it possible to have a philosophical belief which is not a religious one? The cases, both at the European level and in Great Britain, indicate that it is.³²

Secondly, is it possible to have a religion which is not a belief? From a religious studies perspective, the distinction between religions which emphasise shared beliefs and those which emphasise shared practice is well explored; as are religions which determine an individual's religion through reference to ancestry, rather than belief, and which are also covered by race discrimination law. The ECtHR has, however, consistently emphasised belief at the expense of other understandings of religion (McIvor, 2015). In Great Britain, in *Re St Andrew Alwalton*, a widow's petition to exhume human remains was refused, with the judge ruling that because the

³¹ *R v Secretary of State for Education and Employment ex parte Williamson* [2005] UKHL 15, para. 24.

³² UK examples would include *Streatfield v London Philharmonic Orchestra Limited*, where Humanism was found to be a protected belief; *Maistry v BBC*, where a belief that public service broadcasting had a higher purpose was similarly categorised; and *Hashman v Milton Park*, where a belief that foxhunting was wrong was similarly found to be a protected belief (in rather sharp contrast to *Countryside Alliance v Attorney General* [2007] UKHL 52, where the House of Lords found that pro-hunting views were not covered by Article 9).

petition was not motivated by conscience or religious belief, Article 9 was not implicated.³³ There does not appear to be any British case where a religion which did not involve religious belief has been put before the Courts.³⁴

Thirdly, is it possible to have a religion which is also a belief? It would seem to follow from the discussion of the importance of belief above, that every religion is by definition a belief; and the assumptions in cases such as *Williamson* and others support this view. The significance of this will depend upon the practical differences between bringing a claim based on 'religion' and on a 'belief' which happens to be religious. Justice Burton, in *Grainger*, saw important evidential distinctions between the two: (a) 'To establish a religious belief, the claimant may only need to show that he is an adherent to an established religion. To establish a philosophical belief ... it is plain that cross-examination is likely to be needed';³⁵ (b) 'it is not a bar to *philosophical belief* being protected by the Regulations if it is a one-off belief and not shared by others'.³⁶ User guidance, such as that from ACAS, suggests a distinction between what needs to be proven for religion and for belief, with religion satisfied by 'any religious belief, provided the religion has a clear structure or belief system', while philosophical belief is described with reference to the more detailed and potentially demanding *Grainger* criteria (ACAS, 2014a: 3). A differential treatment between religion and belief appears potentially inconsistent with *GMB v Henderson*, where it was stressed that 'The law does not accord special protection to one category of belief and less protection for another. All qualifying beliefs are equally protected'.³⁷

If the emphasis on belief as the foundation of religion is accepted, and no practical difference is to be found in pleading religion or religious belief, the existence of these separate routes to claim protection might be queried. If, on the other hand, there are

³³ Similarly, if we look outside of the workplace to religious hatred, the Racial and Religious Hatred Act 2006 defines religious hatred as hatred against a 'group of persons defined by reference to religious belief or lack of religious belief' (sch.1).

³⁴ The closest example is perhaps Lord Brown's dissent in *R(E) v Governing Body of Jewish Free School* [2009] UKSC 15: 'Jewish schools in future, if oversubscribed, must decide on preference by reference only to outward manifestations of religious practice. The Court of Appeal's judgment insists on a non-Jewish definition of who is Jewish. Jewish schools, designated as such by the Minister and intended to foster a religion which for over 3000 years has defined membership largely by reference to descent, will be unable henceforth even to inquire whether one or both of the applicant child's parents are Jewish' (para. 248).

³⁵ *Grainger*, para. 6.

³⁶ *Grainger*, para. 27. *Grainger* has been understood as showing, in passing, that a philosophical belief, unlike a religious one, does not need to be shared by others. The judge in *Grainger* was here influenced by the EAT decision in *Eweida*, which found that a religious belief might not be shared at all by anyone. The Court of Appeal in *Eweida* [2010] EWCA Civ 1025 took a different approach, finding that indirect religious discrimination required group disadvantage. This approach may not have survived the decision of the ECtHR in *Eweida and Others v UK*, App no. 4820/10, (2013) which stressed the applicant's views.

³⁷ *GMB v Henderson*, EAT 73/14/DM, 13 March 2015, para. 62.

practical differences, the justification for such differences may need to be made more explicitly than is currently the case.

3 | Legal protection for religion or belief

This chapter provides an overview of the protection for religion and belief in Great Britain and at European level, and addresses the question of whether or not it is easier to bring a successful religion or belief claim under equality law than under human rights law.

3.1 The scope of the protection at European level

Religion and belief are protected through two legal mechanisms. First, religion and belief are protected within the human rights framework. Secondly, as noted in Chapter 1, religion or belief is a protected characteristic under the equality law framework.

These two frameworks share the same broad intentions and reflect the position in the preamble to the Universal Declaration of Human Rights that ‘All human beings are born free and equal in dignity and rights’.³⁸ The two frameworks are also legally interconnected in that the fundamental rights of the ECHR constitute general principles of EU law, and in turn, that the ECHR should be interpreted in the light of international law, including EU equality law.³⁹

However, while sharing the same deeper purpose in relation to human dignity, the two frameworks have a different focus. The central concern of the ECHR right is freedom of thought, conscience and religion; with an emphasis on the protection of forms of belief and their manifestation. The focus of the EU law is on equality, with

³⁸ Art 1. Dignity also features in the preamble to the United Nations Charter, and the preambles of the ICCPR and ICESCR.

³⁹ *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008.

the primary aim of combatting discrimination on the protected grounds (Donald, 2013: 70-71, Howard, 2014).⁴⁰

The right to freedom of thought, conscience and religion

Article 9(1) states that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 9(2) states that:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Thus, under Article 9(1), the right to freedom of thought, conscience and religion is absolute and cannot be restricted. This raises few practical difficulties in the context of employment and the provision of goods and services, relating more commonly to cases where individuals are prevented from changing religion. Instead, in the context of employment, education, and provision of goods and services, legal cases have tended to involve the right to manifest a religion. This is a qualified right, meaning that it can be limited where limitations are prescribed by law and where it is necessary and proportionate to do so for the protection of other rights such public safety or the rights and freedoms of others. In effect, the principle of proportionality allows a fair balance to be achieved between competing interests. It requires that there is a legitimate aim for any measure; that the measure is suitable to achieve that aim; and that it is necessary, in that there is no method of achieving the aim that involves less of a restriction on the freedom in question (Evans, 2001).

Article 9 recognises that freedom of religion has both an individual and a collective dimension: the right is to manifest religion 'either alone or in community with others'. In the workplace context, the right to religious freedom can therefore potentially

⁴⁰ The protected grounds in the EU Directive 2000/78 are age, disability, religion and belief, and sexual orientation. Directive 2000/43 protects against discrimination on grounds of race and Directive 2006/54 protects against discrimination on grounds of sex.

apply to religious employers who may wish to impose faith requirements on their staff, although their freedom to do so may be limited in accordance with Article 9(2). The right also applies to religious staff, and has tended to be engaged with regard to manifestations of belief; in particular, the wearing of religious symbols, time off work and conscientious objection to certain work tasks.

A number of difficulties have been identified in using Article 9 in the context of employment and the provision of goods and services. (Sandberg, 2011a; Hill, 2013).

First, the ECHR is an international treaty. In the past, this had raised questions as to whether its application was restricted to claims against the state. If this had been the case, this would have meant that employees in private companies or private service users would not be able to bring a claim under Article 9. However, this issue was resolved in *Eweida* (discussed below), where the ECtHR found that there is a positive obligation on state authorities to secure the rights under Article 9 to those within their jurisdiction, allowing *Eweida's* claim.⁴¹ This means that employees in the private sector are protected by Article 9.

Second, until *Eweida*, the court made a distinction between behaviour that was motivated by religion, which was not protected, and that which was mandated, which was.⁴² This meant that many common religious practices were not covered by the protection of Article 9 (Sandberg, 2011a; Donald, 2012). In particular, it led to discussion regarding whether a particular religious activity was 'core' to the belief system or not, with non-core beliefs left unprotected (Vickers, 2008; Hambler, 2015). Workshop 1 also discussed the difficulties in drawing clear boundaries around the concept of manifestation. However, the ECtHR confirmed in *Eweida* that as long as there is a sufficiently close and direct link between the act and the underlying belief there is likely to be a manifestation of religion.⁴³ This should mean that courts are no longer drawn into discussions regarding whether or not a belief is a 'core belief' (Vickers, 2010).

It therefore seems clear that, since *Eweida*, many of the interferences with the right to religious freedom identified in the employment context (such as adaptations to uniform codes, and refusal of requests to be exempt from performing certain work tasks) will be viewed as interferences with manifestations of religion, and so potentially protected by Article 9, even if not strictly required by the religion in question. In relation to service provision, dealt with more fully below, issues have

⁴¹ *Eweida*, para. 84.

⁴² *Arrowsmith v UK* [1978] 3 EHRR 218.

⁴³ *Eweida*, para. 82.

involved manifestations of belief such as withholding services from those whose actions do not accord with perceived religious teaching.⁴⁴ Again, such manifestations could potentially be protected by Article 9.

In addition, the 'specific situation rule' restricts protection where a person voluntarily submits to a system of rules which limits the manifestation of religion: for example choosing to go to work in a specific role or for a specific employer; or choosing to attend a particular school. In the context of employment this had been interpreted to mean that ECHR rights have not applied at work because the worker remains free to resign.⁴⁵ However, this issue was also resolved in favour of the employee in *Eweida*. The ECtHR accepted that work-based restrictions on a person's exercise of religious freedom can amount to an initial infringement of the right, finding that the fact that an employee could resign might be relevant in assessing whether a restriction on religious freedom was proportionate, but would not prevent the claim altogether (Pearson, 2013, 2014).⁴⁶

Even if an initial case can be made out, it will still need to be established that any interference with Article 9 cannot be justified as proportionate and for a legitimate aim. The concept of proportionality had been the subject of significant debate (Rivers, 2006, 2014; Chan, 2013). For example, in *Eweida*, the ECtHR found that the restriction on religious dress imposed on Nadia Eweida, an employee of British Airways who wore a cross at work, was not proportionate, but that the restriction imposed on Shirley Chaplin, a nurse who wore a crucifix on a chain over her uniform, was proportionate given the need to maintain health and safety. In assessing the proportionality of any restriction, the ECtHR allows some discretion (known as the margin of appreciation, described above) to states in their application of the ECHR, to reflect the fact that there is often little consensus across Europe on these matters, and that domestic courts are best placed to determine proportionality. The use of the margin of appreciation at European level means that it can be difficult to predict how proportionality might be determined in any particular case. For example, it could be proportionate both to allow the wearing of religious symbols at work and to restrict

⁴⁴ *Bull and Bull v Hall and Preddy* [2013] UKSC 73; *Ladele v Islington Borough Council* [2009] EWCA Civ 1357; then heard with *Eweida* (*Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10*) Judgment 15 January 2013.

⁴⁵ *Ahmad v UK* (1981) 4 EHRR 126. *Stedman v UK* (1997) 23 EHRR CD168; *Thlimmenos v Greece* ECHR 2000 – IV, (2001) 31 EHRR 15.

⁴⁶ 'where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.' *Eweida*, para. 83.

them, depending on the circumstances, as seen in the outcome of the *Eweida* case itself (McCrea, 2014; Pitt, 2013).

The view of some respondents to the EHRC call for evidence (Mitchell and Beninger, 2015: 8-9) was that religion should be regarded as a personal and private matter, with no special treatment at work. However, the decision in *Eweida* shows that the law does not support such an approach. Instead, many of the issues that previously may have made it difficult to use Article 9 to protect religion or belief in the context of employment and the provision of goods and services were resolved in that case (Sandberg, 2011a; Hill, 2013).

Discrimination on grounds of religion or belief

The second form of protection for religion or belief is by the provisions of EU Directive 2000/78, which protects against direct and indirect discrimination, harassment and victimisation on grounds of religion or belief. Direct discrimination occurs where a person is treated less favourably on grounds of religion or belief and includes where employers refuse to employ religious (or non-religious) staff altogether, or employ those of one religion on more favourable terms than those of a different religion. Direct discrimination cannot be justified. However there are some exceptions to this position where a religion or belief constitutes an occupational requirement for the job in question because of the nature of the occupation or the context in which the work is carried out. In such a case, discrimination will be lawful if it is proportionate.⁴⁷ An additional and rather wider exception exists where the employer is an organisation with a religious ethos, and can require that members of staff follow that ethos.⁴⁸ This is the case even though sharing a religious belief may not be an essential requirement for carrying out the core duties of the job. Any such requirement must not entail discrimination on any other ground.⁴⁹ This is discussed in more detail below.

Indirect discrimination occurs where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage compared with other persons. It can be justified where there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary.⁵⁰ Examples

⁴⁷ Equality Directive 2000/78 Article 4.

⁴⁸ Equality Directive 2000/78 Article 4 (2).

⁴⁹ Equality Directive 2000/78 Article 4(2). Any requirement as to religion or belief must constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. Note that unlike for the general exception in article 4(1), the requirement does not have to be 'determining.'

⁵⁰ Equality Directive 2000/78 Article 2(2)(b).

include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. Any such requirements must be justified as a proportionate means of achieving a legitimate aim.

In terms of justification, it is not yet clear what factors the CJEU will accept as justifying indirect religious discrimination. It is worth noting, however, that where the CJEU has determined the proportionality of discriminatory action in the context of sex discrimination, the standard of review has been very strict: any requirement must have a legitimate aim; the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.⁵¹ Given that no cases have yet come before the CJEU relating to religion or belief discrimination, and that practice regarding the protection of religion and belief in the public sphere is so varied across Europe (Haverkort, 2012; van Ooijen, 2012; Cumper and Lewis, 2012; Howard, 2012a, 2012b), it is as yet unclear whether the same strict standard of proportionality, developed in the context of gender and race equality, will apply to religion or belief cases.

In the absence of case law, it is suggested that factors that might be taken into account in making a proportionality judgment in religion or belief cases include whether the requirement will have the effect of limiting religious freedom, the type of business (whether it is public or private, or providing services to the public, as discussed in Workshops 1 and 4), and the nature of the request and how in practice it could be allowed. Some participants in the workshops noted that this could result in those with stricter religious positions being provided with greater protection. They thought that if the religious rule is strict and the believer considers that failure to manifest it (i.e. non-compliance) will have serious and eternal consequences, a court may find that a restriction on manifestation is a disproportionate interference with religious freedom. In contrast, a restriction on a more modest demand, such as a preference for a particular behaviour, from a more liberal religious perspective, may be proportionate, as the level of interference with religious freedom is more limited. Thus, although there is no case law as yet to support this view, courts might end up providing greater protection for stricter or less flexible forms of religion.

It is worth noting that the development of protection for freedom of religion or belief at work is a fairly recent phenomenon, and conceptions of the relationship between religion and the public sphere are still developing (McCrudden, 2011), with practice

⁵¹ *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607-1631 [1986] ECR 1607.

across Europe varying significantly (Haverkort, 2012; Vickers, 2007). Religious equality was only introduced in most Member States in response to the need to implement the 2000/78 Directive in 2003; and until 2013 it was unclear whether the ECHR's protection for religious freedom applied to the workplace at all. So far, then, there has been little case law to rely on in order to determine the effectiveness of the law at European level and the question of whether cases are better brought as human rights or equality cases. In Great Britain, as Donald (2012: 44) notes, the Equality Act 2010 (and its predecessors) has come to be viewed by legal practitioners as a firmer basis for pursuing claims relating to religion or belief (Sandberg 2011a).⁵²

However, one contrast between the two systems should be noted (Howard, 2014). The ECtHR relies heavily on the margin of appreciation doctrine, and in religion cases a fairly wide margin operates (Evans, 2001: 143-44). This means that states are afforded a significant margin of discretion in their protection of religious freedom, and that interferences are not subjected to particularly high levels of scrutiny. In contrast, the CJEU has a tradition of imposing a strict standard of review in its gender and race equality jurisprudence, whereas a lower standard of review has been applied in age discrimination cases. However, no cases relating to religious discrimination have yet been heard by the court, making it difficult to predict its likely approach on the issue.

3.2 Application of the law in Great Britain

Equality claims in Great Britain are brought under the Equality Act 2010. The Equality Act provides the legal framework to protect the rights of individuals and advance equality and is the mechanism in England and Wales and in Scotland by which Great Britain meets its obligations under EU Directive 2000/78 (see Dingemans et al, 2013). Human rights claims are brought under the Human Rights Act 1998, which has the effect of incorporating the protections in the ECHR into UK law.

⁵² For example, in *R (Watkins-Singh) v The Governing Body of Aberdare Girls' High School*, [2008] EWHC (Admin) 1865, the claimant's legal team relied on race and religious discrimination laws rather than Article 9 to protect her freedom to wear a Sikh kara bangle at school.

Article 9 ECHR and Human Rights Act

Although a number of human rights cases have been brought in the UK under the Human Rights Act 1998 using Article 9, they have been largely unsuccessful, usually because any interference has been justified under Article 9(2). For example in *Williamson*, the House of Lords found that although the ban on corporal punishment in schools interfered with the religious freedom of the claimants who had a religious belief in the importance of corporal punishment, it was justified for the legitimate aim of protecting children.

Some cases have been unsuccessful for the reasons discussed above. The specific situation rule has been used to find that there has been no interference with religious freedom. For example in *R (Begum) v Headteacher and Governors of Denbigh High School*,⁵³ the House of Lords found there to be no interference with religious freedom when a school excluded a school girl for refusing, for religious reasons, to abide by the school uniform code. One of the reasons for this decision was that she could have chosen to attend a school which did allow her to wear religious dress. Other domestic cases have been unsuccessful on the basis that the practice in question was not a manifestation. For example, in *R (Playfoot) v Millais School Governing Body*,⁵⁴ where a schoolgirl wished to wear a 'purity ring' to signify her religious commitment to chastity before marriage, the practice was found not be covered by Article 9 as it was not sufficiently closely linked to the religious belief.

Given that both the specific situation rule and the issue of manifestation of religion were given a broader interpretation by the ECtHR in *Eweida*, it could be that in future domestic courts will be more willing to find *prima facie* breaches of Article 9 in religion or belief cases. However, as discussed in Workshop 1, it is too early to assess whether this will be the case in practice.

Although after *Eweida* it may be easier to identify an interference with Article 9, the final stage in any claim will be to determine whether the interference was justified as a proportionate means to achieve a legitimate aim, such as the protection of the rights and freedoms of others. Proportionality was considered in *Bull and Bull v Hall and Preddy*.⁵⁵ It was held that the restriction on religious freedom created by the requirement imposed on the Bulls⁵⁶ that they offer their bed and breakfast accommodation to all, regardless of sexual orientation, was proportionate, given their

⁵³ [2006] UKHL 15.

⁵⁴ [2007] EWHC (Admin) 1698.

⁵⁵ *Bull and Bull v Hall and Preddy* [2013] UKSC 73.

⁵⁶ By the Equality Act (Sexual Orientation) Regulations 2007, now covered by the Equality Act 2010.

legal obligation to provide a service in a non-discriminatory fashion and the rights of Hall and Preddy to be free from sexual orientation discrimination. It was noted that very weighty reasons are required to justify discrimination on grounds of sexual orientation.⁵⁷ The issues that arise from balancing the rights of those who hold a religion and other equality rights are discussed in Chapter 4.

Equality Act 2010

EU Equality Directive 2000/78 is implemented in Great Britain by the Equality Act 2010 which protects against direct and indirect discrimination, harassment and victimisation because of religion or belief. Direct discrimination occurs where a person is treated less favourably because of religion or belief and includes where employers refuse to employ religious (or non-religious) staff altogether, or employ those of one religion on more favourable terms than others. Direct discrimination cannot be justified, although Schedule 9 provides exceptions for occupational requirements, discussed further below.

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief at a particular disadvantage compared with other persons. It can be justified where there is a legitimate aim for the requirement and the means of achieving the aim are proportionate and necessary.

Harassment related to religion or belief occurs where a person engages in unwanted conduct which has the purpose or effect of violating another person's dignity; or where a person creates an intimidating, hostile, degrading, humiliating or offensive environment for another person, related to religion or belief.⁵⁸

Direct discrimination

There have been few direct discrimination cases in the higher courts, and although there is some evidence of such discrimination in practice, it has not led to difficulties in interpretation of the law (Sandberg, 2011a).

One area that has caused debate, including in the workshops, is the distinction between direct and indirect discrimination. On the face of it, the distinction appears clear. Direct discrimination occurs where the less favourable treatment is because of religion or belief; indirect discrimination arises because of the use of neutral criteria

⁵⁷ *Bull and Bull v Hall and Preddy* [2013] UKSC 73, para. 53.

⁵⁸ S 26 Equality Act 2010.

which have an unequal impact in practice for reasons related to religion or belief. However, some commentators have questioned whether the distinction is as clear in practice (Hale, 2014a; Pitt, 2011; McColgan, 2009). This was also the view of some workshop participants. This is particularly the case since the meaning of direct discrimination was expanded in *James v Eastleigh Borough Council*⁵⁹ to mean that direct discrimination can occur where the discrimination is because of a factor which itself is entirely determined by the characteristic in question. In *James*, the factor in question was retirement age, which itself was determined by gender and so was said to amount to gender discrimination. In the context of religious discrimination, some have queried whether rules such as bans on face coverings which, in practice, apply almost exclusively to one religious group (Muslim women) ought instead to be treated as direct discrimination, an argument that was unsuccessful in *Azmi v Kirklees Metropolitan Borough Council*⁶⁰ (Pitt, 2011: 392; McColgan, 2009: 13). This issue was also discussed in Workshop 1. Indeed the ECHR does not make the same distinction between direct and indirect discrimination (Hale, 2014a). However, with regard to the ECHR protection, the lack of distinction between direct and indirect discrimination also means that direct discrimination can be justified. In domestic and EU non-discrimination law direct discrimination cannot usually be justified.⁶¹ Thus an extension of the meaning of direct discrimination in equality law to include situations where a general rule predominantly disadvantages one religious group in practice would be significant.

*Indirect discrimination*⁶²

Claims involving religion or belief have more commonly involved indirect discrimination. This is mainly because when religious staff or service users seek to manifest religion or belief, a refusal to allow them to do so may amount to a neutral rule which puts the person with the religion or belief at a disadvantage compared to others. Any such rule then needs to be justified if it is not to amount to indirect discrimination.

A critical issue with regard to indirect discrimination is whether it requires group disadvantage (discussed in Workshop 1). In *Eweida*, the Court of Appeal confirmed the previously held view that indirect discrimination requires a particular

⁵⁹ *James v Eastleigh Borough Council* [1990] 2 AC 751.

⁶⁰ [2007] UKEAT/0009/07.

⁶¹ With the exception of age discrimination and some forms of disability discrimination.

⁶² Equality Act 2010, s 19.

disadvantage to a group (Vickers, 2009).⁶³ Although Nadia Eweida was then successful in her Article 9 claim, this does not necessarily mean that the position on group disadvantage will change in domestic law. In *Mba v London Borough of Merton*,⁶⁴ the Court of Appeal suggested that although Article 9 protects individuals as well as groups, this would not mean that the Directive or domestic law should be interpreted so as to enable indirect discrimination to apply to individual claimants.⁶⁵ However, the point is not definitively dealt with in the case, as the question of group disadvantage had been conceded on the facts; moreover, as Lord Justice Vos confirmed, this issue was not fully argued.⁶⁶

The case of *Eweida* proceeded on the assumption that no group of individuals existed who shared her beliefs. However, in most cases more than one person is likely to hold the belief. Indeed at the ECtHR, Eweida's case was heard alongside that of Shirley Chaplin, a nurse who also held the belief that she should manifest her religion by wearing a crucifix, demonstrating that Eweida's belief was not unique to her. In *Eweida*, the Court of Appeal left open whether the group in question would need to comprise other co-workers, or just others with the same views in society at large. However if the broader understanding of the group is accepted, then the concern for the 'lone believer' may remain hypothetical, as other believers are likely to be identifiable somewhere, albeit not in the same workplace.

It appears, then, that the question of group disadvantage was not fully determined in *Mba*. Moreover, a second related question was considered by the Court of Appeal regarding the size of the group affected and whether this has any effect on the question of proportionality. It seems that this issue can cut both ways when considering proportionality. Where a large number of individuals are affected by any restriction on religion, it is arguable that more effort should be made by the employer to remove the obstacle to religious manifestation. This would mean that restrictions on religion would be harder to justify where the number affected is large. Conversely, as discussed in Workshop 1, it may be more difficult for an employer to allow requests from many individuals, for example if large numbers of staff want time off work at the same time. Consequently, it may be easier to justify restrictions on religious manifestations where the numbers are high, because the costs to the business are likely to be higher. In contrast, requests from a small number of

⁶³ *Eweida v British Airways* [2010] EWCA Civ 80, paras 13-24. See also *Chatwal v Wandsworth Borough Council* [2011] UKEAT 0487_10_0607.

⁶⁴ [2013] EWCA Civ 1562.

⁶⁵ See [2013] EWCA Civ 1562, paras. 34-35.

⁶⁶ [2013] EWCA Civ 1562, para. 41.

individuals may be much easier to allow as fewer changes to the work environment will be needed. So, although in *Mba* it was recognised that the size of the group may be relevant to the question of proportionality, it remains unclear exactly how this will affect the issue.

Application of the law in the workplace

In the workplace, cases have commonly involved religious symbols and work uniforms, hours of work, proselytisation in the workplace and refusal of work tasks (Donald, 2013: 60). These cases are sometimes referred to as conscientious objection, although as Donald (2012: 83) notes, the courts have treated them as indirect discrimination cases and reserved the term conscientious objection for military service cases, and then abortion (as discussed below). Hambler (2015) uses a different term, 'negative manifestation' to refer to employees who object to performing aspects of their work for religious reasons; the term 'passive manifestation' is used for employees who express religious views visually, for example through uniforms; and the term 'active manifestation' for those who proactively articulate their beliefs.

Dress codes and uniforms

The issues relating to dress codes are illustrated by two cases. First, in *Azmi*, Aishah Azmi, a teaching assistant, was dismissed for refusing to remove her niqab⁶⁷ when assisting in class. The court held that the restriction on wearing the niqab was a neutral rule which put her at a disadvantage. However, it was justified as it was a proportionate measure given the interests of the children in having the best possible education. In that case, the employer had investigated whether the needs of the children could be met with the niqab in place, and so they had evidence to back up their case that the indirect discrimination caused was justified (Hill and Sandberg, 2007; Vickers, 2010). In contrast, in *Noah v Sarah Desrosiers (trading as Wedge)*⁶⁸ Bushra Noah, a Muslim who was applying for a hairdressing position, succeeded in her indirect discrimination claim when Desrosiers stated that she would be required to remove her hijab⁶⁹ while at work if appointed. The justification for this rule, submitted by the employer, was to promote the image of the hairdressers. The employment tribunal found that the requirement for hairdressers to have their own hair visible was not a proportionate means of achieving this aim, in particular

⁶⁷ A cloth covering the face.

⁶⁸ ET 2201867/2007.

⁶⁹ A headscarf covering the hair but not the face.

because in this case the employer had not brought any evidence that this was the case (Jones, 2012; Catto and Perfect, 2015; Sandberg, 2009; Woodhead with Catto, 2009). The tribunal did not require the employer to go so far as to carry out a trial to test the impact of the headscarf on business. However, it did note that there was some onus on the employer to bring evidence that the wearing of the headscarf would have an adverse effect on the business. In the absence of any such evidence, the requirement was found not to be justified.

Requests about religious requirements are routinely allowed in terms of uniforms and dress codes at work (van Ooijen, 2012) and they are only restricted where employers can provide good reasons, such as health and safety requirements, the requirements of effective service delivery or other business needs. *Azmi and Noah* show that whilst carrying out a trial or testing various options is not required before a restriction on religious dress can be justified, nonetheless it is not sufficient merely to identify business reasons for a restriction; employers will also need to show that the business reasons apply in the particular case.

Time off for religious observance

Prima facie, indirect discrimination also occurs if employers refuse requests for time off for religious observance, as the refusal puts religious individuals at a disadvantage compared to those who do not need time off. Any such refusal will need to be justified, and reasons may relate to the business needs of the employer or service users. This has given rise to a number of cases, with varied outcomes, making it difficult to predict exactly how courts may deal with a case in advance. For example, in *Thompson v Luke Delaney George Stobbart Ltd*⁷⁰ a Jehovah's Witness was refused permission for time off work on Sundays. Her discrimination claim was upheld: the refusal was not proportionate because there were other employees who could have covered the Sunday shift without difficulty. In contrast, in *Cherfi v G4S Security Services Ltd*⁷¹ the refusal of a request by security guard to adapt his working hours to facilitate attendance at a mosque for prayer on Fridays was found to be justified. The employer required a certain number of security staff to be on site during operating hours, and so his request was turned down. The employer offered a number of alternative options but these were refused. Cherfi's indirect discrimination claim was unsuccessful, as the requirement to be on site during the shift was found to a proportionate means of achieving a legitimate aim. Similarly, in *Mba v London*

⁷⁰ [2011] NIFET 00007 11FET (15 December 2011).

⁷¹ [2011] UKEAT 0379_10_2405 (24 May 2011).

*Borough of Merton*⁷² the refusal of a request not to work on Sundays was found to be proportionate. Although the employer had managed to arrange the rota to accommodate her request for nearly two years, this was no longer possible, and there was no viable or practical alternative but to require her to be available to work on Sundays. The difference between the cases appears to relate to the extent to which the employer had made attempts to accommodate the employee's request. However, there are no hard and fast rules and the cases are very fact sensitive.

Proselytisation

A further area in which cases of indirect discrimination have arisen is that of harassment and freedom of religious expression, including through prayers and the distribution of literature. Such activity can be viewed by the religious staff member as the manifestation of religion, and so any restrictions on religious expression at work could be indirectly discriminatory unless they are justified. However, as other members of staff or customers may object, and such activity may amount to harassment, restrictions may be justified.

Simple conversations about religion or belief are unlikely to amount to harassment, but if conversations persist once it has been made clear that they are unwelcome, it is possible that they could come within the definition: the religious employee will have engaged in unwanted conduct with the effect of creating an intimidating or offensive environment for the other person.⁷³

Proselytisation may also raise concerns about freedom of religion. Although the right to manifest religion does cover proselytising, any such right is not absolute, and is limited where it is improper.⁷⁴ Proselytising will be improper if it interferes with the rights of others, for example, to be free from the inappropriate promotion of religion either as a service user, or at work.⁷⁵ Thus although harassment cases involving proselytisation may engage rights to religious freedom on the part of individuals who wish to share their beliefs, interference can be justified in order to respect the rights of others.

Whether staff can share their religious views with others, particularly when those views involve negative views regarding lesbian, gay and bisexual (LGB) people, has caused some concern (Mitchell and Beninger, 2015: 12). In some cases, speech

⁷² [2013] EWCA Civ 1562.

⁷³ Equality Act 2010 s 26.

⁷⁴ *Kokkinakis v Greece* [1993] 17 EHRR 397.

⁷⁵ *Chondol v Liverpool City Council* [2009] UKEAT 0298/08.

regarding religious attitudes to LGB people may be viewed as harassment, and such speech may be restricted at work. In such cases, freedom to debate religious doctrine will need to be balanced against the need to protect the dignity of other workers.

Cases involving disciplinary action for speech related to sexuality have been dealt with using indirect discrimination law. In *Apelogun-Gabriels v London Borough of Lambeth*,⁷⁶ Tunde Apelogun-Gabriels claimed religious discrimination when he was dismissed for distributing 'homophobic material' to co-workers. He had organised prayer meetings for Christian staff and then distributed some verses from the Bible which were critical of same-sex sexual activity to members of the prayer group and other co-workers. Other staff members found them offensive and complained. The tribunal found that the material was offensive to LGB people and although it had not been targeted at these staff, this nonetheless meant that any indirect discrimination involved in his dismissal was justified. In *Haye v London Borough of Lewisham*,⁷⁷ Denise Haye, a Christian administrative assistant, was dismissed after posting her beliefs about LGB practice on the Lesbian and Gay Christian Movement's website, using her work computer. The tribunal dismissed the claim of religious discrimination: any indirect discrimination was justified.

Opting out of work duties

A final set of cases in which the protection of religion or belief has been engaged has involved opting out of work duties, which, as noted, is sometimes termed conscientious objection (Hambler, 2012; Leigh and Hambler, 2014). This issue was discussed in Workshop 4. In many cases, the issues can be dealt with simply, while others have been more difficult. For example, requests related to selling alcohol or handling meat products can be dealt with similarly to those relating to uniforms or time off work: where proportionate, requests can be refused, but a refusal may be indirectly discriminatory when it would be easy to allow the request. So for instance, whilst it would be proportionate for an employer to refuse a request from a butcher who wished not to handle meat, a request from a butcher to be exempt from requests to handle alcohol, as part of an occasional promotional event, for example, should probably be allowed if other staff can cover the task.⁷⁸ However, employers would probably not be expected to let staff opt out of a task where this makes the

⁷⁶ (2006) ET Case No. 2301976/05.

⁷⁷ (2010) Reported by Christian Concern: http://www.christianconcern.com/sites/default/files/Appendix-CLC-Cases_0.pdf. (Accessed: 27 August 2015).

⁷⁸ See for example, *Chatwal v Wandsworth Borough Council* [2011] UKEAT 0487_10_0607.

service inoperable, or where the effect is that an unpopular task falls repeatedly on a small group, with negative effects on staff morale.

A range of factors can be identified that might be relevant to any assessment of the proportionality of a refusal to allow a member of staff to opt out of a task, such as the size of the organisation; whether the workplace is public or private sector; and whether it has a religious ethos (Vickers, 2008; Workshop 4). Some commentators have also suggested that individuals have some responsibility to choose occupations which do not fundamentally conflict with their beliefs (Donald, 2013; Leader, 2007).

In some cases, an employee has refused to undertake a task for reasons which are discriminatory. These cases have been contentious and respondents to the EHRC call for evidence expressed strong views on these issues (Mitchell and Beninger, 2015). For example, in *Ladele v Islington Borough Council*,⁷⁹ a marriage registrar, Lillian Ladele, sought to be excused from carrying out civil partnerships on the basis of her religious beliefs, but permission was refused. The case was treated as one of indirect discrimination: the requirement to carry out the civil partnership was a neutral requirement which caused disadvantage to Ladele because she did not feel able to comply with it for religious reasons. However, the Council was able to justify the requirement as it was necessary for all staff to offer all services to everyone, as part of the Council's 'Dignity for All' policy (Sandberg, 2011a).

This finding was upheld by the ECtHR in *Eweida*. This case was brought under the ECHR provisions on freedom of religion and belief, and the conclusion was the same. This shows that whether the matter is approached as an equality issue or as a matter of human rights, the conclusion is clear: conscientious objection in the context of the workplace will not outweigh the rights of others which may be infringed by allowing the objection. Employers do not need to allow requests to opt out of work duties when to do so may interfere with others' rights, so that their decision is likely to be justified. (For commentary on the case see McCrea, 2014; Hambler 2010, 2012; Pitt 2013; Stychin 2009; Scriven, 2012).

There is one sector in which conscientious objection can be explicitly requested. It relates to objections to abortion or activities related to the Human Fertilisation and Embryology Act 1990. Here special rules apply, although they are not limited to religious objections. With regard to abortion, section 4(1) of the Abortion Act 1967 states: 'no person shall be under any duty...to participate in treatment authorised by this Act to which he has a conscientious objection.' Similar terms can be found in

⁷⁹ *Ladele v Islington Borough Council* [2009] EWCA Civ 1357.

Section 38 (1) Human Fertilisation and Embryology Act 1990. The scope of this exemption has been tested in a number of cases, and in the most recent one, *Greater Glasgow Health Board v Doogan*,⁸⁰ it was confirmed that it is limited only to the medical process of abortion. Those engaging in broader activity related to the follow up care of the patient are not covered by the provisions. They will, however, be covered by the general provisions of Article 9 ECHR and the Equality Act. Therefore, requirements to be involved in care of patients before or after an abortion may be said to be indirectly discriminatory against those with religion or belief objections: and any requirement for them to participate will need to be justified, as discussed above (Cranmer, 2012; Vickers, 2014).

3.3 The special position of schools

As discussed in Workshops 2 and 3, special rules relating to discrimination on grounds of religion or belief apply to teachers in schools (Vickers, 2009, 2012; Sandberg, 2011a: 150-68). Different provisions apply in Scotland and in England and Wales.

In England and Wales, the position is covered by the Schools Standards and Framework Act 1998 (SSFA), as amended by the Education and Inspections Act 2006, to which the provisions of the Equality Act 2010 are subject. The provisions of the SSFA distinguish between different types of school: voluntary aided (VA) voluntary controlled (VC), community schools, foundation schools and academies.⁸¹ The distinction between the different types of school relate to questions of funding and the legal question of who employs staff, rather than the extent of the religious input.⁸²

In summary, in community schools and other schools which do not have a religious character, teachers cannot be discriminated against on grounds of religion or belief, including for refusing to give religious education.⁸³ With regard to schools with a religious character, the main distinction is between VA schools, on the one hand, and VC and foundation schools, on the other. In VC or foundation schools with a

⁸⁰ [2014] UKSC 68.

⁸¹ In addition, there are City Technology Colleges, funded directly by the Government, rather than via a local education authority.

⁸² As a general rule, Voluntary Aided schools and Voluntary Controlled schools are faith schools. Foundation schools and Academies may or may not be faith based, and Community schools are rarely faith based.

⁸³ SSFA 1998 s59. The provision applies to working as a teacher, and being employed for the purposes of the school otherwise than as a teacher.

religious character, religion can be taken into account in appointing the head teacher, and in addition the school can 'reserve' up to a fifth of its teaching staff who can be 'selected for their fitness and competence' to give religious education in accordance with the tenets of the faith of the school.⁸⁴ VA schools can impose religious requirements on all teaching staff, although with regard to non-teaching staff there is a small difference between England and Wales. In England non-teaching staff are covered by the exceptions in the Equality Act, discussed above, whereas in Wales, the SSFA provides that non-teaching staff are not to be 'disqualified by reason of ...religious opinions, or of ...attending or omitting to attend religious worship, from being employed'.⁸⁵ The provisions of the SSFA as they apply to heads and reserved teachers in VC schools, and all teachers in VA schools, go beyond what would be allowed under the Equality Act 2010 as they do not contain a requirement of proportionality in their application (Vickers, 2009). However, it should also be noted that the SSFA does not create any special exceptions with regard to other grounds of discrimination such as sex or sexual orientation. Thus, although the Act may allow discrimination on religious grounds, such discrimination will be unlawful if it results in indirect sex or sexual orientation discrimination. The exception for such discrimination with regard to employment for the purposes of an organised religion discussed below at section 4.1⁸⁶ does not extend to employment in schools.⁸⁷

In Scotland, the position is covered by the Education (Scotland) Act 1980. Where a teacher wishes to be appointed to a post in a denominational school managed by an Education Authority, they are required to be approved as regards their religious belief and character by representatives of the relevant church or denominational body.⁸⁸ The Equality Act exception relating to statutory provisions applies.⁸⁹ In relation to all other schools, the general Equality Act employment provisions apply.

⁸⁴ SSFA 1998 s58. 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.

⁸⁵ SSFA s 60(6).

⁸⁶ Schedule 9 Equality Act 2010.

⁸⁷ *R (on the application of Amicus – MSF and others) v Secretary of State for Trade and Industry and others* [2004] EWHC 860 (Admin).

⁸⁸ Section 21 (2A).

⁸⁹ Schedule 22 Para 1 (1).

4 | Balancing rights

The media focus on apparent conflicts between religion and other rights can lead to an increased perception of significant and unresolvable problems with the legal framework (Malik, 2008; Hamblen, 2015). Public perceptions regarding the effectiveness of the legislation may also be influenced by media reports on high profile cases (Donald, 2012: 43-44; Weller et al, 2013: Catto and Perfect, 2015).

A common concern relating to the protection of religion and belief is that it can have an impact on the protection of other fundamental rights, such as the right to freedom of expression, or rights related to equality, especially equality on grounds of sexual orientation (Mitchell and Beninger, 2015; Woodhead with Catto, 2009). Legally these issues are largely dealt with, as has been described above, through the proportionality mechanism within indirect discrimination. Evidence from the workshops as well as from the EHRC call for evidence suggests that the difficulties are not widespread, but that instead resolution is possible in many cases. Indeed, some commentators have argued that concerns about conflicts between religion and equality as being both intractable and widespread are often overstated (Malik, 2008).

Restrictions are allowed on an individual's right to manifest their religion, as long as these restrictions are proportionate. Where the manifestation has an impact on the rights of others, then any restriction must be proportionate in order to respect the rights of others (Trispiotis, 2014).

Examples of this process can be seen in the discussion above of proselytisation and harassment. For example, as was seen in the discussion of harassment, speech regarding religious attitudes to LGB people may be viewed as harassment, and such speech may be restricted at work. In such cases, freedom to debate religious doctrine will need to be balanced against the need to protect the dignity of other workers. Cases such as *Apelogun Gabriels v London Borough of Lambeth*⁹⁰ and *Haye v London Borough of Lewisham*⁹¹ discussed above demonstrate that the need

⁹⁰ (2006) ET Case No. 2301976/05.

⁹¹ (2010) Reported by Christian Concern: http://www.christianconcern.com/sites/default/files/Appendix-CLC-Cases_0.pdf, (Accessed: 27 August 2015).

to protect freedom of religion or belief and freedom of expression will not provide a defence to a claim of harassment. Moreover, in two Employment Tribunal cases, *Mbuyi v Newpark Childcare*⁹² and *Wasteney v East London NHS Foundation Trust*,⁹³ it was decided that that disciplinary action by an employer against an employee who expressed negative views towards LGB people in conversation with colleagues did not amount to harassment.⁹⁴

The cases of *Ladele* and *Hall and Preddy* are illustrative of the legal approach to resolving cases in which both sexual orientation and religion are involved. As seen above, in *Ladele*⁹⁵ where the marriage registrar was required to carry out civil partnerships the case was treated as one of indirect discrimination. Here, Islington Council justified the requirement on the basis that it was necessary as part of the Council's 'Dignity for All' policy.⁹⁶ The case demonstrates that individual's claims for opt outs from work duties due to religious beliefs do not outweigh the rights of others who are harmed by allowing the opt out; and employers are under no duty to allow discriminatory requests for accommodation of religion or belief. This will mean that a refusal to permit an opt out from work duties is likely to be proportionate in circumstances where the opt out may interfere with the rights of others.

Proportionality was also used in balancing rights in *Hall and Preddy*,⁹⁷ considered above. Here the court held that the legislative requirement imposed on the Bulls to offer their bed and breakfast accommodation to all, regardless of sexual orientation, was a proportionate limitation on their religious freedom, in the light of the rights of Hall and Preddy to be free from sexual orientation discrimination. Very weighty reasons would be required in order to justify discrimination on grounds of sexual orientation.⁹⁸ The same reasoning would likely apply to other situations discussed in the workshops regarding the provision of services to the public.

Where there is a need to balance rights of this type, most cases will be interpreted in the same way as in *Hall and Preddy*, with weighty reasons required before refusal of

⁹² *Mbuyi v Newpark Childcare* [2015] Case Number: 3300656/2014

⁹³ *Wasteney v East London NHS Foundation Trust* [2015] Case Number 3200658/2014.

⁹⁴ It should be noted, however, that *Mbuyi* was successful in parts of her claim as the Employment Tribunal found that stereotypical assumptions had been made by the employer in the investigation of the dispute between Mbuyi and her colleague, which had little evidence to support them. This had been done because of her beliefs, and led to a finding that Mbuyi's treatment had been directly discriminatory. *Mbuyi v Newpark Childcare* [2015] Case Number: 3300656/2014 at paras 151-158.

⁹⁵ *Ladele v Islington Borough Council* [2009] EWCA Civ 1357; then heard with *Eweida (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* Judgment 15 January 2013.

⁹⁶ *Eweida (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* Judgment 15 January 2013.

⁹⁷ *Bull and Bull v Hall and Preddy* [2013] UKSC 73.

⁹⁸ *Bull and Bull v Hall and Preddy*, para. 53.

a service based on sexual orientation can be justified. However, where the employee or service provider is expected not only to provide a service but to express support for a position with which they disagree, it might be argued that the right to freedom of expression should be weighed alongside the other interests to mean that some form of exception becomes warranted. A case in which such issues arose is the Northern Ireland case, *Gareth Lee v Ashers Baking Company Ltd, McArthur and McArthur*,⁹⁹ which is discussed below, and is currently subject to appeal.

The cases have also been interpreted by some commentators as emblematic of a conflict between religion and sexual orientation equality. In particular, some workshop participants and some commentators (Christians in Parliament, 2012: 37; Woodhead with Catto, 2009) believe that in these cases sexual orientation equality has been prioritised over religion or belief equality. Other commentators believe that human rights based arguments have been trumped by equality interests (Trigg, 2012; Rivers, 2010, 2011).

However, claims that one form of equality is being given priority over another do not accurately reflect the legal reasoning in the cases. The cases have been resolved by applying the current law on indirect discrimination, according to which requirements which might at first seem indirectly discriminatory can be justified where proportionate in pursuit of a legitimate aim, such as the aim of protecting the rights of others. Such an outcome is also reached when human rights claims are made, as the freedom to manifest religion or belief is limited where it interferes with the rights of others. Both legal frameworks are thus able to take into account competing interests without the creation of formal hierarchies.

It was suggested in the workshops that rather than a hierarchy between protected characteristics, there may be a hierarchy of direct and indirect discrimination: direct discrimination is given greater protection than indirect discrimination, because it cannot be justified. So for example, the council's requirement that its registrars perform civil partnerships indirectly discriminated against Ladele, but this was justified as her refusal to perform civil partnerships would have been directly discriminatory to LGB couples on grounds of their sexual orientation.

⁹⁹ *Lee v Ashers Baking Co Ltd and McArthur and McArthur* (2015), County Court of Northern Ireland 19 May 2015 (online at http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf).

4.1 Exceptions on the basis of religion or belief to equality law duties

To address the balancing of rights, there are instances when individuals and organisations are not required to meet a generally applicable legal obligation because of a legal exception based on their religion or belief (Jones, 2012). In the later discussion of reasonable accommodation, the report looks at requests from employees for a modification of their working experience in order to accommodate their religious interests. This section focuses on the employer, and less centrally the service provider, and their religious interests. The legal framework dealing with these two forms of request for a change in the general application of the law is very different.

The Equality Act 2010 contains a number of exceptions.¹⁰⁰ As discussed by Sandberg (2011a: 117-28), many of these exceptions are uncontroversial, but this has not been the case with the religious exceptions relating to employment and the provision of goods or services.

Exceptions relating to employment

The Equality Act 2010 contains exceptions from generally applicable non-discrimination duties under Schedule 9. This includes a general exception under Paragraph 1 for occupational requirements which are a proportionate means to achieve a legitimate aim: this exception being a reformulation of a well-established provision in equality law which applies to all protected characteristics.¹⁰¹ A further exception, applicable only to religion or belief is contained in Paragraph 3: an employer with an ethos based on religion or belief¹⁰² is permitted to discriminate on the grounds of religion or belief if it is an occupational requirement for the particular post,¹⁰³ and having regard to that ethos, and the nature or context of the work, the application of the requirement is a proportionate means of achieving a legitimate

¹⁰⁰ Academic literature differs in whether to describe the substance of this section as 'exceptions' or 'exemptions'. The term 'exemptions' is, for instance, preferred by Sandberg and Doe (2007).

¹⁰¹ Equality Act 2010, schedule 9, para. 1.

¹⁰² Which can be a natural person, in which case determining that they had such an ethos may be easier than for a legal person – consider *Jivraj v Hashwani*, [2011] UKSC 40, para. 56. A distinction between a 'sole trader' and a company was also suggested in Workshop 1, and taken further in Workshop 2 with consideration given to very small employers and service providers.

¹⁰³ *Hender (Louise) v Prospects* ET Case no. 2902090/2006; *Sheridan (Mark) v Prospects* ET Case no. 2901366/2006, both 13 May 2008.

aim. These criteria are determined objectively, that is, it is not sufficient that the employer genuinely believe that they apply.¹⁰⁴

The EU Directive provides an exception, for all protected characteristics, where the protected characteristic, such as religion or belief, is a genuine and determining occupational requirement and it is proportionate to apply that requirement in the particular case. This wording was used in the 2003 Regulations and meant that it was evident that the exception only applied where there was a very clear connection between the work to be done and the characteristics required: the occupational requirement had to be genuine *and determining*. Under this narrow exception, religious discrimination was only really likely to be lawful in cases of those employed in religious service, whose job involved teaching or promoting the religion, or being involved in religious observance. The fact that the religious requirement had to be 'determining' meant that the religious nature of the job must be a defining aspect of the job. This could then be contrasted with the slightly wider exception that applies to organisations with an ethos based on religion or belief, in which an exception needed only to be 'genuine' without the requirement that it be 'determining'. Again, this reflects the wording used in the EU Directive. It suggests a less rigorous approach in deciding whether the particular job requires a particular characteristic; it might allow an employer with an ethos based on religion to require that all staff share the religion, even ancillary staff, for whom religion is not a determining requirement. An example of the use of the broader exception for religion or belief employers can be seen in *Muhammed v The Leprosy Mission International*,¹⁰⁵ where a small Christian charity was allowed to refuse applications from non-Christians, because Christianity permeated the organisation, with prayers starting each day. Employing a non-Christian would have had a significant impact on the ability of the organisation to maintain its ethos, whereas the finance administrator who was refused a job would have had the chance to work elsewhere.

In the redrafting of the legislation for the Equality Act 2010, the word 'genuine' was removed from the exceptions contained in Schedule 9, on the basis that it was unnecessary (because an occupational requirement which is not genuine is therefore not an occupational requirement). Equally, it was assumed that whether the requirement was determining or not, would be assessed as part of the review of proportionality, and did not need stating in the legislation. As the British legislation must be interpreted to accord with the EU Directive, this difference may not be of

¹⁰⁴ *Jivraj v Hashwani*, [2011] UKSC 40.

¹⁰⁵ *Muhammad v The Leprosy Mission International*, ET 2303459/0989, 16 December 2009.

significance. However, it is arguable that the removal of these terms, particularly the term 'determining' from the face of the legislation has hidden from view an important distinction between the two levels of occupational requirement (Pitt, 2011).

These occupational requirement provisions are supplemented by specific provisions intended to protect religious autonomy. Paragraph 2 of Schedule 9 provides that discrimination on grounds of sex, gender reassignment, marriage and civil partnership, marriage to a person of the same sex, and sexual orientation is permitted if, among other requirements, it is shown that the employment was for the purposes of an organised religion. The requirement must be one that is either being applied so as to comply with the doctrines of the religion; or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. There is no express requirement that such discrimination be a proportionate means of doing so, although it has been argued that the legislation needs to be read in accordance with EU law, and so import a proportionality requirement (Donald, 2012: 96). Donald (2012: 94) also notes that the Explanatory Notes to this section of the Act go beyond the text of the actual exception. An earlier provision had been interpreted by the High Court in *R (Amicus – MSF Section) v Secretary of State for Trade and Industry* as needing to be 'construed strictly since it is a derogation from the principle of equal treatment',¹⁰⁶ although it has been interpreted to include a Diocesan Youth Officer on the basis that he would be 'promoting religion' in addition to simply carrying out youth work.¹⁰⁷ During the passage of the Act an attempt to provide a definition of 'the purposes of an organised religion' failed. The Explanatory Notes reflect some of the rejected definition when they stress that the exception was 'intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion'.¹⁰⁸ As Sandberg (2011b: 120) has pointed out, the exception does not expressly convey this restricted meaning. In practice, these Explanatory Notes, together with the emphasis on strict construction in *Amicus*, seem to have led to the continuation of a narrow interpretation.

¹⁰⁶ *R (Amicus – MSF Section) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).

¹⁰⁷ *Reaney v Hereford Diocesan Board of Finance*, ET 1602844/06, 17 April 2007. Compare *Glasgow City Council v McNab* [2007] IRLR 476.

¹⁰⁸ Equality Act 2010 Explanatory Notes, para. 790.

Exceptions relating to provision of goods and services

The Equality Act 2010 allows 'organisations relating to a religion' or belief to discriminate on the grounds of religion or belief or sexual orientation in the way they operate.¹⁰⁹ The purpose of such an organisation must be to practise, advance or teach a religion or belief, or to enable persons of a religion or belief to receive a benefit, or engage in an activity 'within the framework of that religion or belief', or to foster or maintain good relations between persons of different religions or belief.¹¹⁰ The organisation must not have a commercial sole or main purpose.¹¹¹ Such organisations may restrict, on discriminatory grounds in relation to religion or belief or sexual orientation, membership of the organisation, participation in its activities, use of its premises, or 'the provision of goods, facilities or services in the course of activities undertaken by the organisation'.¹¹² Such a restriction in relation to religion or belief must be imposed either because of the purposes of the organisation, or to avoid causing offence on grounds of its religion or belief to persons of that religion or belief.¹¹³ Such a restriction in relation to sexual orientation must be imposed either because it is necessary to comply with the doctrine of the organisation, or to avoid conflict with strongly held convictions of a significant number of followers of its religion or belief.¹¹⁴ Additionally, the Equality Act 2010 allows ministers of an organised religion to provide a service only to persons of one sex or to separate services for persons of each sex.¹¹⁵ This must be necessary to comply with the doctrines of the religion, or be for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers.

The sexual orientation exception does not apply when the organisation has contracted with a public authority to provide a service on its behalf. This has led to litigation where a religiously based adoption agency wished to exclude same-sex couples from their processes (Donald, 2012: 100-01).¹¹⁶

The EHRC call for evidence identifies some examples of concerns over service provision with a religious element (Mitchell and Beninger, 2015: 76-77). With regard

¹⁰⁹ Equality Act 2010 schedule 23, para. 2.

¹¹⁰ Ibid, para. 23(1).

¹¹¹ Ibid, para. 23(2).

¹¹² Ibid, para. 23(3).

¹¹³ Ibid, para. 23(6).

¹¹⁴ Ibid, para. 23(7).

¹¹⁵ Equality Act 2010 schedule 3, para. 29.

¹¹⁶ *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* (2012) FTC/52/2011. See also *Re J and S (Children)* [2014] EWFC 4.

to service providers which were not organisations relating to religion or belief,¹¹⁷ some were concerned that equality law was 'stifling' religious views they saw as integral to the way that they worked, while others were concerned that the imposition of religious views of the provider could be upsetting to both staff and service users (Mitchell and Beninger, 2015: 97).

The recent decision in a Northern Ireland County Court case, *Ashers Baking Company*, could have a significant influence on the British law.¹¹⁸ In May 2015, the court found that it was unlawful direct discrimination on grounds of sexual orientation for a bakery owned by two Christians to refuse to bake a cake which had printed on it a picture of 'Bert and Ernie' and the caption 'Support Gay Marriage' (Henderson, 2015). The significance and implications of the case will only become clear once there has been a final determination on appeal.

Issues

Discussion of exceptions has tended, as in *Ashers Baking Company*, to turn on discrimination because of sexual orientation. Individuals and organisations motivated by religion or belief may, however, seek to justify discrimination on other grounds, for instance sex or disability (Edge, 2011). Some commentators have suggested that the law on exceptions creates '... a varied and sometimes confusing patchwork of law' (Pearce (2013: 82)) as different exceptions apply in relation to discrimination because of religion or belief, sexual orientation, sex, and disability for instance. The exceptions for employment and service provision also differ. This has led to the suggestion by some commentators that the current exceptions should be replaced by an alternative model based on the theory of religious autonomy, a concept recognised by human rights law,¹¹⁹ (Leigh, 2013).

An approach which began in religious autonomy, particularly if religious autonomy were to be framed as a fundamental right rather than as a privilege granted by the state, as in the US,¹²⁰ might work differently. An autonomy based exception could well be broader than the current law, for instance in allowing religious organisations

¹¹⁷ Equality Act 2010 schedule 23, para.2.

¹¹⁸ *Lee v Ashers Baking Co Ltd and McArthur and McArthur* (2015), County Court of Northern Ireland 19 May 2015 (online at http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf).

¹¹⁹ For instance by the ECtHR in *Hasan and Chaush v Bulgaria*, app. 30985/96; *Svyato-Mykhaylivska Parafiya v Ukraine*, app. 77703/01; *Sindicatul "Pastorul cel Bun" v Romania*, app. 3220/09.

¹²⁰ *Hosanna-Tabor Evangelical Lutheran Church & School v Equal Employment Opportunity Commission*, 565 US (2012).

to discriminate more than the current law allows in favour of co-religionists in order to create mono-religious workplaces. Some participants in the workshops considered that an approach which resulted in more extensive exceptions would be unacceptable, striking the wrong balance between religious rights to autonomy and the right to be protected from discrimination.

A particular issue where autonomy has been seen as particularly relevant has been referred to internationally as the 'ministerial exception',¹²¹ under which the relationship between a minister of religion, however defined, and their religious organisation is treated differently from a normal employment relationship. In Great Britain, this scenario has been dealt with by applications of broader doctrines to the problem: a distinction between office holder and employee so as to exclude the operation of a contract of employment; a distinction between the intention to create legal relations in a normal agreement, and an agreement between a minister and their religious organisation, so as to exclude the operation of any legal contract; and a distinction between normal services and religious services, so as to exclude the latter from a legal agreement. All have proven unstable, and have largely been rejected by the courts (Edge, 2015). British courts have begun to make some use of concepts of the autonomy of religious organisations under Article 9 of the ECHR,¹²² but have yet to fully explore the implications of religious organisation autonomy (Hatzis, 2013).

There is significant, but not universal, consensus that the autonomy of religious organisations justifies some departure from the norms of equality law (Mitchell and Beninger, 2015: 134; Laborde, 2014a). There is notably less consensus on how wide the definition of religious organisation should be. Some respondents to the EHRC call for evidence were concerned that individuals who sought to run a business in accordance with their faith were treated in law as businesses, rather than entitled to a religious exception to the normal rules (Mitchell and Beninger, 2015: 144). The discussion in Workshop 2 reflected significant differences of opinion as to whether individuals operating businesses should be considered for any exception to normal duties on the grounds of religion or belief.

As discussed above, the current law provides a broader range of exceptions to normal equality law duties to religious organisations whose main purpose is not commercial. The application of religious rights arguments to commercial

¹²¹ This topic is discussed in comparative perspective in an issue of the *Oxford Journal of Law and Religion* currently at press; see chapters by Slotte and Årsheim; Svensson; Edge; Garcimartín; and Christoffersen.

¹²² e.g. *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, CA.

organisations with legal personality has been given greater prominence by the decision of the US Supreme Court in *Burwell v Hobby Lobby Stores Inc.*¹²³ In that high profile case, a for-profit corporation owned by family members, with a well-documented religious ethos, was found to possess religious rights which could be upheld against obligations to provide particular types of healthcare to employees.¹²⁴

In UK tax law, there has been a willingness to afford religious rights to a company which is an extension of a person, or potentially a group of persons¹²⁵ as well as to treat the normal work of a church as 'conducted on commercial principles' so that use of a church 'constituted a trade'.¹²⁶ It is not clear how far this convergence of the commercial and the religious in 'commercial religion' (Edge, 2013) will be applied to for-profit organisations in relation to employment law and the provision of services. In *Ashers Baking Company*, for instance, Judge Brownlie considered that '...a limited company cannot invoke Article 9 rights',¹²⁷ but accepted that individuals engaged in commerce could, although she found that they could not 'manifest them in the commercial sphere if contrary to the rights of others'.¹²⁸

¹²³ *Burwell v Hobby Lobby Stores Inc* (2014) 573 US.

¹²⁴ For a recent, but notably less clear, consideration of related issues under the ECHR, see *Firma EDV fur Sie v Germany*, App. No. 32783/08 (2 September 2014), para. 31.

¹²⁵ *Exmoor Coast Boat Cruises Ltd v Revenue & Customs* [2014] UKFTT 1103 (TC).

¹²⁶ *Senex Investments Ltd v The Commissioners for Her Majesty's Revenues and Customs*, [2015] UKFTT 0107, para. 94.

¹²⁷ *Ashers Baking Co Ltd*, para. 98.

¹²⁸ *Ibid*, para. 94.

5 | A duty of reasonable accommodation

Commentators frequently question whether the law would be improved by introducing a ‘duty of reasonable accommodation’ for religion or belief (Alidadi, 2012; Gibson, 2013; Howard, 2013; Henrard, 2012). This issue was also extensively discussed in the four workshops. Those who support the introduction of such a duty believe that it would overcome the difficulties that face individuals wishing to bring claims of indirect discrimination, as there would be no need to show group disadvantage, and that it would be simpler and more appropriate to use in the work context than indirect discrimination (discussed by Bribosia et al, 2010; Vickers, 2008: 220-25). Precedent for this approach can be found domestically as well as in other jurisdictions. In Great Britain, employers and service providers are subject to a ‘duty of reasonable adjustment’, requiring them to make adjustments necessary to working practices, premises or services to remove any disadvantage faced by disabled people; this requires a disadvantage to be shown which the reasonable adjustment is intended to address.¹²⁹ It should be noted that the workshops discussed whether comparisons between the duty to accommodate and the duty to make reasonable adjustments is apt (Waddington and Hendriks, 2002).

In the USA and Canada (Gibson, 2013; Moon, 2006; Stychin, 2009), a duty is placed on employers to accommodate the religious practices of employees, as long as this does not cause undue hardship to the employer. However, although the US and Canadian laws both have such a duty, in practice they are applied somewhat differently, because a different standard of review is used in assessing whether an accommodation is reasonable or not. For example, in the US, although the duty to accommodate exists, the duty is very easily fulfilled: if the employer will be caused even minimal hardship by accommodating the employee’s religion (for example in terms of cost or the dissatisfaction of other staff members) then the duty will not apply.¹³⁰ In effect, once a competing interest is identified, the duty on the employer tends to give way (Prekert and Magid, 2006). Nonetheless, the duty does require that an employer makes some attempt at accommodation: although only minimal

¹²⁹ Equality Act 2010, S 20.

¹³⁰ *Trans World Airlines v Hardison* (1977) 432 US 63.

hardship is required, there must at least be actual hardship, not merely hypothetical (Gibson, 2013).¹³¹

In Canada, a higher standard of review is used. Again, the employer must comply with the duty reasonably to accommodate unless accommodation would cause undue hardship. Whereas the US has taken a minimal approach to the issue of hardship, the Canadian courts have required employers to accommodate where possible, and have listed examples of criteria to be considered in assessing whether the duty has been met. These include financial cost, the size of the employer, and the nature of the employee's job.¹³² In assessing whether it would be reasonable for the employer to accommodate a religious employee's request, courts balance the competing interests and use the principle of proportionality to reach their conclusions.

There is nothing in the existing law which prevents an employer making an accommodation, unless doing so would breach discrimination law or health and safety legislation. In some respects, the protection provided by a duty of accommodation does not materially differ from that provided by indirect discrimination. A failure to accommodate a request by religious employees for different treatment may amount to indirect discrimination, unless the refusal to accommodate can be justified. For example, where an employer refuses a request that a work uniform be adapted to accommodate religious practice, religious employees would suffer indirect discrimination. The employer's requirement that staff wear the uniform would put those members of staff at a particular disadvantage, and the requirement would need to be justified. Similarly, depending upon the legal framework, a request for time off for religious observance could be framed as a request for accommodation, which could only be denied on reasonable grounds; or it could be framed as an indirect discrimination claim: that the requirement to work particular hours puts the religious individual at a disadvantage, and must be justified.

Whether such an approach would be beneficial in Europe and Great Britain has been the subject of much debate (Alidadi, 2012; Hepple et al, 2000; Gibson, 2013; Loenen, 2012).¹³³ The EU funded project RELIGARE recommended that a duty of reasonable accommodation for religion and belief be introduced in EU law (Foblets

¹³¹ *EEOC v Alamo Rent-A-Car* (2006) 432 F.Supp.2d 1006 (2006).

¹³² *Central Alberta Dairy Pool v Alberta (Human Rights Commission) (Alberta)* [1990] 2 SCR 489.

¹³³ See also the chapters in part II section II of Foblets et al (2014) by Ast, Cumper, Henrard, Laborde and Stein; see also the 2014 interim report of the UN Special Rapporteur on Religion and Belief, which focussed on tackling religious intolerance and discrimination in the workplace available at <http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>. (Accessed: 27 August 2015).

and Alidadi, 2013, particularly the chapters in part 2), and similar suggestions have been made by commentators in Great Britain (Christians in Parliament, 2012; Gibson, 2013), as well as by some participants in the workshops. As noted above, it is generally recognised that the current law on indirect discrimination does largely provide similar protection to that which a duty of reasonable accommodation would provide: a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal to accommodate can be justified.

This understanding of the links between reasonable accommodation and indirect discrimination has some judicial backing, with the acceptance in the service provision case of *Hall and Preddy* that failure to make a reasonable accommodation may be evidence that a refusal to change a requirement is disproportionate.¹³⁴ In effect, whether using a reasonable accommodation model or an indirect discrimination model, the question for the court depends largely upon the assessment of whether it would be proportionate in the particular case to accommodate the religious employee given the different competing interests at stake. The outcome of that assessment will depend more upon the standard of review chosen than on the model used, as is shown by the difference in approach between the US and Canada, both of which are based on the reasonable accommodation model.

Although both systems rely largely on an assessment of reasonableness or proportionality, an additional difference between an approach based on indirect discrimination and one based on reasonable accommodation relates to the burden of proof. In indirect discrimination the employee must first show that a requirement creates a disadvantage. The burden then shifts to the employer to justify the requirement. In contrast, with a duty of reasonable accommodation, the employee just needs to request the accommodation, and the employer will need to show that any accommodation would create unreasonable hardship. This suggests that the burden on the employee to prove the case would be easier. However, of itself this would not necessarily mean that the creation of a duty of reasonable accommodation would be of benefit to religious employees. This is because the level of protection provided by a duty of reasonable accommodation turns largely on how easy it is for employers to justify a refusal to accommodate. If all that is needed is minimal hardship to the employer (for example the fact that other staff could be

¹³⁴ 'I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases'. Lady Hale, *Bull v Hall* [2013] UKSC 73, para. 47.

inconvenienced) before refusal to accommodate is justified, the protection would not be very strong.

The question remains whether a change to British law to introduce a duty of reasonable accommodation would improve the effectiveness of the legal protection for religion and belief. As the experience of the US and Canada show, the use of a legal framework based on a duty of accommodation does not of itself increase the level of protection: instead this is determined by the standard the courts apply in assessing whether a refusal of an accommodation was reasonable.

Arguments in favour of creating a duty of reasonable accommodation

The first argument in favour of an approach based on reasonable accommodation is that such a duty would apply to individuals as much as groups, and so would overcome the difficulty potentially caused to individual claimants by the current lack of clarity, discussed above, over whether there is a requirement in indirect discrimination cases for group disadvantage.

Second, the creation of a separate duty of reasonable accommodation would create clarity for individuals with a religion or belief. It would be clear that employees have the right to ask for accommodation, and this could lead to more cases being dealt with at a workplace level, without recourse to courts.

Moreover, as discussed in the workshops, it may be that for an employee to make a religion or belief request to their employer would feel more comfortable and less confrontational than for them to allege that their employer has discriminated against them. Some workshop participants thought that the creation of a duty of reasonable accommodation might lead to more open dialogue about religion or belief in the workplace, a reduction in litigation and greater satisfaction with the legal framework. However, it could also be the case that, at least in the short-term, any change in the law would result in an increase in litigation seeking to determine the boundaries of what is 'reasonable'.

Other concerns are more technical and relate to how the creation of a separate duty would affect the interpretation of equality law more generally, and the protection afforded in relation to other protected characteristics (Stuart, forthcoming). The concern arises because of the usual practice of applying the same standards of justification across all strands of equality law. The standard applied is very strict: the means chosen for achieving that legitimate aim must correspond to a real need on

the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.¹³⁵ For example, increased costs alone or inconvenience would not be acceptable as justification for indirect sex discrimination.

However, it is arguable that in cases involving manifestation of religion or belief, the standard of justification has been less strict, and that this may affect the standard used for other grounds, a process known as ‘levelling down’ (Loenen, 2012; Loenen and Vickers, 2015). For example, if an employer can refuse to allow time off work for religious observance and then justify this on grounds of economic cost, they might also be able to justify refusing a request relating to sex or race discrimination. This could lead to a reduction in the current levels of protection under the Equality Act for these protected characteristics.

One benefit of a separate duty of reasonable accommodation for religion or belief, therefore, is that it may remove the risk of ‘levelling down’ in this way. This is because the separate legal framework for religion or belief cases would provide a way for different levels of legal protection to be set as seems appropriate for the particular context of religion or belief. This would remove the danger of ‘cross fertilisation’ into other areas of equality law, where standards have been developed in a different context.

Arguments against creating a duty of reasonable accommodation

A number of arguments against creating a duty of reasonable accommodation can be identified (see Pitt, 2013). First, such a duty might be seen to privilege religion or belief over other protected characteristics for which there is no similar duty with the exception of disability, which importantly can be distinguished by the asymmetrical nature of the protection from discrimination. It is not unlawful to treat a disabled person more favourably than a non-disabled person because of disability, whereas accommodating one religion or belief might result in less favourable treatment of another. Second, the absence of a clear definition of belief means that creating a duty of accommodation for religion or belief could lead to significant uncertainty for employers. For example, it is unclear how far employers would be expected to go to accommodate some of the beliefs that have been found to be covered by the legislation, such as a belief that public service broadcasting has a higher purpose,¹³⁶

¹³⁵ *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607-1631 [1986], para. 607.

¹³⁶ *Maistry v BBC*, ET Case No.1313142/10, 29 March 2011.

or that foxhunting is wrong.¹³⁷ Third, a duty to accommodate may imply a default position that employers should attempt to accommodate, whereas the indirect discrimination protection does not have such an underlying assumption.

In addition, another set of arguments can be made based more on the symbolic effect of the creation of a duty. The creation of a separate duty may not lead to substantial change in the level of protection for religion and belief over and above that already provided by indirect discrimination (see Chapter 4). Indeed, whether or not any such duty did have any substantial impact would depend on where the threshold of 'reasonable' was set. However, explicitly treating religion or belief differently from other protected characteristics would have a significant symbolic effect, as it would mark religion and belief out as having special status. This was a main concern of workshop participants who thought that if religion or belief received special treatment in comparison with other protected characteristics, those might then be perceived as less important. Some workshop participants considered that any duty of accommodation should not be extended to apply to service providers, nor should it be possible for an employer to argue that they have accommodated a request as part of their defence against a claim of direct discrimination. Moreover, some participants who were opposed to the introduction of a duty of reasonable accommodation suggested that the use of the language of a 'duty' would imply a positive obligation and that this could create a *prima facie* expectation that the accommodation would be granted. These participants felt that this could exert pressure on employers to accommodate requests which would give excessive weight to religious interests in the workplace.

Some participants in the workshops suggested an alternative to a duty to accommodate, which could meet some of these concerns. They argued that a right to request accommodation of religion or belief in the workplace, analogous to the current right to request flexible working, could be introduced.¹³⁸ The right to request flexible working provides a legal right to make the request and the employer has to consider the request in a reasonable manner. The application requires those making a request to provide an explanation of how they think flexible working might affect the business, as well as how this could be dealt with. Although this right is not especially strong, and making such a request has always been possible in any event, it does encourage employers and staff to think about flexible working, and

¹³⁷ *Hashman v Milton Park Dorset Ltd (t/a Orchard Park)*, ET Case No. 3105555, 4 March 2011.

¹³⁸ See <https://www.gov.uk/flexible-working/overview>. (Accessed: 27 August 2015).

requires employers to give some consideration to requests made (Anderson, 2003; Weldon-Johns, 2011).

The right to request flexible working applies to all staff, and can be used by those seeking a change to working hours to accommodate needs based on religion or belief. The suggestion from the workshops was to extend the right to include a right to request other forms of accommodation, such as a request to adapt a work uniform to comply with religious rules, or a request to opt out of certain work tasks. Although the right to request would be fairly weak (requiring only that employers consider the request in a reasonable manner), this could also be seen as an advantage

The limited nature of the right would mean that it would not be providing extensive special treatment for religion or belief, but nonetheless, the existence of the right might make it easier for employees to make requests and could facilitate open and non-confrontational discussion between employer and employee. However, the concern remained that, as with the creation of a duty of accommodation, the creation of a 'right to request accommodation' would still mark religion or belief as having special status. Moreover, a further concern was that the creation of a right to request 'reasonable' accommodation for religion or belief might lead to a risk of conflicting standards as between the right as it applies to religion, and the right to request flexible working for other workers. For example, employers may need guidance on how to resolve competing demands for time off from those with family or caring needs, and those with religion or belief based reasons for requesting time off (ACAS, 2014b).¹³⁹

¹³⁹ ACAS guidance on how to handle matters fairly when facing multiple requests for flexible working includes considering some form of random selection if unable to distinguish between all the requests; or calling for volunteers from existing flexible workers to change their hours to create capacity.

6 | The public sector equality duty

Under the Equality Act 2010, the public sector equality duties that had existed for race, gender and disability were consolidated into a single duty. This duty was extended to apply also to religion or belief, age, sexual orientation, gender reassignment, and pregnancy and maternity. The equality duty is one of the key ways in which the Equality Act 2010 aims to strengthen the law to support progress on equality (Fredman, 2011). The duty has three aims. Public authorities must have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; (b) advance equality of opportunity between persons who share a [religion or belief] and persons who do not share it; and (c) foster good relations between persons who share a [religion or belief] and persons who do not share it.¹⁴⁰

Guidance on what is required to comply with the duty is provided by the EHRC's guidance materials, including its technical guidance (EHRC, 2014a, b, c). Although a number of cases brought before the courts have been unsuccessful in overturning the decisions of public bodies (Bell, 2010; Fredman, 2011, 2014), nonetheless, case law has developed the understanding of what is required by the duty to have 'due regard'. Moreover, there is evidence that many public sector organisations have put in place processes to try to promote equality in the workplace and in the provision of their services, as part of a process of integrating equality into day to day practice (Clayton-Hathway, 2013; Government Equalities Office, 2013). The evidence of the impact of the duty on public sector organisations is also echoed by findings of the EHRC call for evidence (Mitchell and Beninger, 2015: 129) and was discussed in Workshop 2. Despite these positive views of the impact of the PSED, some commentators have expressed concern about the extension of the public sector duty to religion or belief (Lester and Uccellari, 2008: 570; Vickers, 2011; Woodhead with Catto, 2009). They suggest that public sector bodies need to be careful to consider how best to respect the interests of those who would prefer that religion be kept out of the public sphere. In addition, they should not assume that accommodating

¹⁴⁰ Equality Act 2010, S149.

majority versions of religious faiths will be sufficient to meet the requirements of the duty. However, Malik has noted that 'merely consulting with religion or belief groups does not mean that public authorities have to implement all of the demands of such groups; and consultation or accommodation does not in itself breach the principle of secularism which is a principle that applies to the institutional separation of religion and state (Malik, 2008). Some of the goals of the PSED may be met by retaining a focus on ensuring participation and consultation when developing policy. Experience of the similar duties in Northern Ireland (Equality Commission for Northern Ireland, 2012), although in a rather different political context, suggests that it is important to encourage consultation with religion and belief organisations before and during the design of public policy. Used proactively, the public sector equality duty in Great Britain can provide an impetus to consult widely with stakeholders in the design of public policies, and can encourage religion and belief groups to engage in dialogue with other groups. This may help minimise or resolve potential conflicts before they become entrenched. Mainstreaming equality into everyday practice, by ensuring that processes of consultation, negotiation and compromise are developed, can contribute to social cohesion and help to minimise conflict between different groups (Equality Commission for Northern Ireland, 2012).

Much of the research on the impact of the public sector equality duty in practice (Government Equalities Office, 2013) has focussed on the duty in general, or on other grounds rather than on the duty as it applies to religion or belief. More research on how the duty has been implemented with regard to religion or belief would help determine its practical effectiveness in this area.

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Appendices |

EHRC stakeholder workshops

Workshop One: Oxford Brookes University, 27 November 2014

Participants

Sue Coe, Clare Collier, Professor Peter Edge, William Garnier, Dr Don Horrocks, Dr Erica Howard, Associate Professor Tarunabh Khaitan, Dr Megan Pearson, Dr Dave Perfect, Professor Gwyneth Pitt, David Pollock, Caroline Roberts, Macca Teclehaimanot, Emeritus Professor Roger Trigg, Professor Lucy Vickers, Professor Paul Weller.

Summary of discussion

The workshop started with introductions and a brief description of the project. The purpose of this event was to examine what is protected under the law on religion or belief. This would include both an overview of the legal protection and an assessment of current practical experiences of religious discrimination. This would cover the fundamental definitional issues, and also the characteristics that flow from basing claims on freedom of religion as opposed to religious equality.

We framed the discussion around three short presentations: an overview of the Human Rights Act 1998 (Articles 9 and 14) and the Equality Act 2010, including recent case law such as *Eweida and Others v UK* (2013) App. 48420/10 and *Bull v Hall* [2013] UKSC 73; a discussion of the definition of religion and belief in English law, including outside of equality law such as *R (on the application of Hodkin and Another v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77; and a discussion of the use of equality or human rights frameworks to approach the issues.

In the subsequent discussion, participants questioned the distinction between belief and manifestation; how clear is the difference between sincerely believing in something and manifesting that belief? And is there a distinction between affirming or stating one's faith, and manifesting it? If so, to what extent can it be limited? The

right to believe something cannot be limited although manifestation of that belief can be, yet it was suggested that it can be problematic to distinguish between the two in practice. In particular it was suggested that affirmation of beliefs might be understood more as akin to the holding of the belief, rather than as a manifestation of that belief. Some participants suggested that proselytisation, as opposed to affirmation, had an element of targeting of another person, and should be treated as a manifestation.

In relation to manifestation, some participants felt strongly that the current legal structures prioritised particular forms of religious experience, with religions with a functional requirement (e.g. a prayer room) being easier to identify and seek accommodation for than a requirement that an individual not be complicit in an activity contrary to their conscience – *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 was cited as an example of this. Some contributors saw a disjunction between religion or belief and other protected characteristics because of the intellectual content. There was some distinction drawn between illegal and legal manifestations of belief.

We discussed the place of the state, particularly the state seeking to be neutral between religions. Participants discussed the difficulty of the state determining what belief should be protected, as well as the legitimacy of the state distinguishing between different religious beliefs, and the implications of looking at religions by reference to majoritarian stances within a particular religious community. There was a general consensus that the difficult cases in this area had been on philosophical beliefs which were not comprehensive worldviews – *Maistry v BBC* (2012) ET no. 1313142/10 was cited as an example. Some participants suggested that it may be better to test sincerity of beliefs, with courts recognising only genuinely held beliefs, rather than determining whether a belief system counts as a belief at all. Some contributors noted the change in the law with the removal of 'similar' from the statutory definition, although it was not suggested that this change had much practical effect.

We discussed the implications of treating Article 9 as a group right, or an individual right. Participants noted that Article 9 recognises freedom of religion and belief as a group right. This had been discussed by the Court of Appeal in *Mba v London Borough of Merton* [2013] EWCA Civ 1562 with the judges considering that group disadvantage was not covered under the Equality Act. Participants noted that the size of any disadvantaged group can be relevant to the question of indirect discrimination in different ways; if there is only one person disadvantaged, it may be easier to accommodate their views, whereas this may not be feasible for a larger group.

Some contributors felt that the current law, with the emphasis on individual rights, did not properly consider the social side of religion and the importance of institutions to religious freedom. A slightly different theme was whether the size of a service provider should also be relevant, with some suggestion that a sole trader may be more entitled to consideration of their religious views in providing services than a large company.

Within the discussions, there was some emphasis on the importance of law acting to smooth relationships and dialogue between differently placed individuals, and some concern that the legal framework was not an effective tool to solve problems, because it emphasised conflict and reliance upon rights. There was also a concern by some contributors, though not all that the law was not being applied evenly between different belief systems. There was some discussion of burden sharing, with some contributors seeing a difference between an employee whose duties have changed, who should be entitled to special consideration, and an employee who joins a concern knowing what will be required of them.

Some participants suggested that recognition of protected characteristics in relation to those providing a service was not as advanced as in those receiving a service; for example they suggested that the religious beliefs of service providers should be taken into account so as to excuse them from offering services to all, on the basis of their religious belief. Others felt that the interests of those receiving services, especially public services, should be given more weight. There was some discussion of the importance of looking at the impact of a management decision in favour of an individual employer in relation to other members of the workplace, as well as customers and service users.

Some contributors suggested that tactically, a claimant was better off relying upon the Equality Act rather than the Human Rights Act. Indirect discrimination was seen as key to claims here. An issue that arose from this was whether indirect discrimination could be relied upon where only one person was affected. There was some agreement that a group may be easier to find than first appeared, but citing *Mba*, there was a feeling that an individual who could not do this may find their case difficult to bring. Reasonable accommodation, perhaps as an alternative to indirect discrimination, or perhaps as a supplement, was discussed – there was no consensus that this was a good way forward. Supporters of the idea noted that a request for reasonable accommodation might seem less confrontational when made to an employer, in comparison with a claim that the employer is indirectly discriminating against the employee. Opponents to extending this concept from disability to religion or belief were concerned that it would privilege religion and belief

over other characteristics, such as sexual orientation; or that it would place an undue financial burden on employers.

Workshop Two: King's College London, 7 January 2015.

Participants

Angela Brierley, Jennifer Crook, Sam Dick, Professor Peter Edge, Stephen Evans, Sue Ferris, Abigail Fitzgibbon, Dr Myriam Hunter-Henin, Emeritus Professor Peter Jones, Professor Maleiha Malik, Andrew Marsh, Professor Aileen McColgan, Alan Murray, Dr Yossi Nehushtan, Macelle Palmer, Dr Dave Perfect, Quinn Roache, Dr Russell Sandberg, Dr Jonathan Seglow, Macca Teclehaimanot, Professor Lucy Vickers, Professor Paul Weller, Graeme Wilson, Professor Rob Wintemute.

Summary of discussion

We introduced the Workshop with a brief description of the project. The purpose of this event was to explore two issues: reasonable accommodation and the religion or belief exceptions under the Equality Act. We framed discussion around two short presentations: one on reasonable accommodation, particularly in the context of existing law on indirect discrimination, and the public sector equality duty; and one on exemptions to equality law obligations.

In the subsequent discussion, participants did not agree on whether a duty of reasonable accommodation would be a desirable development of the law. Some contributors felt that such a duty would make no difference to individual cases from the current indirect discrimination framework, although the reasoning may be expressed differently; while others felt it would make a difference in some cases. Others felt that this would give more weight to religion or belief over other rights, and there was strong difference of opinion as to whether this was desirable, with some participants being fundamentally opposed to a duty to accommodate on principle, rather than because of concerns over the difficulty of effective implementation of such a duty.

The focus of discussion was on reasonable accommodation of employees' religion or belief, and this was seen as a weakness in the current debate by some contributors. Some participants suggested that users of services may also need to be reasonably accommodated in terms of religion or belief, with *Bull v Hall* [2013] UKSC 73 being given an example.

Some contributors expressed concern that open dialogue was not taking place between religious groups and individuals and others about equality, particularly in relation to sexuality. A duty of reasonable accommodation, if it encouraged better discussions between different parties, could be beneficial.

Participants also discussed the issue of proportionality, particularly in relation to the meaning of the term 'reasonable'. Some contributors were concerned that the impact of equality law on employers and service providers, particularly very small ones, was not currently given sufficient weight. Some contributors expressed concern that a duty to reasonably accommodate would replace current vagueness in indirect discrimination with similar vagueness over 'reasonable'. Others were keen to ensure that applying such a test took account of the full range of people who would be affected by a decision to make a particular accommodation, including those suffering harm to their dignity. This would also include the interests of users of services, particularly public services aimed at supporting vulnerable people. Others, looking at the US experience in particular, felt that the limits of 'reasonable' may be set very low.

One possible path of development emerging from the discussion was the introduction of a right to request accommodation of religion or belief in the workplace, analogous to the current right to request flexible working. There was no consensus on whether such a right to request would make any practical difference to individual cases, although it was suggested that the right might make the discussion between employer and employee more open and less confrontational. An alternative view of the impact on discussion was that a right to request would make such requests unusual, rather than part of the normal running of a good workplace. As with the discussion of a duty to accommodate, some participants were concerned that it would mark religion or belief as special: one contributor opposed such a right to request, but if it was introduced would like to see it introduced for all protected characteristics.

Participants discussed the models that would be drawn upon in any duty to reasonably accommodate: they noted the existence of international models, and expressed some scepticism as to whether current UK disability law was a good starting point.

In relation to exemptions, there was some discussion of the importance of autonomy to religious organisations, and a suggestion that exemptions could strike a balance between generally applicable equality values and this autonomy. There was some recognition that exceptions, or the lack of exceptions, could influence internal debates within religious organisations which needed to be recognised as diverse, with their own power structures. The sort of organisations which could rely upon

such exceptions was also contested, with some discussion of the US case of *Burwell v Hobby Lobby* 573 US (2014). Participants also noted that exceptions do already apply to direct discrimination, and that this needed to be particularly scrutinised – one commentator suggested that there was not so much a hierarchy of protected characteristics, but a hierarchy of direct and indirect discrimination, with direct discrimination being given greater protection than indirect discrimination.

The range of any such exception was the subject of considerable disagreement. Some contributors felt that there needed to be a clear link between the religious ethos of the organisation and its use of an exemption, so that only those organisations, or roles, actively promoting a religion or belief could have recourse to an exception. Others phrased a similar idea in terms of 'centrality' of the religion or belief ethos to the challenged actions of the organisation, and wished that any exemptions should be interpreted narrowly. An alternative view was that exceptions were crucial to the autonomy of religious organisations, and the fair treatment of religious individuals, and needed to be interpreted broadly enough to fulfil this function.

A particular focus of the exemptions discussion was the education sector, both in relation to faith schools and the employment of teachers. There was also some discussion of religious ethos higher education institutions, with a reference to ongoing litigation between Trinity Western University in Canada, which has a religious ethos, and the Ontario Law Society, which has refused to accredit the University's Law School.

Workshop Three: King's College London, 12 January 2015.

Participants

Mark Barrell, Alan Beazley, Sally Brett, Paul Deemer, Nick De Marco, Nick Denys, Dr Moira Dustin, Professor Peter Edge, Susan Ferris, QC Karon Monaghan, Dr Dave Perfect, Sir Bernard Rix, Quinn Roach, Catriona Robertson, Dr Russell Sandberg, John Scriven, Jennifer Laurent Smart, Macca Teclehaimanot, Dr Cheryl Chin, Professor Lucy Vickers, Professor Paul Weller, Dianah Worman.

Summary of discussion

We introduced the Workshop with a description of the overall purpose of the project. The review of the effectiveness and interpretation of religion or belief law formed part of an EHRC programme of work, which also included its call for evidence on religion

or belief in the workplace and service delivery. This Workshop would focus on the experiences of stakeholders and practitioners.

We framed discussion around three short presentations: on the 2013 report on belief, discrimination and equality in England and Wales led by Professor Paul Weller; the difficulties of minimising bias in the application of law to the area of religion or belief; and the experience of presenting religion or belief cases in the courts.

Stakeholders disagreed as to the extent of religion or belief problems compared with other areas of equality law, with one contributor describing cases which had appeared before tribunals as 'the tip of the iceberg', and another indicating that religion or belief cases may be more commonly represented in these formal cases than more established grounds (such as discrimination on the grounds of pregnancy). Participants discussed the effect of high profile cases on public understanding of the area, and suggested that very specific cases could be taken out of context and given a broader significance than lawyers or scholars would attach to them.

Participants discussed the limitations of law to deal with issues around religion or belief, and in particular the possibility that the legal developments in the early 21st century had created high expectations. Law was placed in a broader framework of education, training, and cultural change. The different approach of different religious traditions to law was discussed, in particular the possibility that some groups may have religious objections to involving the state in disputes.

As part of this, the difficulties judges face if they seek to engage with complex issues of religious doctrine were alluded to. There was some suggestion that this was because of the relative newness of protection on these grounds, and so the courts were being conservative in their interpretation of the protection. There was also some suggestion that judges needed more religious literacy to properly engage with this area: *R (E) v Governing Body of Jewish Free School and Others* [2009] UKSC 15 was cited as an example. There was some suggestion that foundational issues of the relationship of religion to the state were not being worked through in this area of law, with a focus on individual cases and situations.

Some participants discussed alternatives to what was seen as an adversarial legal process. These contributors emphasised discussion, and the hearing of a range of voices, as the best way to deal with difficult issues. Some contributors saw the contribution of a range of voices to decision makers as a good in itself.

Participants discussed how religion or belief fitted in with other protected characteristics, including race in relation to those religious communities which were also categorised as racial groups in English law. Some contributors put forward a

possible distinction between religion or belief and other grounds, with the former being different because of the possibility that manifesting religion or belief could impact on other people: Eweida et al was discussed as an example of this.

The specificity of particular workplaces was raised in relation to both medical staff and teachers.

We discussed the possibility of a right to request accommodation, which had arisen during discussion in Workshop 2. There was no consensus. Some contributors felt that it would be too easy for employers to turn down requests, and this might exacerbate tensions between employers and employees; or constitute an additional management burden on employers; or expose employees to scrutiny and possible adverse consequences. Others felt that it could help to change an organisational culture without the conflict inherent in reliance upon a legal right to accommodation. Some contributors questioned whether such a right to request for religion or belief, but not other protected characteristics such as sexual orientation, would be seen as giving religion or belief priority over these other characteristics.

Workshop Four: Edinburgh University, 13 February 2015.

Participants

David Bradwell, Catriona Cannon, Professor Peter Cumper, John Deighan, Professor Peter Edge, Colin Emerson, Dr Matt Gibson, Irene Henery, Dr Karen Jochelson, Dr Gordon MacDonald, Dr Javier Oliva, Dr Dave Perfect, Macca Teclehaimanot, Kieran Turner, Professor Lucy Vickers, Professor Paul Weller, Lynn Welsh.

Summary of discussion

We introduced the Workshop with a brief description of the overall purpose of the project. The review of the effectiveness and interpretation of religion or belief law formed part of an EHRC programme of work, which also included its call for evidence on religion or belief in the workplace and service delivery. This Workshop had a particular focus on reasonable accommodation of religion or belief and conscientious objection.

We framed the discussion around two short presentations: a discussion of reasonable accommodation of religion or belief drawing on international comparisons, particularly with the US and Canada; and a discussion of

conscientious objection in the workplace, with an emphasis on UK cases such as *Ladele*.

There was disagreement between participants as to whether a duty of reasonable accommodation would make a significant practical difference from the current law. There was a suggestion that the standard of review would be important here, with a contrast being drawn between the Canadian and US approaches. Such a duty may simplify the process of bringing individual claims in relation to indirect discrimination law; or be seen as less confrontational than indirect discrimination claims. The broader impact on an employer of losing a reasonable accommodation claim, as opposed to an indirect discrimination claim, was also discussed, with the suggestion made that a finding that the employer had failed to accommodate religion and belief could lead to future indirect discrimination claims, as well as potential claims, for public sector employees, of claims under the Public Sector Equality Duty.

We discussed the idea of a right to request, raised in other Workshops. There was some suggestion that it could improve discussions regarding religious accommodation between employer and employee, which was important, but it was not generally seen as a strong way forward. Most participants recognised the difficulty of constructive dialogue within the setting of a legal action, with a number of participants seeing mediation as a better way to resolve disputes in this area.

A recurring theme was the distinctiveness, or otherwise, of religion or belief. Some participants queried the creation of a duty of reasonable accommodation for religion or belief, and not for other grounds in equality law. This was generally from concern that such a distinction would provide too much protection for religion or belief, but it was also suggested that the language of accommodation was inherently majoritarian: minorities needed to be 'accommodated' by the majority. Others felt that looking to the existing reasonable adjustment rules in relation to disability was not a productive way to develop new law in relation to religion or belief.

The variety of religious beliefs was also discussed. It was suggested that even within a religious community, individuals would vary as to what they could and could not accept: some individuals would be identified by co-religionists as having a particularly tender conscience, and this could change over time within a single individual. It was also suggested that flexibility by a religious community might lead to less protection by the law, as it indicated that a particular individual could accommodate generally applicable legal duties more easily. One participant suggested that as religious communities became more flexible by being more accommodating in their approach, they became less secure in protecting their religious rights.

We also discussed the basis for restricting, or failing to accommodate, religious interests, including requests to be exempt from work tasks that might be framed as conscientious objection. It was suggested that there was a broad consensus that religious practice should be permitted unless there was a good reason not to do so, but that there was considerable difference of opinion as to what constituted a good reason. There was a clear distinction between those who saw the integrity of state non-discrimination laws (and other state values) as in itself a good reason, and those who did not; and those who gave considerable weight to dignitary harm and those who gave less weight. A distinction would be drawn by some between requests for conscientious objection that give rise to dignitary harm to others due to the impact on other protected groups, and those requests that do not have such results. In assessing requests for conscientious objection or other forms of accommodation, contributors differed as to how much weight they would give to a range of factors: an employer being a small one; or in the public sector; or in a sector in which their religious community was underrepresented; or in which the employer has a religious ethos; or is run by individuals with a particular religious commitment. Contributors also differed as to how much weight they would give to the impact of a failure to accommodate on the individual, with some participants seeing this as a very serious individual cost. Within this, some suggested that the specificity of a career path, and the age of the employee who would be affected by a failure to accommodate, should both be considered.

