

Equality and Human Rights Commission
Research report 84

Religion or belief, equality and human rights in England and Wales

Alice Donald, with the assistance of Karen
Bennett and Philip Leach

Human Rights and Social Justice Research
Institute
London Metropolitan University

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First published Summer 2012

ISBN 978 1 84206 433 7

Equality and Human Rights Commission Research Report Series

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Research Team
Equality and Human Rights Commission
Arndale House
The Arndale Centre
Manchester
M4 3AQ

Email: research@equalityhumanrights.com

Telephone: 0161 829 8500

Website: www.equalityhumanrights.com

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Acknowledgments

This report was written by Alice Donald. It was researched by Alice Donald, Karen Bennett and Professor Philip Leach.

We would like to thank all those who gave interviews or attended roundtable discussions and were so generous with their time and insights.

Our thanks also go to Aruna Dudhia for administrative support and Federico Burlon, Hannah Cowking and Tarik Elhadidi for research assistance.

Special thanks are given to our advisers: Malcolm Evans OBE (Professor of Public International Law, University of Bristol); Conor Gearty (Professor of Law, London School of Economics); Samantha Knights (Barrister, Matrix Chambers); Voirrey Manson (Senior Equality Manager, NHS Wales Centre for Equality and Human Rights); and Mohammad Nafissi (Associate, Human Rights and Social Justice Research Institute, London Metropolitan University). We would also like to thank Dr Rebecca Catto (Lancaster University) and Professor Maleiha Malik (King's College London) for providing helpful comments on a draft of this report.

Thanks are due to Matrix Chambers and the Equality and Human Rights Commission (EHRC) in Cardiff for hosting the two roundtable discussions.

We are especially grateful to David Perfect at the EHRC: his knowledge of and interest in the themes of this research, combined with his patient and enthusiastic support, have made the project a pleasure to work on. Our thanks also go to Jonathan Evans, Jayne Hardwick and Karen Jochelson at the EHRC, as well as Paola Uccellari who advised the project in its early stages.

Abbreviations

Acas	Advisory, Conciliation and Arbitration Service
BHA	British Humanist Association
CIPD	Chartered Institute of Personnel and Development
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDF	Equality and Diversity Forum
EHRC	Equality and Human Rights Commission
EIA	Equality Impact Assessment
EVAW	End Violence Against Women coalition
GMC	General Medical Council
HRA	Human Rights Act 1998
JCHR	Joint Committee on Human Rights
LGBT	Lesbian, gay, bisexual or transgender
RBCG	Religion or Belief Consultative Group
RE	Religious education
SACRE	Standing Advisory Councils for Religious Education
SSFA	School Standards and Framework Act 1998

Executive summary

Aims of the research

In January 2011, the Equality and Human Rights Commission (EHRC) commissioned the Human Rights and Social Justice Research Institute at London Metropolitan University to conduct research on 'understanding equality and human rights in relation to religion or belief' in England and Wales.

The aims were to explore:

- the state of the law in relation to equality, human rights and religion or belief and different groups' responses to the law;
- approaches to achieving freedom of religion or belief and preventing discrimination on the grounds of religion or belief in the workplace and in public services;
- situations where interests conflict (or are perceived to conflict) between the different equality 'strands' or different human rights;
- principles or approaches that might pre-empt or resolve dilemmas or disputes relating to religion or belief; and
- equality or human rights concerns that arise in relation to the role of religion or belief groups in the formation of law and public policy.

Methodology

The research comprised:

- a literature review covering relevant case law (primarily domestic and European) and wider British and international research;
- 67 semi-structured interviews with religion or belief groups, employers, service providers and groups concerned with other equality strands, as well as legal experts and academics;
- roundtable discussion events, one in London involving academics, legal practitioners and policy experts and one in Cardiff involving practitioners and voluntary sector organisations in the fields of health and social care; and

- two online surveys, one aimed at people responsible for managing issues associated with religion or belief in their workplace and the other aimed at all other interested groups.

Main findings

The religion or belief landscape in England and Wales

Evidence relating to the religion or belief ‘landscape’ is contradictory and contested (especially Census data) (section 2.2). However, some trends are clear: a decline in affiliation to historic churches; a rise in those stating that they have no religion; and (particularly in England) an increase in faiths associated with post-war and post-colonial immigration, especially Islam. Other trends are also apparent: for example, the growth of independent and black majority churches and the greater significance attached to their religion by minority religious communities compared to those that state a Christian affiliation. Overall, the landscape is complex and geographically variable; it is not possible to establish a clear trend towards the population or social institutions of Britain as a whole becoming either more or less ‘religious’ or ‘secular’.

Discrimination on grounds of religion or belief

Measurements of discrimination are complicated by the fact that they generally rely on perceived or reported experience of discrimination, which may differ from legal definitions (section 3.2). Moreover, individuals may experience different forms of discrimination simultaneously. There is scant evidence about whether there is discrimination against ‘belief’. One clear trend is the greater prevalence of discrimination (by any measure) against Muslims compared to other groups defined by their religion (sections 3.3, 3.4 and 3.5). There has been an increase in concerns and claims relating to discrimination against Christians; however, evidence has not been adduced to substantiate such claims at a structural level (section 3.4).

Equality and human rights in a multi-faith society

Debate about multiculturalism has become intertwined with concerns about Islamic ‘extremism’ and the perceived segregation of communities with distinct social values - one response to which is said to be a ‘muscular’ liberal politics in which minorities are required to live according to the presumed shared social norms of the indigenous majority (section 2.3). By contrast, ‘progressive’ notions of multiculturalism seek to address the powerlessness **both** of minority groups in relation to the centralised state **and** of individuals within those groups whose interests may conflict with those of dominant members of the group. This research suggests that, in matters of public policy, the emphasis should be on identifying asymmetries of power and engaging with vulnerable individuals to prevent harm. Such an approach recognises and

respects individuals' membership of a cultural or religious community, whilst also recognising the internal diversity of most such communities and ensuring that all their putative members are able to be full citizens of a liberal political community.

Minority legal orders

The potential vulnerability of 'minorities within minorities' is brought into sharp focus by the existence of systems of normative and legal regulation rooted in religious communities (section 2.3). There is a need for further empirical research to examine the impact of minority legal orders on those that use them or are affected by them, particularly groups that may be relatively powerless within their communities such as women and children. In addition, there is a need to strengthen the protections presently offered by the Arbitration Act 1996 to users of religious tribunals to ensure that they are not deprived of their right to equality at law.

Religion or belief and the formation of law and policy

Different understandings of 'secularism'

Among our interviewees, the faultline between the 'religious' and the 'secular' was generally perceived to be greater than that between religious faiths - and was certainly more vehemently expressed by some (section 2.4). Some interviewees affiliated to religious groups perceive there to be a combative 'secular agenda'. According to this perspective, secularism is not about neutrality; it is itself a belief with its own 'equalities identity' and an intention to diminish the importance of religion in society. Other interviewees, including some affiliated to religious organisations as well as those situated in the 'belief' strand, did not share this view. It was noted that hostility towards 'secularism' stems in part from its becoming confused with atheism or 'secularisation' (that is, the subordination or rejection of religious values and beliefs). For these interviewees, secularism is a philosophy of the separation of religion and state: it is respectful of all religions and beliefs and privileges none, and is the best guarantor of everyone's right to manifest or be free from religion or belief. This debate suggests that careful use of language is required by all parties, since the term secularism may be used to mean radically different things.

In some instances, discussion about religion or belief in the public sphere involves assumptions on each side which appear to be mutually unintelligible (such as the observation by a Sikh interviewee that 'secularists' concerned about the representativeness of religious community leaders do not understand 'how religions work'). This may explain why debate has at times become so acrimonious, as specific legal cases or policy matters act as a lightning rod for a broader perceived gulf between the religious and the secular.

At the same time, it is important not to overstate this division. Our interviews suggested a degree of consensus among groups situated in both the ‘religion’ and ‘belief’ strands (as well as groups concerned with other equality strands) that religion or belief groups are legitimate interest groups like any other but should have no privileged role in the formation of law and policy. In particular, the majority of interviewees stated that in matters of law and policy, there is no room for ‘truth claims’ based upon religious doctrine or claims of moral superiority based upon a particular religion or belief. This suggests a broadly-held desire to maintain an appropriate balance between religion or belief and democratic debate.

Government engagement with religion or belief groups

Many religion and belief groups do not consider themselves to operate on a ‘level playing field’ when it comes to law- and policy-making (section 2.5). Groups situated in the ‘belief’ strand perceive there to be a tendency among public authorities to focus solely or principally on the ‘religion’ strand with their focus on engagement with ‘faith communities’. Some minority religious organisations, in particular Muslim groups, also felt at a disadvantage.

Communities based upon a religion or belief tend to be highly differentiated. Divergent views may exist within religion or belief groups and there is a need to avoid the misattribution of views to whole groups. Differentiation within religion or belief groups has implications for public authorities seeking to identify authentic or authoritative voices that represent different groups (or denominations, sects or social structures within them) (section 2.6). This raises important issues in relation to equality and human rights since religion or belief groups may discriminate as well as being discriminated against. Who ‘speaks for’ a group matters greatly where power is unevenly distributed within it in ways that may not always be obvious to those outside the group. Who government chooses to speak to also matters, because it may confer legitimacy or resources that may affect the balance of power within a community. Several interviewees commented that religious hierarchies tend to be more orthodox and conservative around matters of doctrine and social policy than the wider public and even than the majority of their adherents. It was also suggested that policy-makers should be mindful of the differential resources and power of certain groups, which can make their views appear more widespread than they actually are.

The law on equality, human rights and religion or belief

The new and unsettled nature of the law

The law in relation to equality, human rights and religion or belief is relatively new and far from settled. In the past decade in Britain, both the quantity and the reach of

the law have expanded as the state seeks both to facilitate and regulate the activities and practices of religious bodies in the context of a multi-faith society. There has been a considerable amount of litigation, much of which has been controversial.

The importance of contextualising legal cases

Legal judgments may raise important matters of principle. However, being highly context-specific, they are not necessarily representative of common experience or a reliable indicator of the place of religion or belief (or particular religions or beliefs) in society (section 4.4). There are invariably contingent reasons why certain cases come to court and others do not. Moreover, the outcome of cases is often unpredictable and may appear contradictory. This is partly due to the heavy reliance on the principle of proportionality in balancing competing factors in each case. This makes it hard to ‘read across’ from one case to another because each is fact-specific. In addition, public responses to high-profile cases may make conflicts between religion or belief and other interests appear more intractable or prevalent than they actually are - especially when understanding is reliant upon media reports or the views of lobby groups and is not also informed about the detailed circumstances and legal reasoning in each case. Thus, considerable caution is required when seeking to generalise from specific cases or assess their social, as well as legal, significance.

The definition of ‘belief’

A number of Employment Tribunal decisions have created a lack of clarity among employers about the definition of ‘belief’; for example, anti-hunting sentiments and a belief in the moral imperatives arising from man-made climate change were found to fall within the definition. There is consequent uncertainty among employers as to which beliefs warrant legal protection and which do not (section 5.2).

Legal protection of religion or belief

Overall, the law on equality, human rights and religion or belief has been interpreted cautiously in domestic courts and tribunals (section 5.3). While some indirect discrimination claims concerning dress codes and working hours have succeeded, most claims based on religion or belief have failed. This is largely because courts have generally found that interference with freedom of religion or belief under Article 9 of the European Convention on Human Rights (ECHR) is not easily established. Concern exists about the tendency of courts and tribunals to exclude religion or belief claims at an early stage by stating that there has been no interference with the protected right; this precludes a detailed assessment of the merits of each case in relation to the **justification** for interference (section 5.4). In particular, the requirement to show group (rather than solitary) disadvantage in discrimination cases

is viewed by the EHRC and other legal specialists as failing to provide sufficient protection for individual believers.

Some claims have been filtered out on the grounds that an individual has voluntarily put themselves in a situation (for example, in a job or a school) that limits their ability to manifest their religion or belief and can choose to leave that restrictive context, even if doing so requires some personal sacrifice. Another filter that courts have applied is the requirement that the claimant's actions relate to a prescribed practice of their religion or belief.

There is broad agreement that courts and tribunals should assess justification for restrictions on the manifestation of religion or belief using sociological arguments based upon the context of the case, rather than arguments about whether, for example, particular beliefs or practices are prescribed by a religion or belief. This does not preclude legal scrutiny of the nature of beliefs and practices, but recognises the inherent difficulty for secular courts in adjudicating doctrinal matters. Courts have traditionally been careful not to make determinations on matters of belief or practice. However, some commentators suggest that in both Article 9 and religious discrimination cases, the courts' previous reticence has given way to a greater willingness to adjudicate issues that touch upon matters of doctrine.

The extent and limits of reasonable accommodation of religion or belief

This was an area in which there was a relatively high degree of consensus among our interviewees and roundtable participants (section 5.5). Virtually all agreed that individuals whose religion or belief is important to them have a responsibility to make sensible professional choices and may have to make personal sacrifices to avoid conflict with the law or professional guidelines. We also found broad consensus among our participants about the **type** of criteria which might reasonably restrict the manifestation of religion or belief in particular instances. These include genuine health or safety concerns; business efficiency and requirements for uniformity; detrimental impact on colleagues (excluding pure offence); the capacity to communicate; and the relative institutional power of the parties involved.

We found an equally strong presumption **towards** the accommodation of religion or belief where these criteria do not apply or are not compelling. This was sometimes expressed in terms of the principle of personal autonomy and the inherent value of diversity in social settings. It was also viewed as making good business sense. This presumption towards accommodation applied principally to matters of dress and flexibility over working patterns; by contrast, the provision of facilities to permit religious observance was viewed as more likely to cause undue hardship to

employers. Views differed (including between individuals of the same religious background) as to what was 'reasonable' in particular instances. Nevertheless, these findings indicate a high degree of acceptance of what might be termed 'routine' accommodation of religion or belief, in stark contrast to approaches elsewhere in Europe.

Interviewees generally acknowledged that decisions about what it is reasonable to accommodate are always fact-specific and may involve nuanced judgments as to the social context involved. It is arguable that the introduction of a duty of reasonable accommodation would not necessarily produce greater certainty than the present indirect discrimination model, since the proportionality calculation has to be made in each case, whatever the legal model adopted.

Competing interests in equality law

The inclusion of religion or belief alongside other protected characteristics in the Equality Act 2010 has stretched legal concepts in often uncomfortable ways (section 6.3). One effect has been to magnify conflicts - especially between the 'religion' strand and sexual orientation - which might not otherwise have become so visible or so fraught. Cases concerning tension between religion and sexual orientation have been exceptionally high profile and were the most contentious of those we reviewed. Some (but not all) Christian participants spoke of sexual orientation claims routinely 'trumping' those based on religion. However, the prominence of these cases does not mean that such disputes are prevalent or entrenched in society or that they are insuperable.

The issue of conscientious objection

Tensions between the religion and sexual orientation strands have prompted calls, mainly from some Christians, for an extension of the right to conscientious objection to new and diverse situations, such as that of a registrar who wishes to abstain from officiating at a civil partnership (section 6.5). By this account, conscience (especially when religiously inspired) deserves special protection and can in most cases be accommodated without harming others. Other (both religious and non-religious) voices object to extending protection for conscientious objection where it allows an individual, on the basis of their religion or belief, to discriminate against others on another equality ground, even where there are no significant practical obstacles to doing so. A key principle established in case law is that employees or organisations that deliver public (and especially symbolic) functions cannot choose who they serve on the basis of their beliefs. This principle was supported by a broad range of our interviewees, including some situated in the 'religion' strand, who viewed the ethos, reputation and reliability of services as being at stake. It has also been endorsed by

the EHRC in relation to two prominent cases concerning individuals' right conscientiously to object to delivering services to same-sex couples (*Ladele* and *McFarlane*).

However, the difference in these perspectives should not be overstated. No participant in our research argued either for an unrestricted right to conscientious objection or enforced uniformity in every instance. Interviewees generally agreed on the desirability of avoiding disciplinary action or litigation. In public debate, arguments coalesce around the criteria by which to decide which exercises of conscientious objection are acceptable and should be accommodated in laws and procedures, and which not. This is an area of unresolved difficulty which requires further discussion.

While public debate is frequently couched in terms of protection (or not) for conscientious objection, legal judgments are not. In *Ladele* and *McFarlane*, the Court of Appeal focused its reasoning on the proportionality of the restriction of their right to freedom of religion or belief and the nature of a reasonable accommodation in each situation. These judgments suggest that conscientious objection should be viewed as, at most, a **residual** form of protection, to be invoked only if situations have not been resolved through the usual considerations of proportionality or accommodation.

Legal exceptions

The exceptions in the Equality Act 2010, which permit discrimination on grounds of sex, marriage and sexual orientation in the context of employment for the purposes of organised religion, are controversial. They are also subject to legal uncertainty due to ambiguities in their wording and discrepancies between the text of the Act and the Explanatory Notes (section 6.6). In particular, the employment exceptions do not expressly require that their application is proportionate; this makes them vulnerable to challenge under European Union law. In addition, there is a disjuncture between, on the one hand, a view among some religion or belief groups that the exceptions are too narrow and, on the other, a perception based on largely anecdotal evidence that they are applied too broadly in practice. The lack of clarity surrounding the exceptions creates potential for them to be misunderstood and misapplied. Further litigation concerning the employment exceptions cannot be ruled out.

The religion or belief exceptions relating to goods and services have also proved contentious (section 6.7). Controversy has centred on the principle (established in the *Catholic Care* adoption agency case) that organisations relating to a religion or belief cannot discriminate on grounds of sexual orientation if they are contracted to provide a public service. Again, the suggestion that the discourse of equality and gay rights had 'trumped' sincerely held faith-based views created palpable anxiety among

some, mainly Christian, participants in this research. However, that view was not universally shared, either by Christians or by other religion or belief groups.

The nature of religion or belief as a characteristic

Underlying discussion of the more contentious legal cases are contested understandings about the nature of religion or belief as a protected characteristic under equality law (section 6.4). The lack of consensus is particularly evident in relation to whether religion or belief is chosen or immutable. Less contestable is the observation that religion or belief is distinct from other characteristics in having intellectual content and both proscribing and prescribing certain behaviour which impacts on adherents to the religion or belief and, indirectly, on others. As a result, some commentators suggest that religion or belief should enjoy an attenuated form of protection. By this account, a hierarchy between characteristics is inevitable - and is desirable if it prevents a levelling down of protection on other grounds; for example, if business needs can be used to justify indirect discrimination on grounds of religion or belief, then the same justification might in theory be introduced to justify sex or race discrimination (sections 6.4 and 6.8). For others, the idea of prioritising some characteristics over others is anathema: the legal form of protection may differ, but the aim is to provide equivalence of protection.

The interplay of Article 9 and equality provisions

There is a lack of clarity about the relationship between, on the one hand, protection for the manifestation of religion or belief under Article 9 and, on the other, protection against direct and indirect discrimination under the Equality Act 2010 (section 6.8). Confusion arises partly from a disjuncture between the understanding of freedom of religion or belief in the domestic and international contexts. In the international arena, the preoccupation is with the **persecution** of religious individuals or groups and the protection against persecution afforded by Article 9 ECHR. In the domestic context, the preoccupation is with discrimination that emerges primarily in the context of **social exclusion**. The (international) Article 9 'persecution' analysis and the (domestic) discrimination law 'social exclusion' analysis are essentially different, yet these differences are often elided in domestic public discourse. Consequently, there is a need to differentiate more clearly those situations that are most appropriately addressed on the basis of freedom of religion or belief and those that are best addressed on the basis of non-discrimination.

Greater clarity about this distinction will also enhance understanding of the debate being framed by some Christian groups, which characterises the deployment of equality law in some instances as a form of religious persecution. This argument

portrays equality and human rights law as being in conflict with each other, again illustrating the uncomfortable stretching of the law in the area of religion or belief.

Responses to the law

'Religious' versus 'secular' perspectives

While some interviewees suggested that 'conflict' cases pitch 'religious' against 'secular' perspectives, our research suggests that the lines are not so clearly drawn. Members of religion or belief groups (including co-religionists) argued both for and against extending protection for religiously-inspired conscientious objection (section 6.5). Some Christian interviewees supported the *Catholic Care* judgment, while others deplored it (section 6.7). This is not surprising since legal cases reflect ideological and theological disputes that are also taking place **within** some religious organisations. The rights of lesbian, gay, bisexual or transgender believers are centrally at stake in this debate - a consideration that is overlooked in debates framed as religious versus secular.

Further, recognition of the foundational differences between religious and non-religious perspectives on human rights should not mask their shared concern about social injustice and commitment to a set of human rights standards and principles enshrined in law. There is much scope for dialogue between these two perspectives; for example, about the meaning of human dignity and what it means to live an authentic and flourishing life.

Feelings of marginalisation among some Christian groups

Communities defined by religion or belief appear to have markedly different attitudes towards equality and human rights law. Interviewees from minority communities tended to view the law as a guarantor of a 'level playing field' and an 'ally' of communities that face particular disadvantage (section 7.2) At worst, the law was deemed by some of these interviewees to be irrelevant to the achievement of substantive equality.

By contrast, some strands of Christian opinion are intensely concerned that equality law has become the primary vehicle by which Christianity is being marginalised and penalised in modern Britain (section 7.3). The deployment of equality law is thus characterised as a form of religious persecution. This view is disputed, not only by those of another, or no, religious faith, but also between and within different Christian traditions. Some Christians view the 'marginalisation' narrative as a response by a dominant, conservative Christian tradition to a loss of privilege. There is concern that too vociferous a movement against the perceived sidelining of Christianity and the

excessive or misguided pursuit of litigation could, paradoxically, **decrease** the effectiveness of efforts to uphold the rights of Christians to manifest their religion (section 7.4).

Participants who think that Christianity is being marginalised appear to view specific legal cases as the principal evidence for this claim. However, since legal cases may be unrepresentative of common experience, it is not possible to interpret whether they do, in fact, indicate a trend towards anti-Christian discrimination. The evidence base concerning discrimination against Christians is incomplete; however, the evidence that does exist suggests the need for a more nuanced analysis of the incidence and seriousness of discrimination against Christians than the generalised ‘marginalisation’ narrative presently articulates.

The limitations of the law

Allied to concern that there has been excessive litigation concerning religion or belief is a view that the law is limited in its capacity to address complex questions of multiculturalism and social identity in modern Britain (section 7.5). Interviewees situated in both the religion and belief and other equality strands argued that equality law has produced unintended consequences. In particular, it was seen as having sometimes encouraged an undue insistence on the assertion of competing identities and set different groups on an ‘intellectual collision course’. This had occurred both between different religions or beliefs and between claims based on religion or belief and sexual orientation. Several interviewees spoke of the need to lower the emotional temperature of public discussion about religion or belief since ‘copy-cat’ or ‘me too’ claims for legal recognition and protection were divisive and suppressive of debate. Interviewees overwhelmingly viewed litigation as a ‘weapon of last resort’ and symptomatic of failure, whoever instigated it. Some interviewees were concerned about the ‘collateral damage’ that might be done to claimants whose cases had become particularly high-profile as a result of campaigning.

The role of the Equality and Human Rights Commission

A number of interviewees were critical of what they knew of the EHRC’s track record on religion or belief (section 7.6). Strong criticism came from Christian participants who objected to the Commission’s intervention in particular cases concerning religion or belief and sexual orientation. Groups situated in the ‘belief’ strand were also critical, suggesting that the EHRC had not responded adequately to aspects of the law which permit discrimination by religious organisations in ways that are vulnerable to challenge under European Union law. Interviewees suggested three broad areas in which the EHRC could play a constructive role: ‘myth-busting’ about specific cases; developing guidance; and developing its ‘good relations’ mandate. These

roles were viewed as inter-linked as a means of avoiding litigation through improved decision-making and greater use of conciliation and mediation.

Principles underpinning dispute resolution

Interviewees proposed principles or 'rules of thumb' as a basis for pre-empting or resolving disputes in the workplace or community (section 7.7). These were congruent with principles in human rights law, though they were commonly expressed in non-legal terms. The most commonly invoked was the principle of 'do no harm'. This principle suggests a position of mutual restraint, according to which individuals or groups refrain from asserting claims if to do so entails harm to others. In the context of the workplace, the principle was considered a useful means of distinguishing situations in which claims for reasonable accommodation are refused for compelling reasons as opposed to merely a disinclination to embrace religious or cultural difference. Proportionality (or the 'least restrictive' approach) was also frequently invoked.

Some interviewees situated in the religion strand proposed, as a general principle, respect for the intrinsic value of religions or beliefs to their adherents; however, it was acknowledged that this does not necessarily entail protection from offence. The principles of personal and institutional autonomy were also endorsed by several interviewees, though it was recognised that these might sometimes conflict. Several interviewees also commented that diversity is an inherent social good; this added ballast to the argument that institutions should bear a degree of cost or inconvenience in order to accommodate religion or belief within reasonable limits.

Ground rules for public debate

A persistent theme of this research was that public discussion of equality, human rights and religion or belief is often unduly intemperate and tends to accentuate conflict (section 7.8). This concern has prompted proposals for a set of 'ethical rules of engagement', acceptance of which is a minimum requirement for groups or individuals who seek to negotiate a particular outcome in a context where competing interests are at stake. Among the ground rules proposed was the requirement to respect the integrity and legitimacy of the position of each party to a dispute since impugning others' motives tends to preclude any possibility of dialogue. Also important are good faith and openness to those whose viewpoints are incomprehensible to oneself. Interviewees pointed to examples where mediation or negotiation had successfully resolved disputes concerning religion or belief without resort to litigation. It was emphasised that the resolution of disputes concerning religion or belief is not a 'zero sum' game. Negotiation of differences may require the creation of safe spaces for discussion within workplaces and communities.

These ‘ground rules’ are likely to become increasingly important in view of the contentious legal and policy issues which are currently under debate, not least that of legal reform to allow civil marriage for same-sex couples.

Implementing equality and human rights in the workplace

Studies of management experience of handling religion or belief in the workplace indicate a prevailing uncertainty about how to respond to instances where an employee’s religious belief appears to conflict with others’ protection from discrimination on grounds of sexual orientation (section 8.2). However, evidence from participants and the literature suggest that such instances are rare; they can be prevented or mitigated by the development of policies which integrate equality and human rights principles and are promoted as part of a tolerant and inclusive workplace culture. An anticipatory approach is preferable to a reactive one.

Some studies suggest that managers’ uncertainty extends to the handling of religion or belief more generally, but this appears not to be uniform across different types and sizes of employer. A fear of litigation was viewed by interviewees as a barrier to principled decision-making; it tended to produce knee jerk decisions which may complicate the resolution of grievances (section 8.4). Managers also lamented the lack of certainty created by fact-specific and apparently contradictory legal judgments; however, interviewees and roundtable participants acknowledged that ‘blanket’ rules create only an illusion of certainty and militate against dialogue and negotiation.

Participants advocated the integration of human rights and equality principles in the handling of religion or belief (and indeed all equality strands). Indeed, this research suggests that an approach based on human rights is likely to be more satisfactory in the longer term than one based principally on equality. Participants noted that the equality ‘lens’ can produce a narrow focus on legal compliance based on single (and sometimes competing) characteristics while human rights encourage a holistic focus on individual flourishing. The human rights principle of proportionality is paramount, as it provides a framework for decision-making which balances competing interests and identifies the least restrictive alternative in each circumstance.

Guidance for decision-makers

Some interviewees expressed a need for more accessible practice-based guidance on the handling of religion or belief in the workplace (section 8.5). Equality specialists suggest that this should establish ‘rules of thumb’ for easily achievable good practice in order to realise freedom of religion or belief and prevent discrimination on the grounds of religion or belief in the workplace. It should also explain principles

emerging from case law as to the limited circumstances in which indirect discrimination may be justified. Guidance which integrates human rights and equality principles would address the limitations of using the equality 'lens' in isolation.

There is also a need for more detailed and accessible guidance which might assist managers to achieve clarity and consistency in matters of definition of 'belief' (section 5.2). A web-based source which gathered existing sources in one place would be a valuable contribution to more confident and consistent management practice.

Implementing equality and human rights in public services

The ethics of self-disclosure

Ethical concerns may arise when practitioners discuss their personal beliefs with a service user (section 9.2). The vast majority of participants who expressed a view on this issue suggested that the justification for self-disclosure rests entirely on the therapeutic value to the service user in the particular context in which it occurs; they did not view it as a matter of the practitioner's right to freedom of expression or freedom of religion or belief. Incidents where practitioners are considered to have transgressed professional guidelines in relation to self-disclosure are rare, though intensely controversial when they do occur.

The value of a proactive approach to equality and human rights

Participants emphasised the value of using equality and human rights proactively to shape policy and practice and to carry out a holistic appraisal of individuals' needs, whether related to their religion or belief or any other characteristic (section 9.2). Equality and human rights impact assessments have been used to increase uptake of services and identify and address needs arising from patients' religion or belief. They had created opportunities for practitioners to discuss sensitive issues with greater confidence and balance competing interests, including those of staff. They were viewed as particularly valuable in the context of expenditure cuts since they enable decision-makers to make informed, principled and transparent decisions about the allocation of resources.

Religion or belief in schools

There are several areas in which law and practice concerning religion or belief in schools is in tension with equality and human rights (section 9.3). One concern identified in this research relates to the necessity and proportionality of faith-based admissions policies. Another was the wide discretion given to voluntary-aided schools to discriminate on grounds of religion or belief in the employment of all teachers, without any requirement to demonstrate that a genuine, legitimate and

justified occupational requirement exists. The law also appears out of step in not expressly protecting the rights of the child; for example, in relation to religious education (RE) and collective worship. The entry into the education system of new religious providers setting up 'free' schools and academies, and the likely expansion in the number of voluntary-aided schools, heightens these concerns.

There is a need to monitor the practical impact of discrimination that is permitted within the education system, in relation to admissions; employment; and the broad exemption for the content of the curriculum and RE from the prohibition of discrimination, particularly in relation to sexual orientation. This role might be taken on by the EHRC or the parliamentary Joint Committee on Human Rights, as well as by civil society and academic organisations.

The public sector equality duty

Participants expressed strongly divergent views about the extension of the public sector equality duty to include religion or belief. Some were opposed in principle and/or felt that the duty in relation to religion or belief would in practice be divisive or unworkable. Concerns included the potential for vociferous religion or belief groups to 'browbeat' public authorities and the difficulty of identifying authentic representatives of religious communities. Other participants were more positive about the potential for using the new single duty to address persistent disadvantage among particular communities associated with religion or belief and focus on the exclusionary effects of policies or practices. This perception rests on a substantive understanding of equality as a vehicle to address social exclusion and promote participation among marginalised groups defined by religion or belief, rather than one which emphasises the recognition or celebration of different religious identities.

Advancing debate about religion or belief

A persistent theme of this research has been the intemperate nature of much public debate about equality, human rights and religion or belief. In particular, there is palpable anxiety about specific cases which are viewed by some groups as both demonstrating and perpetuating an anti-religious (or, more commonly, a specifically anti-Christian) bias. However, it is important that this divisive current of debate does not obscure the areas where there is (or is potential for) consensus. Debate is likely to be advanced if these areas can be identified and, as far as possible, insulated from the more rancorous tone which has characterised public debate about equality, human rights and religion or belief in recent years.

This research found broad agreement between different types of participant in favour of the accommodation of religion or belief in the workplace within reasonable limits.

There was also a high degree of consensus as to how these limits should be determined. The majority of participants also shared the view that claims based on religion or belief should be pursued wherever possible through forms of social action such as mediation, negotiation and guidance, with legal action reserved for cases of real strategic importance. There was a significant degree of overlap between the principles or 'rules of thumb' proposed by participants as a basis for pre-empting or resolving disputes outside the courtroom.

The law on equality, human rights and religion or belief is likely to remain unsettled. There are a number of areas in which the law is unclear, under strain or vulnerable to challenge. Overall, our research suggests that the most productive level of engagement for those who wish to advance debate, practice and understanding in relation to religion or belief is with those on the 'front line' of decision-making, such as policy-makers, practitioners and workplace managers. This places the focus on the use of equality law and human rights standards and principles as a framework for day-to-day decision-making - on implementation rather than litigation. Where the principles established in legal cases are contested, it is important that public debate is conducted in good faith and with respect for the integrity of different perspectives, however irreconcilable they may appear to be.

1. Introduction

1.1 Aims of the report

In January 2011, the Equality and Human Rights Commission (EHRC) commissioned the Human Rights and Social Justice Research Institute at London Metropolitan University to conduct research on ‘understanding equality and human rights in relation to religion or belief’ in England and Wales.

The aim was to explore:

- the state of the law in relation to equality, human rights and religion or belief and different groups’ responses to the law;
- approaches to achieving freedom of religion or belief and preventing discrimination on the grounds of religion or belief in the workplace and in public services;
- situations where interests conflict (or are perceived to conflict) between the different equality ‘strands’ or different human rights;
- principles or approaches that might pre-empt or resolve dilemmas or disputes relating to religion or belief; and
- equality or human rights concerns that arise in relation to the role of religion or belief groups in the formation of law and public policy.

The research team invited participation from groups that have a direct stake in these issues: religion or belief groups, employers, service providers and groups concerned with other equality strands, as well as legal practitioners and academics (see 1.4).

1.2 Note on terminology

‘Religion’ and ‘belief’ are notoriously difficult to define. Definitions are contested and invariably context dependent. Numerous different definitions are used in academic, legal and social contexts and, for example, in the design of survey instruments. It is beyond our scope to examine the rich academic literature on matters of definition (for useful overviews see Weller, 2011; Woodhead with Catto, 2009). Section 5.2 discusses definitional issues that arise in legal contexts in relation to religion or belief.

The Equality Act 2010 defines ‘religion’ as meaning ‘any religion’ and ‘belief’ as ‘any religious or philosophical belief’. This includes a lack of religion or belief. This report

adopts the same usage except where the meaning dictates otherwise. It is important not to use the term 'religion or belief' as a synonym for religious belief, as sometimes happens in public usage.

Religion or belief is known as a 'protected characteristic' under the Equality Act, along with age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation. These categories were previously referred to as equality 'strands'. They can also be referred to as 'grounds' for discrimination. This report uses all of these terms.

1.3 Context of the report

The law in relation to equality, human rights and religion or belief is relatively new and is far from settled or uncontested. It has frequently caused controversy in its interpretation and application, both in domestic courts and at the European Court of Human Rights (ECtHR). As McCrudden (2011: 38) notes, 'The architecture of human rights and its relationship to religion is in the course of being constructed'. This sense of instability has spread to public policy and debate about equality, human rights and religion or belief in Britain, which has at times become highly polarised and rancorous.

The unsettled nature of the debate points to the significance and topicality of this research but has also presented challenges to it. There were important developments within the lifetime of the project, which meant that participants interviewed later in the main fieldwork period (March-August 2011) were able to respond to certain issues which those interviewed earlier were not.¹ We do not consider that this affects the integrity of our findings, but illustrates the dynamic nature of the discussion. The text of this report was largely completed by December 2011, but selected developments in early 2012 (up to 27 February) are briefly described in the report.

Notable developments in this period include the following:

- In April 2011, the Leeds-based adoption agency Catholic Care lost its much publicised two-year legal battle to be made exempt from equality legislation, which requires it to consider same-sex couples as prospective parents (see section 6.7).²

¹ One interview was conducted on 2 December 2011.

² *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007, 26 April 2011.

- The *Catholic Care* case coincided with continuing controversy over two others in which religious beliefs conflicted with others' rights to receive equal treatment. The first, in January 2011, concerned two gay men who were civil partners and who won their claim that they suffered discrimination on grounds of sexual orientation when they were refused a double room by Christian hotel owners who said they only let out double rooms to heterosexual married couples.³ The second, in February 2011, concerned a Christian couple who lost their claim that they were discriminated against by a local authority because they insisted on their right to tell young foster children that they believe homosexuality is morally wrong.⁴
- In May 2011, the ECtHR asked the UK government to respond to cases brought by four Christian claimants - Nadia Eweida, Shirley Chaplin, Lillian Ladele and Gary McFarlane.⁵ Each of the claimants had lost claims of workplace discrimination on the grounds of religion and belief in domestic courts. Their cases have achieved particular prominence in Britain. *Eweida and Chaplin* concerned the claimants' wish to wear a visible cross or crucifix on a neck chain contrary to their employers' dress codes. In *Ladele* and *McFarlane* the employees' Christian beliefs concerning homosexuality were in conflict with their duties as, respectively, a civil registrar and a counsellor. The claimants argue that their right to freedom of religion or belief under Article 9 of the European Convention on Human Rights (ECHR) is not sufficiently protected in UK law.
- In July 2011, the Equality and Human Rights Commission announced that it had been granted permission by the ECtHR to intervene in the four cases. It did so in September, submitting that in the cases of *Eweida* and *Chaplin* the courts may not have given sufficient weight to the claimants' right to manifest their

³ *Hall and Preddy v Bull and Bull* [2011] EW Misc 2 (CC). This case went to the Court of Appeal in November 2011. The Bulls lost their appeal. See *Bull and Bull v Hall and Preddy* [2012] EWCA Civ 83.

⁴ *R (Johns) v Derby City Council* [2011] EWHC Admin 375.

⁵ *Eweida and Chaplin v UK* Nos. 48420/10 and 59842/10, 12.4.2011; *Ladele and McFarlane v UK* Nos. 51671/10 and 36516/10, 12.4.2011.

religion or belief; and in the cases of *Ladele* and *McFarlane* that the domestic courts came to the correct conclusions.⁶

- In August 2011, the All Party Parliamentary Group ‘Christians in Parliament’ launched an inquiry ‘to seek clarity regarding what Christians can and cannot do within the law’.⁷ The inquiry, chaired by Gary Streeter MP, promised to ‘cut through the claims made in the media and by opposing campaign groups to consider whether Christians are finding their freedoms eroded’.
- In an indication of the unsettled nature of debate about religion or belief at the European level, in March 2011 the Grand Chamber of the ECtHR ruled that the compulsory display of crucifixes in Italian classrooms does not restrict the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe.⁸ The Grand Chamber judgment provoked highly polarised comment in Britain.⁹

These developments occurred against a background of often controversial debate about public policy that relates to religion or belief. Debate has centred on, among other issues: the efforts led by Nadine Dorries MP to prevent existing abortion

⁶ The EHRC made its submission after an informal public consultation that invited stakeholders to provide their thoughts on its intended position. A summary of responses to the consultation and the EHRC’s submission are available at: <http://www.equalityhumanrights.com/legal-and-policy/human-rights-legal-powers/legal-intervention-on-religion-or-belief-rights/>. In an indication of the volatility of public debate on the *Ladele* and *McFarlane* cases, the EHRC had in July 2011 felt it necessary to issue a statement to its stakeholders clarifying that ‘under no circumstances would the Commission condone or permit the refusal of public services to lesbian or gay people’. This followed an earlier public statement by the Commission that stated that judges in the UK had ‘set the bar too high for someone to prove that they have been discriminated against because of their religion or belief’. This had been reported by several media organisations and other groups as indicating a new approach by the EHRC to its work to prevent discrimination on the grounds of sexual orientation (for a useful summary, see Henderson, 2011).

⁷ The Evangelical Alliance acted as the secretariat for the inquiry, which issued its preliminary report in February 2012, after interviews for this project had been completed (Christians in Parliament, 2012).

⁸ *Lautsi v Italy*, No. 30814/06, 18.3.2011. See ‘European Court of Human Rights, ‘Crucifixes in Italian State-school classrooms: the Court finds no violation’, 18 March 2011. Available at: http://www.echr.coe.int/echr/resources/hudoc/Lautsi_pr_enG.pdf See also McGoldrick (2011).

⁹ For a useful summary of responses, see http://www.religlaw.org/index.php?blurb_id=1216&page_id=19. For a critique of the judgment on behalf of the European Humanist Federation, see Pollock (2011c).

services from offering counselling and to create a greater role for ‘independent’ counsellors, including those from religious anti-abortion groups;¹⁰ a government commitment, following consultation, to implement section 202 of the Equality Act 2010 so as to allow those religious organisations that wish to do so to host civil partnership registrations on their religious premises (Government Equalities Office, 2011a, 2011b);¹¹ a consultation in 2012 on changing the law to allow civil (but not religious) marriage for same sex couples (Government Equalities Office, 2012);¹² the role of religious providers in ‘free schools’ and academies which are outside local authority education structures;¹³ and the greater involvement of religious organisations in delivering other public services as part of the coalition’s ‘Big Society’ initiative.¹⁴

In addition, two government initiatives have placed the very architecture of equality and human rights law in the UK on an uncertain footing. In March 2011, the Commission on a Bill of Rights was established to investigate the creation of a new UK Bill of Rights that might subsume or replace the Human Rights Act (HRA).¹⁵ This Commission has conducted its work against a background of frequent and vehement

¹⁰ See ‘Nadine Dorries’s abortion proposals heavily defeated in Commons’, *The Guardian*, 7 September 2011.

¹¹ In December 2011, the House of Lords debated the Marriage and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011, which establish the procedure for approving the voluntary registration of civil partnerships on religious premises. The debate was secured after the Merits of Statutory Instruments Committee drew to the attention of the House arguments that the regulations do not fulfil the Government’s pledge properly to protect faith groups from being compelled to register civil partnerships where it is against their beliefs (House of Lords Merits of Statutory Instruments Committee, 2011). The Committee had received submissions from the Evangelical Alliance, the Christian Institute and CARE and a legal opinion from Professor Mark Hill QC, which stated that the regulations were ‘bound to lead to long and costly litigation for faith groups and individual resident or officiating ministers’. See <http://www.parliament.uk/documents/lords-committees/merits-statutory-instruments/Professor-Mark-Hill-QC-Legal-Opinion-to-Merits-Committee-on-Marriages-and-Civil-Partnerships-%28Approved-Premises%29-%28Amendment%29-Regulations%202011.pdf>. The Lords rejected these arguments and a motion which would have reintroduced a ban on civil partnerships in religious premises was withdrawn before a vote.

¹² See also Sandberg (2011b: 166-69).

¹³ Of the 281 applications to set up a ‘free school’ from September 2012, 29 per cent characterised themselves as ‘faith schools’; in the previous year, the figure was 40 per cent. See <http://www.education.gov.uk/inthenews/inthenews/a0077950/michael-gove-announces-2012-free-school-applications>.

¹⁴ See ‘Ministers talk Big Society with Faith Leaders’, Communities and Local Government press release, 19 July 2010.

¹⁵ See <http://www.justice.gov.uk/about/cbr/index.htm>.

criticism of the HRA by some senior Conservative politicians, arguments which have been challenged by other politicians and commentators.¹⁶ In April 2011, the UK Government launched its Red Tape Challenge, inviting views on whether the Equality Act (among other law and regulation) should be simplified or even scrapped.¹⁷

This digest of developments, which is not exhaustive, serves to illustrate the fluidity and, at times, volatility of public debate about the themes covered by this research. It also illustrates the exceptionally high profile achieved by certain legal cases. The issues raised by these cases are discussed in detail in Chapters 5-7.

1.4 Methodology

Our methodology comprised:

- A literature review covering relevant case law (primarily domestic and European) and wider British and international research.
- 67 semi-structured interviews, mainly conducted by telephone or Skype, with religion or belief organisations; groups concerned with other equality ‘strands’ (gender or sexual orientation); groups concerned with employment and/or service provision (employers, trade unions, service providers and advisory bodies); and legal practitioners and academics. See Appendix 1 for a list of interviewees and Appendix 4 for the questionnaire.
- Two roundtable discussion events, one in London involving academics, legal practitioners and policy experts and one in Cardiff involving practitioners and voluntary sector organisations in the field of health (including mental health) and social care.
- Two online surveys, one aimed specifically at people responsible for managing issues associated with religion or belief in their workplace (the ‘workplace survey’), and another aimed at other stakeholders (the ‘general survey’).

The interviews and roundtables were recorded and transcribed. Interviewees had the option of remaining anonymous or of making certain remarks non-attributable. All attributions in this report were circulated to participants for their final approval. The roundtables were held under the Chatham House rule and therefore material from

¹⁶ See, for example, suggestions that the HRA was a contributory cause of the English riots in August 2011: ‘David Cameron: Human rights in my sights’, *Sunday Express*, 21 August 2011. For a counter-argument, see Smith (2011).

¹⁷ See <http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/equalities-act/>.

these discussions is not attributed. No representative of the EHRC was present at the roundtables.

Selection of interviewees

In this section, we explain the criteria by which interviewees and roundtable participants were selected and our approach to the methodological dilemmas we encountered.

This table provides a breakdown of the 67 interviews by the type of individual or group that they work for or represent (see also Appendix 1).¹⁸ These categories are not watertight but merely indicate the primary affiliation or specialism of the interviewee. For example, the ‘employment and/or service provision’ category includes trade union officers who specialise in LGBT (lesbian, gay, bisexual or transgender) or gender equality in the workplace, while the religion or belief category contains individuals who are also legal practitioners. We have identified a separate category of groups that straddle religion or belief and another equality strand (for example, a Muslim women’s organisation).

Religion or belief	36
Other equality strand	4
Religion or belief and another equality strand	4
Employment and/or service provision	16
Academic or legal practitioner	7

Interviewees concerned with religion or belief

We recognised from the outset of this research that it would be impossible to capture a truly representative spectrum of opinion either within or between religion or belief groups in England and Wales.

We did not consider it practicable or desirable to include interviewees from the greatest possible range of religions or beliefs in England and Wales for its own sake (the ‘one of each’ approach). Therefore, some religions or belief groups with small minorities of adherents were not invited to be interviewed; however, these groups or their members had the option of contributing to the research via the general survey. Nor did we select interviewees in direct proportion to the distribution of their religion or belief in the populations of England and Wales. As discussed in section 2.2, surveys produce significantly different results on the religiosity of Britain depending

¹⁸ Note that Appendix 1 lists 66 interviewees as one wished both their name and organisation to remain anonymous.

on the question asked. Moreover, reported religious affiliation does not necessarily correspond to active religious practice, particularly among those who report Christian affiliation. There are significant differences between religion or belief groups as regards the relative importance of their religion or belief to their identity, with religion more often a defining identity for minority communities. There are also important differences between religion or belief groups in relation to their (actual or perceived) experience of discrimination, prejudice or disadvantage, with Muslims faring worst on all counts (see Chapter 3). These factors created a case for selecting a higher proportion of interviewees from minority religion or belief groups in England and Wales - and especially from Muslim organisations - than their share of the population might otherwise have suggested.

Taking all these factors together, we devised selection criteria that sought to achieve the best possible balance by capturing:

- the perspective of groups or individuals with an overview of the principal issues in England and Wales relevant to this research e.g.:
 - inter-faith or national religion or belief groups that could reflect the experience of a wide membership;
 - religion or belief groups that are especially concerned with human rights and equality issues or, more broadly, the intersection of religion or belief and public life;
 - individuals who sit (or have sat) on consultative groups on relevant policy areas, e.g. Government Equalities Office senior stakeholders; the Faith Communities Consultative Council (which formerly sat under the Department for Communities and Local Government but was disbanded as of May 2011); and the (now defunct) Religion and Belief Consultative Group which from 2008 acted as the advisory body to the EHRC on religion or belief;
- both orthodox and minority positions within religion or belief groups;
- distinct and contrasting (or competing) strands of opinion within religion or belief groups that have a bearing on our research themes; and
- the perspective of groups that are able to reflect the intersection of equality, human rights and religion or belief in a particular locality.

Interviewees concerned with other equality strands

We selected interviewees from groups concerned with gender and sexual orientation because of the greater potential for disputes relating to religion and belief and either gender or sexual orientation, compared to the other equality strands. Tensions have arisen between religion or belief and other strands; for example, in relation to religious beliefs which view disability as a consequence of sins from a previous life (Malik, 2008a: 15). However, such tensions are not as prominent in relation to law and public policy as those involving gender or sexual orientation.

We also selected several interviewees for their knowledge and experience of both religion or belief and gender or sexual orientation. The notion of competing rights or equality grounds, and the need to balance them, is of particular relevance to groups or individuals who expressly identify with more than one protected characteristic.

Interviewees concerned with employment and service provision

This is a broad category which includes employers, service providers and bodies that advise them; central government actors; trade unions; and groups that seek to shape public policy in relation to service provision.

In terms of public services, we chose to focus on health and social care and education in view of their size and relevance to all communities in Britain, and the known range of policies and practices where disputes have arisen in relation to religion or belief. The focus on health and social care was extended through the roundtable discussion in Cardiff (see below).

Academics or legal practitioners

We selected academics or legal practitioners that have expertise (legal and/or sociological) that straddles the fields of religion or belief, human rights and equality. Two legal specialists from outside Britain were also included due to their academic and professional work on approaches to competing rights or equality grounds.

Selection of roundtable participants

The London roundtable involving academics, legal practitioners and policy experts took place at Matrix Chambers in London on 10 June 2011 (see Appendix 3). Participants were invited on the same basis as the equivalent group of interviewees. Some of the participants have, additionally, acted as advisors to the project (see Acknowledgments).

The Cardiff roundtable on health and social care took place at the office of the EHRC in Wales on 28 June 2011 (see Appendix 2). Participants were invited from different

parts of Wales and included: equality professionals and practitioners working within the National Health Service; trade unions and arbitration bodies; voluntary sector organisations; and religion or belief groups.

Online surveys

Both surveys were anonymous and were 'live' for around four weeks up to the closing date of 15 July 2011.

The research team made multiple requests to relevant networks and organisations (beyond those from which our interviewees were drawn) to circulate the surveys and/or promote them on their websites. It was not therefore possible to track the distribution in detail.¹⁹

The workplace survey consisted primarily of closed questions with a prescribed range of options. It elicited 47 responses, mainly from large, public sector employers. The survey questions are presented in Appendix 6 and the results in Appendix 7. In addition, they are discussed alongside other evidence in section 8.3.

The general survey consisted of open questions (except for those related to the respondent's organisational or other affiliation) (see Appendix 5). In this sense, it was akin to a 'call for evidence' and its main purpose was to maximise the opportunity for participation in the research by religion or belief groups and groups representing other equality strands. It elicited 2,411 responses. The vast majority of these (around 2,200) were received between 13 July 2011 and the closing date of 15 July. This followed an 'Action Alert' circulated by Christian Concern on 13 July urging recipients to respond to the survey and suggesting points that they should emphasise in relation to particular questions.²⁰ The volume of responses thereby generated is evident in the profile of respondents. Of the 2,411 responses, 99 per cent were from respondents who identified themselves as belonging to a religion or belief group. Of those that stated an affiliation, around 96 per cent identified themselves as Christian (of which 2 per cent were Catholic). This left small numbers of responses from minority religions or beliefs or other types of respondent (none of which reached 0.5 per cent of the total). The impact of the Christian Concern 'alert' is also evident in the content of the surveys. The vast majority of respondents who identified as Christian

¹⁹ Known distributors of the workplace survey include the Employers Forum on Belief (now incorporated into the Employers Network for Equality & Inclusion). Known distributors of the general survey include the Interfaith Network for the UK and the Religion or Belief Network managed by the Equality and Human Rights Commission.

²⁰ The content of the email alert was re-posted on the Anglican Mainstream website; see <http://www.anglican-mainstream.net/2011/07/13/act-now-to-make-your-voice-heard/>.

raised similar concerns and employed similar (though not always identical) language to that used in the alert and consistently referred to the same legal cases identified in the alert.

The surveys were deliberately not designed to yield statistically significant data. The open-ended nature of the general survey and the self-selecting nature of the respondents to both surveys mean that it is not possible to generalise from the responses. Rather, the responses provide a supplement to the 'richer' data generated by the interviews and roundtable discussions. Survey responses are presented throughout the thematic chapters alongside the evidence from other sources.

1.5 Scope of the report

This report does not provide a comprehensive account of the law and case law in the area of equality, human rights and religion or belief.²¹ It deals selectively with legal issues and cases and focuses principally on the views and experiences of participants in this research. Appendix 8 provides summaries of the cases referred to and further references for readers who wish to find detailed legal analysis of these cases.

This report is focused on England and Wales and does not cover Scotland or Northern Ireland. It refers selectively to cases related to religion or belief from the ECtHR and other non-European jurisdictions but does not attempt a comprehensive analysis of these (see Knights, 2007; Sandberg, 2011a). Nor does it examine in detail policy approaches towards religion or belief in other jurisdictions.

The report does not examine the issue of discrimination on the basis of caste. Caste discrimination and harassment have not been explicitly covered by British discrimination legislation (Hepple, 2011: 27, 146). However, the Equality Act 2010 includes the provision that, by order of a Minister, caste may be treated as an aspect of race. The UK government commissioned research to help inform it whether to exercise this power (Metcalf and Rolfe, 2010). The research found some evidence which suggested caste discrimination or harassment relevant to the Equality Act 2010 could occur in the workplace and in the provision of services, as well as examples of pupil on pupil bullying; however, the extent of such discrimination could not be determined. It suggested that caste discrimination and harassment might be confronted by extending anti-discrimination legislation to cover caste (as an aspect of race) and/or through educative routes. As of January 2012, the government has not

²¹ For which see: Bamforth et al. (2008); Knights (2007); Rivers (2010); Sandberg (2011a); Vickers (2008).

formally responded to its findings. In August 2011, a couple who worked for a Coventry solicitors' firm were reported to be the first to make a claim of caste discrimination in an Employment Tribunal.²²

1.6 Guide to the report

Each chapter integrates evidence from the literature review, interviews, roundtables and surveys.

Chapters 2 and 3 are primarily contextual. Chapter 2 examines the landscape of religion or belief in England and Wales with respect to affiliation and practice. It also examines the relationship between religion or belief and the state and the role of religion or belief in the formation of law and policy. Chapter 3 explores evidence about discrimination on the grounds of religion or belief in England and Wales.

Chapters 4, 5 and 6 are concerned with the law on equality, human rights and religion or belief. Chapter 4 introduces the main legal provisions and examines the importance of contextualising cases in order to determine their social, as well as legal, significance. Chapter 5 examines domestic case law concerning Article 9 and the law prohibiting discrimination on grounds of religion or belief. It explores debate about the institutional competence of courts and tribunals to rule on matters of religion or belief and to comprehend the significance of religions or beliefs to their adherents. It also discusses the idea of a duty of 'reasonable accommodation' for religion or belief in the workplace. Chapter 6 examines the legal and conceptual debates about competing interests in relation to religion or belief. It explores the balancing of competing rights and equality grounds; debates about the nature of religion or belief as a protected characteristic; and the issue of conscientious objection. It also examines the legal exceptions to the Equality Act 2010. It concludes by examining the issue of legal 'overstretch' caused by the inclusion of religion or belief alongside other equality grounds.

Chapter 7 examines the impact of law, and responses to it, outside the courtroom. It identifies different 'narratives' about the impact and significance of equality and human rights law in relation to religion or belief, including the Christian 'marginalisation' narrative. It considers the role of the EHRC. The chapter also discusses the perceived problem of excessive litigation, as well as approaches to resolving disputes by non-legal means.

²² See http://www.castewatchuk.org/caste_Test_Case_employment.html.

Chapters 8 and 9 focus on implementation. Chapter 8 is concerned with managing religion or belief in the workplace; Chapter 9 focuses on the design and delivery of public services, with a focus on health and education. Each chapter presents examples of practical dilemmas and solutions relating to religion or belief.

Chapter 10 draws together the main findings from preceding chapters and proposes ways of advancing debate in England and Wales about religion or belief. It also suggests options for further research.

2. Religion or belief in England and Wales

2.1 Introduction

This chapter examines the demography of religion or belief in England and Wales and the role of religion or belief in the public sphere. It discusses different conceptions of ‘multiculturalism’ and different attitudes towards the relationship between religion or belief and the state. It also examines the role of religion or belief in the formation of law and policy, including the difficulty of identifying and engaging with differentiated interests within religion or belief groups.

2.2 The landscape of religion or belief in England and Wales

This section summarises evidence about the landscape of religion or belief in England and Wales with respect to affiliation and practice.²³ As Perfect (2011: 3) notes, statistical data sources tend only to cover religion/no religion and there are relatively few national statistics relating specifically to ‘belief’. Surveys also vary as to their geographical coverage of the UK or its constituent parts.²⁴

Nye and Weller (2012: 50) describe the landscape in Britain as ‘three dimensional’: Christian, secular and religiously plural. According to the 2001 Census, around 72 per cent of adults in the UK reported Christian affiliation (Office for National Statistics, 2004: 2). Muslims were the second largest group (2.8 per cent), comprising over half the non-Christian religious population, followed by Hindus, Sikhs, Jews and Buddhists. Around 15 per cent said they had no religion. England had a higher proportion affiliated to non-Christian religions (8.1 per cent) than Wales (2.7 per cent), with an especially marked disparity in the Muslim population (3.1 per cent in England compared to 0.8 per cent in Wales).

The British Humanist Association criticised the wording of the 2001 and 2011 Censuses (which asked the question ‘What is your religion?’) for producing a misleading picture of the religiosity of the UK.²⁵ Surveys using differently worded questions have produced significantly lower figures for religious affiliation. Since its inception in 1983, the annual British Social Attitudes (BSA) survey has asked: ‘Do you regard yourself as belonging to any particular religion?’ According to the latest

²³ See Perfect (2011) for a summary of recent statistical information on religious affiliation, religious practice and attendance, discrimination, and gender and church leadership positions. See also McAndrew and Voas (2011).

²⁴ See Winckler (2009: 9-10) for data relating to religion in Wales.

²⁵ See <http://www.humanism.org.uk/campaigns/religion-and-belief-surveys-statistics>.

BSA survey, those in Britain who profess no religion rose from one in three (31 per cent) in 1983 to one in two (50 per cent) in 2010 (Lee, 2011: 173).²⁶ The number identifying as Christian fell from 63 per cent in 1983 to 44 per cent in 2010. The declining Christian share is largely attributable to a fall in the Church of England/Anglican percentage. The proportion identifying as belonging to other religions rose from 2 per cent in 1983 to 6 per cent in 2010.

Other surveys, such as the Annual Population Survey (APS) in Britain and the Citizenship Survey, which covers England and Wales only, ask, 'What is your religion even if you are not currently practising?' The latest APS and Citizenship Surveys produced results which were much closer to the Census data than the results of the BSA survey (Perfect, 2011: 4-5). The APS survey shows three trends: declines from 2004-05 to 2008-09 in the Christian population (from 78 to 72 per cent); an increase in the Muslim population (from 3 to 4 per cent), and a rise in the 'no religion' population (from 16 to 20 per cent) (Perfect, 2011: 5). In keeping with these trends, Woodhead with Catto (2009: 12) highlight the growth in Britain of charismatic, independent and black majority churches; faiths carried by post-war and post-colonial immigration (especially Islam); and a rise in other forms of 'spirituality', at the expense of historic churches, as well as a rise in those stating that they have 'no religion'.

Evidence is also available about the extent to which individuals who state that they have a religion consider whether or not they actively practise it. Beckford et al. (2006: 7-8) find that the significance of religion for the individual and corporate life of Muslims, Sikhs and Hindus is relatively high compared to other groups. According to the Citizenship Survey in England and Wales, between two-thirds and four-fifths of Buddhists, Sikhs, Hindus and Muslims considered that they actively practised their religion in 2008-09, while only a third of Christians did so (Ferguson and Hussey, 2010: 35). The BSA survey confirms this trend. Of those who affiliate to the Church of England/Anglicanism, only around half ever attend religious services or meetings while less than one in ten do so at least once a week (Lee, 2011: 177). Attendance is considerably higher for followers of religions other than Christianity: less than a quarter never attend and almost four in ten attend at least weekly.

The precise meaning of the statistical evidence from the Census and other sources remains contested. In particular, there are ongoing debates about whether Britain remains a religious society or has become a secular one and whether or not 'secularisation' has been succeeded by 'desecularisation', reflecting a revival of

²⁶ Data are also available at: http://ir2.flife.de/data/natcen-social-research/igb_html/index.php?bericht_id=1000001&index=&lang=ENG.

religion. Woodhead (2012), in analysing the debates, suggests that post-war Britain is both religious and secular and emphasises the complexity and multi-layered nature of the current situation. Analysing the secularisation debate from an international perspective, Norris and Inglehart (2004: 4-5) argue that religiosity persists most strongly among vulnerable populations preoccupied with physical, societal and personal risks, especially, but not only, in poorer countries; by contrast, the importance and vitality of religion has eroded most clearly among prosperous social sectors living in affluent and secure post-industrial nations (the United States being a strikingly deviant case). This thesis suggest 'an expanding gap between sacred and secular around the globe' as well as within nations (Norris and Inglehart, 2004: 6).

2.3 Cultural and religious diversity and multiculturalism

A central concern for all liberal democracies with culturally and religiously diverse populations is the need to balance the interests of individuals, minority groups and society as a whole. This raises both theoretical and practical concerns.

The early writers on 'multiculturalism' (e.g. Kymlicka, 1995; Taylor, 1992) emphasised the importance of autonomy and cultural identity for groups and argued for recognition of key aspects of culture and religion in the public realm. Barry (2001) develops a theory of group rights that respects both internal diversity and universal rights and rules, with few permissible exceptions; the key, in his view, is the right to freedom of association and the ability freely to join or leave any group. Knights (2007: 11) observes that more recent scholarship emphasises the fluidity of identity which means that a person may simultaneously experience more than one form of discrimination. According to this perspective, an approach which gives undue emphasis either to individual rights, or to the group, or to the state, may not be sufficiently responsive to this complexity. This view opens up for sociological analysis the discrimination that religion or belief groups exercise against others, including their own members or adherents. This in turn raises the difficult question of whether and in what circumstances the state should intervene in the internal affairs of a religious group; for example, in situations where adults appear to consent to harm or discrimination against themselves.

In practice, state models of dealing with diverse cultures and identities vary, from the policy of assimilation in France to the more pluralistic and permissive legal and policy

approach taken in Britain.²⁷ Debate in the UK about ‘multiculturalism’ is unsettled. While it may be used as a purely descriptive term for the increasing diversity of culture, race and religion in liberal democracies, debate about multiculturalism has become preoccupied in recent years with the issues of combating violent and non-violent Islamist ‘extremism’ and creating social cohesion (Jayaweera and Choudhury, 2008; Commission on Cohesion and Integration, 2007). David Cameron has advocated an ‘active, muscular liberalism’, in which minorities must live according to certain shared social norms; he contrasted this to ‘state multiculturalism’ which he said had failed by tolerating ‘segregated communities behaving in ways that run counter to our values’.²⁸

However, other approaches reject this binary distinction between liberalism and multiculturalism. Malik (2010; 2012) proposes a form of ‘progressive’ multiculturalism. This endorses the accommodation of difference as a requirement of the core values of liberal politics, whilst retaining the liberal concern with individual autonomy and human rights (see also Modood, 2007; Modood and Levey, 2009). It recognises not only the relative powerlessness of minority groups in relation to the centralised state and legal apparatus, but also the powerlessness of some individuals **within** minority groups. A ‘progressive’ multiculturalism, then, gives predominant weight to the interests of vulnerable individuals where they conflict with those of the dominant members of a minority group.

Pursuing ‘progressive’ multiculturalism therefore also involves protecting the right to freedom of religion or belief of relatively powerless groups. For example, Tehmina Kazi of British Muslims for Secular Democracy commented that she had acted as a witness to inform a planning decision as to whether a mosque run by the global Islamic movement, Tablighi Jamaat, could continue to use a site in east London. Kazi had adduced evidence of gender segregation within the movement and a failure to

²⁷ A law criminalising the concealment of an individual’s face came into force in France in April 2011. A similar ban was introduced in Belgium in July 2011 and was immediately challenged in the constitutional court as discriminatory. Legislative proposals addressing the wearing of face coverings in public have also been tabled in Denmark, Italy and the Netherlands. However, the Swedish Equality Ombudsman held that a general ban on the *niqab* was not acceptable. See Do (2011); McGoldrick (2006); Open Society Foundations (2011).

²⁸ David Cameron, speech at the Munich Security Conference on 5 February 2011; available at <http://www.number10.gov.uk/news/pms-speech-at-munich-security-conference/>.

provide facilities for women as a reason why the mosque did not fulfil planning criteria.²⁹

Minority legal orders

The vulnerability of ‘minorities within minorities’ is brought into sharp focus by the existence of minority legal orders - or systems of normative and legal regulation - rooted in religious communities.³⁰ Malik (2012: 24) suggests that minority legal orders may be understood as a spectrum: all entail a set of **norms** as to how individuals in a community should or should not act and the remedies and consequences resulting from those actions, while some also involve a **system** for the identification, change and enforcement of norms. Christians, Muslims and Jews have systems of normative and legal regulation, as do many smaller minority religious communities.

Malik (2012: 9) notes that minority communities’ claims for accommodation of legal norms have frequently been exaggerated in public debate. This has been especially so in relation to Islamic legal norms or *Sharia*; for example, it has been suggested that Muslim communities seek to impose their cultural or religious norms on all British citizens or to opt out of the state’s jurisdiction entirely.³¹ Such erroneous statements have fuelled the discourse of groups like the English Defence League, which object to what they call the ‘Islamisation’ of Britain.

It is important to distinguish these distorted accounts from other concerns about religious arbitration or mediation. Some interviewees highlighted the specific vulnerability of women who use religious tribunals, whether for arbitration or mediation. Religious arbitration involves semi-formal, but voluntary, mechanisms for enforcement of the norms or decisions of a minority legal order. Under the Arbitration Act 1996, family law matters cannot be the subject of contractually binding arbitration agreements; the state system maintains overall sovereignty in family law matters

²⁹ See ‘Tablighi Jamaat mosque accused of encouraging Muslim isolationism’, *The Guardian*, 18 February 2011.

³⁰ This section does not attempt a comprehensive analysis of minority legal orders, for which see Bano (2007); Douglas et al. (2011); Malik (2012); Sandberg (2011a, Chapter 9); Shachar (2001, 2010).

³¹ Such claims were most evident in the intense controversy following the suggestion by Archbishop Rowan Williams in February 2008 that some religious communities could ‘share’ jurisdiction with state law. See also the campaign ‘One Law for All’ that emerged after Archbishop Williams’ speech; <http://www.onelawforall.org.uk/>.

(Douglas et al., 2011).³² Mediation is a separate procedure where parties attempt to negotiate a settlement of their dispute. Mediation is not binding and is not subject to legal principles whether of religious or state law. It must be freely entered into by both parties.

Malik (2012: 32-33) argues that the concept of ‘cultural voluntarism’, which assumes that individuals are free to move in or out of social groups and norms, may be part of the problem in situations where women are unable to negotiate social arrangements that are in their best interests. Women may consent to arbitration procedures (for example, to obtain a ‘religious’ divorce) without agreeing to the substantive legal rule that will be applied or to be bound by the final outcome. The problem is exacerbated when the norms that are applied are uncertain or unclear.

Professor Liz Kelly of the End Violence Against Women coalition argued that:

... it is concerning when ... women are being siphoned into a parallel form of justice which doesn't start from the same human rights principles as [state] law. [Religious arbitration or mediation] can start from the principle that the most important thing is family or the community - always some bigger group to which women's rights are subordinated.

Professor Kelly noted that some religious communities placed a strong expectation on women to use tribunals for determination of family or inheritance disputes rather than using state courts; this was ‘inherently problematic’. Religious mediation, Kelly added, is particularly inappropriate in cases of domestic violence where perpetrator and victim are on an unequal footing and there is a risk that women may be mediated back into violent relationships. Pragna Patel of Southall Black Sisters (SBS)³³ argued that religious tribunals may be well suited to arbitrate business disputes between parties with roughly equal power, but should have no role in relation to family matters where disparities of power are socially engrained. Patel proposed that the Arbitration Act 1996 be amended so that religious arbitration in family matters is declared unlawful. She expressed a view that cuts to legal aid and advice services will increase the use of alternative methods of dispute resolution and ‘drive women

³² Inheritance disputes can in principle be the subject of a binding arbitration decision because they do not come under the jurisdiction of family courts in the state system. However, under section 81 of the Arbitration Act, such a decision would only be enforced if it is compatible with UK law and public policy.

³³ Among other services, Southall Black Sisters offers advice, information, advocacy, counselling and self-help support services to Asian and African-Caribbean and other minority women experiencing violence and abuse; <http://www.southallblacksisters.org.uk/>.

away' from the state legal system where their rights may be contested on a basis of human rights and equality.

Some of the (limited) body of empirical research on the operation of religious tribunals in the UK reinforces these concerns. In a study of Islamic family arbitration, Bano (2007: 20) notes that 'privatised' legal processes ignored state law and due process and provided 'little protection and safety' for women, including those who were party to civil injunctions issued against their husbands on the grounds of violence and threatening behaviour. Women had attended 'reconciliation sessions' (part of the process of seeking a religious divorce) reluctantly and felt they had no choice but to do so in order to obtain a divorce. Bano concludes that:

Quite clearly these women were in a weak bargaining position and their autonomy and choice was to some extent being limited ... [T]here are subliminal and covert forms of power and coercion ... rendering the parties unequal and the process unfair ... [I]n this process of dispute resolution the women were encouraged to reconcile and to conform to cultural dictates and acceptable patterns of behaviour if they were to be issued with a divorce certificate.

These concerns point to the need for further empirical research to examine the impact of minority legal orders on those who use them or are affected by them, particularly vulnerable groups such as women and children. Such research might establish the degree to which women are able to exercise autonomy, agency and choice within religious arbitration or mediation.

Malik (2012: 43-44) argues that the present protections offered by the Arbitration Act 1996 are insufficient because they rely on 'fire alarm' regulation by women themselves; even though tribunal decisions which breach the requirements of procedural justice may be unenforceable, women may be reluctant to challenge them and therefore may be deprived of their right to equality at law. Malik advocates a system of monitoring through statutory agencies which can offer active support to users of religious tribunals.

2.4 Religion or belief and the state

This section explores the relationship of religion or belief to the state, including attitudes towards secularism and the role of the Church of England. There are various models of church and state divide, ranging from close links (such as Greece and many Muslim nations), to weaker forms of establishment (such as the UK), to models of strict separation (such as Turkey and the United States) and models that

combine non-establishment with restricted legal, administrative and political pluralism (such as Germany). An understanding of these diverse models is critical to understanding the level of state interference in religious affairs and the relative positions of different religions or beliefs within a state (Ahdar and Leigh, 2005). In turn, as Knights (2007: 8) notes, a view on the importance of religion (or of a particular religion) and its manifestation will be implicit in the balancing exercise between the interests of religion, the state and individuals in particular instances where these appear to conflict.

Attitudes to secularism

A dominant theme of our interviews was the perceived gulf - on a range of issues explored in this report - between 'faith' and some participants' understanding of 'secularism'. For example, interviewees affiliated to Christian, Muslim, Sikh and Buddhist groups variously described secularism as 'rampant, fundamentalism under another hat'; 'militant'; 'like a dominant religion, monopolising the public space'; and 'negative and superficial'. Yann Lovelock of the Network of Buddhist Organisations observed that:

... many faiths are deeply distressed because we feel that a secular agenda is being forced on us without dialogue ... there is a presumption that religion is the problem and is against human rights.

Shaykh Faiz Siddiqi of the Muslim Arbitration Tribunal commented that public debate about the role of religion or belief in the public sphere had become focused on the Muslim community as a 'strong and fervent faith-based community'; Muslims had become 'caught in the crossfire' and risked becoming scapegoats. He argued that the principal faultline was not between faiths, but between 'the world of faith and the world of secularism':

Ultimately the questions that are being asked by all [faith] communities are the same – what role can we play within our community and the secular pushback on it is, 'Yes, you can play a role in your own individual communities but not at a state level'.

Boucher (2010: 69-70) argues that secularism is not a position of neutrality; secularism is itself a belief with its own 'equalities identity' and with the 'radical political agenda of trying to make the public square completely secular for everyone'. Andrea Williams, Chief Executive Officer of Christian Concern, argued that:

What we are finding is that secular liberal humanism leads to the foisting of certain ideas onto people who, if they speak out, can find themselves in trouble - even leading to the beginnings of censorship.

In contrast, Pollock (2011a: 1) ventures that hostility towards 'secularism' stems in part from misuse and misunderstanding of the term which is confused with (among other terms) atheism and 'secularisation'. While secularisation is about 'the subordination or rejection of religious values and beliefs in a community',

Secularism is not about a secular **society** but about a secular **state**. It is a political philosophy of separation of religion and politics ... Secularism is not hostile to religion. It is respectful of all religions and beliefs. It is a formula for living together harmoniously with people with whom you have profound disagreements in matters of so-called 'ultimate beliefs' .
(emphasis in original)

Pollock's understanding of secularism is supported by some (but not all) religious people, including among our interviewees. From this perspective, a secular state, with no privileging of any one religion and no legitimisation of any particular religious identity, is the best guarantor of everyone's right to manifest or be free from religion; it also provides a neutral public space in which 'competing demands - for resources, services and social and political influence - can be effectively negotiated' (brap/British Humanist Association, 2009: 14). Debbie Young-Somers, a Rabbi in the West London Synagogue, observed that while 'individuals have the right to freedom of expression and freedom of belief, the state must be for the benefit of all'. Tehmina Kazi advocated 'procedural', as distinct from 'ideological', secularism to ensure that no group is allowed to exert disproportionate influence on the state apparatus.

Some interviewees, while advocating some reconfiguring of the relationship between church and state in Britain, were concerned not to downgrade thereby the importance of religious faith. Graham Sparkes of the Baptist Union of Great Britain advocated a 'soft secularism, not a hard secularism that tries to exclude religion and belief'. Charles Wookey, Assistant General Secretary of the Catholic Bishops' Conference of England and Wales, argued that:

There is an idea of the state being neutral which suggests that it shouldn't pay any attention to religion which is one way of treating all religions equally, but this would seem to be prejudicial to the whole notion of religion ... the state should be faith **sensitive** rather than faith **blind** and welcome the contribution of religion to the public square.

(emphasis in original)

What is clear is that ‘secularism’ has no settled meaning. For debate to advance, it may be useful for those who use the term to define what they mean by it in order that differences of meaning are explicit.

It should also be emphasised that religious and secular perspectives are not always or necessarily oppositional. Gearty (2011: 5) argues that faith-based and secular perspectives on human rights share a common concern about social injustice and a commitment to a set of human rights standards and principles enshrined in law. It may not matter, he suggests, if ‘these two versions of human rights and human dignity get to the same truths by radically different routes’.

The role of the Church of England

The United Kingdom is not, of course, a secular state. The Church of England is the established state religion of England (though not of Northern Ireland, Scotland or Wales) with the monarch as its head and 26 bishops holding seats as of right in the House of Lords (Rivers, 2010: 289-96).³⁴ Among our interviewees, views differed as to the implications of having an established Church both for minority religions or beliefs and for equality and human rights more generally.

One interviewee noted that the UK is still constitutionally a Christian country and it is ‘helpful’ that laws have been passed historically to reflect that position. This stance was echoed strongly in responses to the general online survey from respondents who identified as Christian.³⁵ These emphasised the UK’s ‘Christian heritage’ and the role of ‘Christian values’ in supporting the common good. They tended to distinguish between what several called ‘man-made rules’ (mainly identified as lesbian, gay, bisexual or transgender (LGBT) rights) and traditional Christian beliefs which had withstood the test of time. The vast majority cited the 2001 Census data to suggest that almost three quarters of people the UK identify as Christian (see section 2.2) and that, as one respondent put it:

They should not be forced to obey the dictates of a small minority who want to legislate against those laws and Christian practices which have stood the nation in good stead for over 1,000 years.

³⁴ The Church in Wales, part of the Anglican communion, is no longer an established church.

³⁵ Note that the majority of these responses appear to have been generated in response to an ‘Action Alert’ by Christian Concern; see section 1.4.

This view of an embattled church was not shared by Malcolm Brown, Director of Mission and Public Affairs for the Church of England, who observed that:

We cherish the inheritance embodied in the established church and regard it as being of considerable symbolic importance ... but we don't expect laws to be made to secure our precedence within a social pecking order.

He added that the Church would itself 'ask more questions' about establishment if it felt that other Christian denominations or other faith groups found it a major problem, but 'we find that other faiths and churches are quite glad it's there'. Some interviewees affiliated with minority religions or beliefs were indeed comfortable with the idea of an established church. Jon Benjamin observed that the Board of Deputies of British Jews, which he heads:

... is, as a faith community going back 350 years in this country, very accepting of the role of the Anglican church and the structures that exist - possibly more so than some Protestant groups who feel more out on a limb.

Among our interviewees, those from newer faith communities (including all those affiliated with Muslim organisations) appeared to share this acceptance - or at least indifference. None argued for disestablishment. The formal relationship between church and state appeared less important to these interviewees than recognition in principle of the importance of religious faith to some communities and the ability of all religion or belief groups to have a voice and to operate freely. For example, Moulana Shahid Raza of the British Muslim Forum stated that:

In my opinion, the relation between religion and the state should be as it is at the moment, where we are free to observe our religious practices and the state does not interfere in the religious field of faith communities.

Other interviewees favoured a reduction in the influence and privileges of the Church of England. This view was expressed by representatives of trade unions and groups concerned with equality strand/s who had been frustrated by, among other instances, the role played by bishops in the House of Lords in preventing alterations to the scope of religious exemptions during the passage of the Equality Bill (Cranmer, 2010b; see also section 6.6). It was also expressed by some interviewees affiliated to minority religions or beliefs, and especially minority Christian denominations. Charles Wookey was unconvinced of the argument for (say) removing bishops from the House of Lords, lest it send a message that 'faith doesn't matter anymore'. However,

he advocated adjustments to current arrangements in ways that recognise ‘the multi-faith character of our country’; for example, changes to address the disproportionate number of Anglican chaplaincies in public bodies (see also Beckford et al., 2005; Burnside, 2005; Rivers, 2010, Chapter 7).

Other interviewees unequivocally favoured disestablishment. These included, unsurprisingly, the National Secular Society and British Humanist Association, as well as some interviewees affiliated to minority religions or belief groups, especially those from non-conformist traditions. Reverend Sharon Ferguson of the Lesbian and Gay Christian Movement argued that ‘no one religion should be able to influence to such an extent the laws that we put into place’. For Jonathan Bartley of the non-denominational Christian think-tank Ekklesia, disestablishment is necessary because:

The Church has become conditioned to think theologically and practically from a top-down perspective using instruments of the state to get what it wants ... It has to have its arguments accepted on merit rather than privilege; it has to lead by example.

He added that disestablishment would not mean disengagement by the Church from public life: rather, the Church should draw on its radical, subversive tradition, ‘playing a full part in public life but on a level playing field, recognising ... religious and political plurality [and with] no special privileges or favours’.

2.5 The role of religion or belief in the formation of law and public policy

Aside from the constitutional relationship between church and state, broader questions arise as to the role of religion or belief groups in the formation of law and public policy. This includes both ‘formal and semi-formal rights of access to major public contexts of debate and decision-making’ (Rivers, 2010: 289).³⁶

Rivers (2010: 304-05) notes that there has been an ‘exponential rise’ in new consultation processes between public and religious bodies in the past decade.³⁷ This has been driven by different impulses which have variously viewed religion as a positive social force (for example, to tackle urban deprivation or provide welfare

³⁶ See Rivers (2010: 305-14) and Knott and Mitchell (2012) for discussions of religious broadcasting, a topic not covered in this report.

³⁷ This trajectory may not be certain; for example, the Faith Communities Consultative Council, established in 2005 under the Department for Communities and Local Government, has been disbanded by the coalition government.

services); an unavoidable social reality; or potentially socially disruptive (particularly after the July 2005 London bombings) (see also Allen, 2011; Dinham et al., 2009).

For the majority of our interviewees, religion or belief groups have a legitimate place at the public table, but should not have a privileged one. From this perspective, religion or belief groups are, as several interviewees put it, 'just like any other interest group' or self-constituted voluntary organisation. Religion or belief groups can seek to inform law or policy but should not constrain it and the perspective of such groups should not be separated out as requiring different or special treatment. According to this view, there is no room in debate about law or public policy for 'truth claims' or claims of moral superiority based upon a particular religion or belief, however existential it may be for its adherents. These views suggest a broadly-held desire to maintain an appropriate balance between religion or belief and democratic debate. David Pollock of the European Humanist Federation considered that:

... arguments based on religious doctrine should carry no weight in public decision-making, but the onus for that rests with politicians, it's not a ban on the churches ... making those arguments (see also Pollock, 2011a).

This 'just another interest group' view was expressed by a range of interviewees: those affiliated to the Anglican and Catholic Churches, smaller Christian groups or denominations and a range of minority religion or belief groups, as well as by some groups concerned with other equality strands. There were differences of emphasis within this broadly articulated position. Some gave greater emphasis to what they saw as the positive values and perspectives on the common good that religions and beliefs (including humanism) bring to the public table. Reverend Aled Edwards of Cytûn: Churches Together in Wales and the Wales Committee of the Equality and Human Rights Commission argued that:

All good law will be promulgated on good, clear aspirations and a value base... Faith community, or indeed belief involvement ... gives you a healthy sense of personal conviction and value. So I think it forms an important element within the promulgation of law.

For Jit Jethwa of the Hindu Forum of Britain, 'faith groups need to be fully integrated and engaged' in the formation of law and policy in order that the state is able to be responsive to their distinct requirements. Shaista Gohir, Executive Director of the Muslim Women's Network UK, argued that the views of religion or belief groups should be 'taken into account' by law- and policy-makers, but should not be too

closely identified with the state because of the diversity of British society and the general decline in religious (and especially Christian) affiliation.

Some interviewees stood apart from this broadly articulated position that religion or belief has a legitimate, but not privileged, place at the public table. From one perspective, Pragna Patel of Southall Black Sisters argued that,

... religion or belief is a private matter and should not form the basis of public engagement ... It should have no role to play in shaping policy.

From the opposite view, Andrea Williams of Christian Concern suggested that:

What the Christian wants is good for all ... Christianity is hospitable, and never coercive ... The Christian discourse needs to be at the centre of public life.

Government engagement with religion or belief groups

Most interviewees suggested that different religion or belief groups do not engage with government agencies in England and Wales on a 'level playing field'.

Andrew Copson of the British Humanist Association argued that the 'belief' strand (including humanism) has been neglected by successive governments. This had been compounded by a tendency among public bodies to speak of 'faith communities' as if these were inclusive of the whole 'religion or belief' strand - a 'lazy use of vocabulary which constitutes a serious barrier for non-religious engagement' in public policy (see also brap/British Humanist Association, 2009).³⁸ Allen (2011) analyses the Labour government's development of, on the one hand, an equalities framework which protects against discrimination on the basis of 'religion or belief' and, on the other, policies which focused on 'faith' to the exclusion of belief (and those with no religion or belief) (see, e.g., Communities and Local Government, 2008). Despite being routinely spoken about in the same terms, he notes 'fundamental differences ... existed between the way in which Labour approached and responded to religion (or belief) and faith', to the extent that 'its faith policy approaches could even have gone some way in undermining the broader equalities ethos' (Allen, 2011: 272).

³⁸ It has been suggested, for example, that where public agencies want to engage with representatives of 'religion or belief' groups, emphasis should be placed on seeking particular skills, expertise and competence rather than religious, cultural or ethnic 'identity' (brap/British Humanist Association, 2009: 45).

Interviewees from some smaller religion or belief groups, such as those representing the Bahá'í faith and different traditions within Judaism, considered that they were able to articulate a cohesive voice to government. This was fostered by their having relatively clear lines of authority and accountability and continuity of representation within their religious groups. Those affiliated to Muslim organisations considered that they lacked these advantages. According to Wahida Shaffi, Director of the Bradford Muslim Women's Council:

We are still a relatively new community, structurally we are still developing, and we are **far** behind Christian communities ... We have to acknowledge the structural inequalities between Muslims and Christians.
(emphasis in original).

Khalid Sofi, the Legal Officer of the Muslim Council of Britain, argued that this 'structural inequality' created an onus on public bodies to 'provide adequate resources and infrastructure' to engage with disparate and relatively less well-established Muslim communities which, in addition, face higher levels of discrimination and prejudice. Shaista Gohir added that Muslim groups should be consulted about the 'daily inequalities' they face and not only about issues that are priorities for policy-makers.

Interviewees from other minority religions or beliefs, too, considered themselves at a disadvantage. It was observed that evangelical house churches, lacking structure, found it 'hard to get heard' despite their growing numbers.³⁹ The Pagan Federation had encountered 'total inertia' from government in its efforts to gain recognition and respect. Its president, Chris Crowley, stated that:

We're thought of as being fringe and marginal and we're not getting the same equality treatment that would be applied to other religious communities even though they might be a lot smaller than us.

Jit Jethwa suggested that government agencies tended to have a greater understanding of Abrahamic faiths (Christianity, Islam and Judaism) than Dharmic faiths (principally, Hinduism, Sikhism, Buddhism and Jainism):

³⁹ Perfect (2011: 12) summarises data from successive English Church Surveys on those attending 'new' churches (or house churches) or denominations in England. In 2005, 6 per cent of all churchgoers in the survey attended such churches, compared to only 1 per cent in 1979. See also Brierley (2006).

We have had to fight to get the government to recognise the differences between faith groups ... Hinduism is the third largest faith in Britain... yet we may not be consulted in the same way as other faiths.

The 'numbers game' - as some interviewees put it - plays out in complex ways. Malcolm Brown, who represents the Church of England, observed that 'getting to the voice of faith communities' is not easy:

It's a social fact that there are a lot of Anglicans and Catholics compared to others and that needs to be taken into account - but it's not the same as saying that numbers give us the authority to impose our will. We believe in a plurality of voices. So reflecting the fact that we're bigger than most others without making that a point of leverage or moral blackmail is quite subtle.

A problem expressed by interviewees affiliated to both majority and minority religious organisations was that of 'religious illiteracy' among public bodies and the media; that is, a lack of understanding of the tenets and practices of different religions or beliefs.

Malcolm Brown suggested that many decision makers held in their heads a metaphorical wall chart, with a list of world faiths down one axis and a list of 'bizarre behaviours' down the other. For Dr Don Horrocks of the Evangelical Alliance, religious 'illiteracy' too often leads public bodies to engage with inter-faith organisations as a way of 'short circuiting' the need to engage with a plurality of voices: this approach, he believed, had provoked 'huge resistance and opposition' among evangelical communities which disliked its implied syncretism. Tehmina Kazi observed that government agencies do not always have a sophisticated understanding of strands of Islamic thought, with significant consequences for public policy; this was most effectively addressed by public discussion among Muslim networks and organisations which could credibly comment upon theological and political differences within Islam (see also Jayaweera and Choudhury, 2008).

A further concern of some religion or belief groups was the tendency of public bodies to view them simply as a means to achieve a particular end. Reverend Alan Green, who chairs Tower Hamlets Inter Faith Forum, argued that:

The more negative side is the tendency to see the role of faith communities only in terms of community cohesion - to see religion as dampening things down ... We have let religion in the door as a tool of

containment and I'm not keen on that but it's a step - we have been noticed and it's up to us to make it more positive.

In Tower Hamlets, he added, this perception had shifted considerably:

There is now a recognition that faith is a contributor, not just an instrument and [the local authority] has taken pains to find out what it is that faith communities might contribute as faith communities to help the well-being of the borough.

2.6 Authority and representativeness within religion or belief groups

Communities based upon a religion or belief tend to be highly differentiated (Beckford et al., 2006; Dinham, 2009; Dinham et al., 2009; Woodhead with Catto, 2009). A high proportion of minority religious groups also belong to minority ethnic groups, creating a complex - and highly context-specific - relationship between race, religion and culture. This complexity, and a general lack of disaggregated data, makes abstract generalisations about the views of religious communities perilous.

Perspectives between adherents of the same religion or belief may vary according to, among other factors, generation, ethnicity, gender, sexual orientation and geographical location. Differences may, in turn, be linked to the geographical origins of particular communities or religious traditions. Nor do all religion or belief groups have identifiable leaders or representatives, especially those which are non-hierarchical. Even where they do, their positions may be contested by others with the same stated affiliation or may not represent the views of 'dissidents' or of relatively powerless groups, such as women or people who are lesbian, gay, bisexual or transgender (Panjwani, 2007; Stuart, 2010).

Differentiation within religion or belief groups has implications for public bodies seeking to identify authentic or authoritative voices that represent different religion or belief groups (or denominations, sects or social structures within them) (Vickers, 2011: 143-44). This concern is not unique to religion or belief groups; other interest groups or social movements also contain dissonant voices which public bodies must weigh against each other. However, it raises important issues in relation to equality and human rights since religion or belief groups may discriminate as well as being discriminated against. Who 'speaks for' a group matters greatly where power is unevenly distributed within it in ways that may not always be obvious to those outside the group. Who government chooses to speak to also matters, because it may confer legitimacy or resources that may affect the balance of power within a community. Several interviewees argued that religious hierarchies tend to be more orthodox and conservative around matters of doctrine and social policy than the wider public and

even than the majority of their adherents (see also Bamforth and Richards, 2008).⁴⁰ According to Keith Porteous-Wood of the National Secular Society, the undue influence of such voices on policy-makers 'leads to a mismatch in our democratic process'. Several interviewees from groups concerned with equality strand/s suggested that policy-makers should be mindful of the differential resources and power of certain groups, which can make their views appear more widespread than they actually are. Reverend Sharon Ferguson noted that:

... those who shout the loudest get heard. And they tend to be the ones who have attracted larger amounts of money who tend to be the more fundamentalist, more extreme voices, or the longer established.

Interviewees familiar with community-based religion or belief networks were also concerned about the issue of representation. Doreen Finneron of the Faith-based Regeneration Network commented that 'gender representation is lacking in religion or belief groups and audible voices are often male dominated, [even though] the active core of groups is often female'. Dr Husna Ahmad, Chief Executive of the Faith Regen Foundation, noted that the lack of hierarchy in Islam means that people can 'proclaim themselves as self-made leaders'; public authorities, she added, need to engage with members of a community beyond its 'gate-keepers'.

Issues of authority and representativeness present particular challenges for newer faith communities, which may feel exposed and may contain significant differences of view between the generations. Reverend Alan Green gave the example of the East London Mosque, the leadership of which became involved in the local 'No Place for Hate' campaign.⁴¹ This campaign was set up to confront all forms of hate crime. Among other issues, it has addressed the posting of stickers in public spaces declaring east London a 'gay free zone'.⁴² Reverend Green noted that:

⁴⁰ For example, an opinion poll of 1,600 practising British Catholics by YouGov to coincide with the Pope's visit in 2010 found that three out of 10 believed that a woman should always have the right to choose whether to have an abortion, while seven out of 10 believed that she should be allowed to do so in the case of rape, incest, severe disability to the child or as an indirect consequence of life-saving treatment for the mother. Nine out of 10 supported the wide availability of contraception. See <http://today.yougov.co.uk/sites/today.yougov.co.uk/files/YG-Archives-Pol-YouGovITV-PapalVisit-020910.pdf>.

⁴¹ See http://www.towerhamlets.gov.uk/lgs/1101-1150/1133_hate_crime/no_place_for_hate_campaign.aspx.

⁴² See 'East London Mosque and mayor condemn anti-gay stickers', *Pink News*, 17 February 2011.

The East London Mosque leadership ... understands the complexity ... [but] its membership doesn't, and particularly the older generation. So the leaders have real difficulty. If they speak out too clearly they will lose their credibility within their own community and will not then be able to assist in moving their community forward. But in compromising their message - as it seems to LGBT groups - they appear to be covertly endorsing the conservative view.

A small number of interviewees contested the very notion of 'representativeness' in relation to religious groups. The strongest expression of this view came from Jasdev Singh Rai, General Secretary of the British Sikh Consultative Forum, who stated that:

The dynamics of religious institutions are very different; they are religious institutions by virtue of the fact that they concern themselves with revelations or doctrines. [They] are not democratic set ups. The issue of who's representing religious communities is a red herring created by secularists; it's not how religions work.

2.7 Conclusion

This chapter has examined the context in which discussions of equality, human rights and religion or belief in England and Wales take place. Evidence relating to the religion or belief landscape is contradictory but certain trends are apparent: a decline in the numbers affiliated to historic churches, a rise in those stating that they have no religion and (especially in England) an increase in faiths carried by post-war and post-colonial immigration.

Multiculturalism has become a contested term. Debate about multiculturalism has become intertwined with, in particular, concerns about Islamic 'extremism' and the perceived segregation of communities with distinct social values - one response to which is said to be a 'muscular' liberal politics in which minorities are required to live according to the presumed shared social norms of the indigenous majority. By contrast, 'progressive' notions of multiculturalism seek to address the powerlessness **both** of minority groups in relation to the centralised state **and** of individuals within those groups whose interests may conflict with those of dominant members of the group.

Our inquiry suggests that, in matters of policy, the emphasis should be on identifying asymmetries of power and engaging with vulnerable individuals to prevent harm. Such an approach recognises and respects individuals' membership of a cultural or religious community, whilst also recognising the internal diversity of most such

communities and ensuring that all their putative members are able to be full citizens of a liberal political community.

The potential vulnerability of ‘minorities within minorities’ is brought into sharp focus by the existence of minority legal orders rooted in religious communities. We have identified the need for further empirical research to examine the impact of minority legal orders on those that use them or are affected by them, particularly groups such as women and children. In addition, there is a need to strengthen the protections presently offered by the Arbitration Act 1996 to users of religious tribunals.

‘Secularism’ is also a controversial term. Among our interviewees, the faultline between the ‘religious’ and the ‘secular’ was generally perceived to be greater than that between religious faiths - and was certainly more vehemently expressed by some. Some (but not all) interviewees affiliated to religious groups perceive there to be a ‘secular agenda’ to diminish the importance of religion in society - a perception which extends well beyond the established meaning of secularism as a separation of religion and state.

In some instances, our research suggests, discussion about religion or belief in the public sphere involves assumptions on each side which appear mutually unintelligible (such as the observation that ‘secularists’ concerned about the representativeness of religious community leaders do not understand ‘how religions work’). This insight provides an important context for our examination of particular legal and policy issues relating to equality, human rights and religion or belief in Chapters 4 onwards; it may explain why debate has at times become so acrimonious, as specific legal cases or policy matters act as a ‘lightning rod’ for a broader perceived gulf between the ‘religious’ and the ‘secular’.

At the same time, it is important not to overstate this division. Our interviews suggested a fairly high degree of consensus among groups concerned with both the ‘religion’ and ‘belief’ strands (as well as groups concerned with other equality strands) that religion or belief groups are legitimate interest groups like any other but should have no privileged role in the formation of law and policy. In particular, a majority of interviewees held that there was no room for ‘truth claims’ based on religious doctrine in matters of law and policy.

This chapter has also established that religion and belief groups do not consider themselves to operate on a ‘level playing field’ when it comes to law- and policy-making. Some interviewees observed that the ‘belief’ strand had been excluded due

to a tendency among public bodies to focus on 'faith communities'. Some (but not all) minority religions, in particular Muslim groups, also felt at a disadvantage.

3. Discrimination on the grounds of religion or belief

3.1 Introduction

This chapter summarises research evidence about actual and perceived discrimination on the grounds of religion or belief, and the difficulty of attempts to define and measure it.⁴³

3.2 Definition and measurement of discrimination

Woodhead with Catto (2009: 15) note that there is an inadequate evidence base concerning religious discrimination - and no evidence at all about whether there is discrimination against secular belief. Quantitative data are particularly sparse (for available statistical overviews, see Purdam et al., 2007; Walby et al., 2008).

Woodhead with Catto (2009: 15-16) add that a major problem in assessing discrimination in relation to minority religions is that representative sampling of the population requires large booster samples for these groups; the Census is likely to under-represent minority groups and the most disadvantaged in society (for example, those who do not have English language skills or a fixed address). Weller (2011: 13-14) notes that a minority of UK-based surveys have asked questions which might contribute to an understanding of religious discrimination and many fewer ask about 'religious discrimination' as such.

Another factor which makes it difficult to establish trends in either the frequency or seriousness of discrimination is that social research necessarily engages with perceived or reported experience of religious discrimination; these may differ from legal definitions of discrimination which, in turn, have shifted in the past decade (Weller, 2011: 8-9).

The existence of multiple or 'intersectional' forms of discrimination complicates the picture further (Conaghan, 2007; Malik, 2008a; Modood, 2005; Weller, 2011). Khattab (2009: 319) argues that in the UK, 'skin colour and culture (religion) are to a greater extent probably the main mechanisms that operate to reinforce disadvantage among some groups or to facilitate social mobility amongst others'. The impact of skin colour, he suggests, is reinforced when attached to a group which is perceived as culturally and religiously 'alien' by the dominant cultural group. Further, there appears to be an additional penalty for non-white Muslim women. A graphic snapshot of 'intersectional' discrimination comes from one Muslim respondent to a survey on

⁴³ See Weller (2011) for an overview of research on religious discrimination in Britain between 2000 and 2010. See also the research project based at the University of Derby on 'Religion and Belief, Discrimination and Equality in England and Wales: Theory, Policy and Practice (2000-2010)', which is due to report in 2013; http://www.derby.ac.uk/files/religion_and_belief_-_research_project_leaflet.pdf.

discrimination: ‘If someone throws two stones through someone’s window, that’s racism. If they throw two pigs heads [as had happened to them], it’s about religion’ (Weller, 2011: 10). These factors underline the importance of subjective experience in any definition of religious discrimination and any attempt to measure it.⁴⁴

3.3 Socio-economic discrimination

Woodhead with Catto (2009: 15) distinguish between socio-economic or ‘material’ religious discrimination and cultural or attitudinal discrimination. The former involves material disadvantage, including reduced levels of educational, occupational, and/or economic attainment; the latter relates to religion being misunderstood, denigrated, ignored, trivialised, distorted or ridiculed.

A significant body of evidence shows that Muslims are disproportionately vulnerable compared to other religious groups in terms of, among other indicators, unemployment, limiting long-term illness, educational attainment and housing (Beckford et al., 2006: Equality and Human Rights Commission (EHRC), 2010; Jayaweera and Choudhury, 2008; Khattab, 2009; Lindley, 2002; Modood, 2005; Office for National Statistics, 2004).⁴⁵ Clark and Drinkwater (2002) establish a link between the disadvantage of Bangladeshis and Pakistanis in the UK and their religion, with the effect being particularly pronounced for Muslim women.

While the correlation of disadvantage and certain religious affiliations may be clear, Khattab (2009: 306-07) argues that the causal link is still largely open; skin colour, social class and ‘social capital’⁴⁶ also combine to reinforce disadvantage. The policy imperatives that arise from this evidence are also a matter of debate. It has been argued that addressing socio-economic disadvantage on the basis of religion or belief (rather than, say, race or gender) is likely to increase resentment between communities and damage community relations (Lester and Uccellari, 2008: 572; see also Vickers, 2011). This is a pressing matter for public authorities which, since April 2011, have assumed a duty to have due regard to the need to eliminate discrimination, harassment and victimisation on grounds of religion and belief; and

⁴⁴ For example, Weller (2011: 11-13) proposes a working definition of religious discrimination which includes ‘unfair treatment’ manifested through the reported experience of: religious prejudice; religious hatred; religious disadvantage; direct religious discrimination; indirect religious discrimination; and ‘institutional religionism’ (a term coined by analogy to the term ‘institutional racism’).

⁴⁵ See Winckler (2009: 61) for data showing that Muslim people in Wales are much less likely to be economically active than the population as a whole.

⁴⁶ There is no single definition of ‘social capital’ but most definitions emphasise the value of social networks and relationships, reciprocity, trust, and shared social norms.

advance equality of opportunity and foster good relations between people of different religions (and none). The public sector equality duty in relation to religion or belief is discussed in section 9.4.

3.4 Perceived and reported discrimination

Data relating to perceived levels of discrimination and prejudice have fluctuated over time. Citizenship Survey data indicated that in 2008-09, 52 per cent of people thought that there was more religious prejudice than five years previously, a decrease from 62 per cent in 2007-08 (Ferguson and Hussey, 2010: 7). This fluctuation has been attributed to heightened perceptions of prejudice after the July 2005 London bombings (Ferguson et al., 2009).

A Eurobarometer poll found sharply decreasing perceptions between 2006 and 2009 that discrimination on grounds of religion or belief was widespread, both in the UK and selected other European countries (TNS Opinion & Social, 2007: 68; 2008: 66; 2009: 100). In the UK, the figure had fallen from 57 per cent in 2006 to 45 per cent in 2009. In 2009, discrimination on grounds of religion or belief was considered in the UK (and in the other European countries as whole) to be less widespread overall than discrimination on grounds of age, disability and ethnic origin (TNS Opinion & Social, 2009: 99).

Despite the evidence about the perceived extent of discrimination, only 2 per cent of UK respondents to the Eurobarometer poll in 2009 stated that they had themselves experienced discrimination or harassment on the grounds of religion or belief in the previous year, although a higher percentage (6 per cent) had witnessed it (TNS Opinion & Social 2009: Annex of data tables). Similarly, among respondents to the 2009-10 Citizenship Survey in England, less than 0.5 per cent of adults felt that they had personally been refused a job or turned down for a promotion because of their religion or belief, though for Muslims the figures were 4-5 per cent (Weller, 2011: 31). These figures remind us that perceived religious discrimination and direct experience of it may vary widely; however, as Weller (2011: 28) points out, even low percentage figures may still represent a sizeable number of individuals.

Weller (2011: viii) notes that research evidence consistently shows that in Britain, Muslims experience discrimination of a greater frequency and seriousness than other religious groups (see also Brown, 2000; Lindley, 2002; Muir et al., 2004). This has been especially pronounced since 11 September 2001, with identifiable 'spikes' in the manifestation of some forms of religious discrimination in relation to Muslims (or those thought to be Muslim) (Weller, 2011: vii). In a survey of adults in England in 2009-10, 17 per cent of Muslims considered that racial or religious harassment was a

big problem in their local area, compared to 6 per cent of Christians and an average of 7 per cent for other religions (Communities and Local Government (CLG), 2010: 51). A Home Office-commissioned study published in 2001 found that a consistently higher level of 'unfair treatment' was reported by Muslim organisations than by most other religious groups (Weller et al., 2001: vii).⁴⁷ The majority of Muslim organisations surveyed said that their members experienced unfair treatment in every aspect of education, employment, housing, law and order, and in all the local government services covered in the survey.

As regards evidence of discrimination experienced by other religious groups, Hindu, and especially Sikh, organisations also reported relatively high levels of unfair treatment in the 2001 Home Office survey (Weller et al., 2001: viii). So, too, did black-led Christian organisations and those representing groups such as Mormons and Jehovah's Witnesses. Pagans and 'new religious movements' reported experiencing 'open hostility' - a reminder of the (largely undocumented) existence of discrimination against socially marginal religious groups where ethnicity is not a factor (Weller, 2011: 56). Weller (2011: 34-35) also cites evidence that the recorded number of incidents of anti-Semitism has increased since 2000.

According to Woodhead with Catto (2009: 16), the nature and extent of discrimination against Christianity has not yet been studied (save for studies of sectarian prejudice against particular forms of Christianity). They add that it is likely to vary with class, skin colour and type of Christianity, as well as by geography and between rural and urban locations. Weller (2011: 23) notes the growth of 'at least concerns and claims about discrimination in relation to Christians' and, in particular, claims that 'mainstream' Christianity is becoming marginalised (see also Boucher, 2010; Christian Institute, 2009). Weller (2011: 54-55) identifies an associated concern about whether potential 'religious discrimination' against (particularly) white Christians is taken as seriously as discrimination in its own right compared with such discrimination when it is associated with those who are also members of minority ethnic groups. However, as noted in section 3.2, visible difference (of skin colour and culture or religion) is a salient factor in religious discrimination. Weller notes that an important question remains as to 'the extent to which sufficient research evidence on this issue exists and/or if it does exist, the extent to which such evidence supports or does not support such concerns and claims'; none is presented in his review of research evidence.

⁴⁷ Note that the research for this study was conducted before the attacks in the US on 11 September 2001.

3.5 Discrimination in the workplace

The 2001 Home Office study found that employment was a key area where unfair treatment was reported to be experienced by religious individuals. Discrimination was reported on grounds of religious status, such as a reluctance to employ people because of their religion or belief, and on grounds of religious practice, such as a refusal to accept a religious dress code (Weller et al., 2001: 41-42). Three quarters or more of Sikh, Muslim and Hindu organisations surveyed (compared with 40 per cent of Christians) said their members experienced unfair treatment from private sector managers or colleagues, with Muslims being more likely to say such treatment was frequent; figures for the public sector were only marginally lower (Weller et al., 2001: 37-38).

The concerns raised in the Home Office study are reflected in Employment Tribunal discrimination cases. The number of tribunal cases in Britain on grounds of religion or belief remains relatively low, although it is increasing; in 2010-11, 880 claims relating to discrimination on grounds of religion or belief were accepted by Employment Tribunals, compared with 1,000 in 2009-10 (Ministry of Justice 2011: 7). To put these figures in context, 382,400 claims were accepted in total in 2010-11; a higher number of cases related to sex discrimination (18,300), disability discrimination (7,200), race discrimination (5,000) and age discrimination (6,800), but more cases related to discrimination on grounds of religion or belief than to discrimination on grounds of sexual orientation (640). In 2010-11, the success rate for tribunal cases concerning religion or belief was 3 per cent. This was broadly in line with the low success rate for discrimination claims on other grounds, since the majority of cases are withdrawn or result in Acas conciliated settlements (Perfect, 2011: 18).

Of the 461 cases brought to an Employment Tribunal between January 2004 and August 2006 where religion or belief discrimination was the main jurisdiction, around half the claimants were Muslim (Savage, 2007: 44).⁴⁸ Similarly, a survey of calls to the national Acas helpline found that around half of the calls which referred to a specific religion or belief were to do with Islam (Savage, 2007: 44). Across all tribunal cases, bullying and harassment were common complaints; behaviour from managers included verbal abuse, setting impossible deadlines, subjecting claimants to increased scrutiny, refusing holiday requests and disputes over dress codes (Savage, 2007: 50-52). For both tribunal cases and the Acas helpline, problems around working hours and time off or leave to meet religious obligations were far more frequent than those relating to dress codes (Savage, 2007: 59-60). Another

⁴⁸ The remaining half were split between Christians, Jews, Hindus, Sikhs and those who described themselves as 'non-Catholics' bringing cases against a Catholic school.

cause of dispute has been the practice of religious employers recruiting or promoting only those who share the organisation's religion or belief (see section 6.6).

It should be noted that Employment Tribunal statistics are an unreliable proxy for actual discrimination on any ground. Denvir et al. (2007: 23) note that financial and personal factors prevent employees, especially those from vulnerable groups, from taking claims or grievances. Silence or resignation are more likely routes for such individuals and so the extent of discrimination may be under-represented in grievances or tribunal claims.

3.6 Conclusion

In summary, discrimination on the grounds of religion or belief is difficult to define or measure. There is scant evidence about whether there is discrimination against 'belief'. Measurements of 'religious discrimination' are complicated by the fact that social research necessarily engages with perceived or reported experience of religious discrimination, which may differ from legal definitions. The fact that individuals may experience different forms of discrimination simultaneously complicates the picture further.

One clear trend is the greater prevalence of discrimination (by any measure) against Muslims compared to other groups defined by their religion. This has been attributed to the impact of skin colour, combined with a perception that certain groups are culturally and religiously 'alien' in relation to the dominant culture. Anti-Muslim discrimination also appears to have increased since the attacks of 11 September 2001. However, the policy imperatives arising from this trend are a matter of debate.

Reviews of research evidence about discrimination note an increase in concerns and claims relating to discrimination against Christians, though not (yet) any evidence to substantiate those claims at a societal level. The nature of these concerns and claims among Christians is discussed further in section 7.3.

4. The law on equality, human rights and religion or belief

4.1 Introduction

This chapter provides an overview of legal provisions on equality, human rights and religion or belief. It examines the importance of contextualising legal cases in order to determine their social, as well as legal, significance. It introduces a selection of cases that have been particularly significant and/or contentious.

4.2 The right to freedom of thought, conscience and religion

The Human Rights Act (HRA) 1998 came into force across the UK in October 2000.⁴⁹ Prior to the HRA, the right to freedom of thought, conscience and religion was not expressly protected under domestic law. The HRA introduced this right into domestic law through Article 9 of the European Convention on Human Rights (ECHR), as well as safeguarding equality through Article 14 ECHR which requires non-discrimination in the enjoyment of all other Convention rights. Section 13 of the HRA requires courts to 'have particular regard to the importance' of the right to freedom of thought, conscience and religion; however, commentators generally agree that it has made little practical difference (Knights, 2007: 34, 67).

Under Article 9(1), the right to freedom of thought, conscience and religion (including the right to change one's religion or belief) is absolute; it may never be interfered with. The right to manifest one's religion or belief, either alone or in community with others and in public or private 'through worship, teaching, practice and observance' is qualified; it may be interfered with in certain circumstances which are set out in Article 9(2) (and explained below). Most decisions at the European Court of Human Rights (ECtHR) in Strasbourg concern the right to manifest one's religion or belief.

In practice, the ECtHR grants states discretion (also known as the 'margin of appreciation') to determine the precise relationship between church and state and the place of religion or belief in the public sphere. The ECtHR thereby recognises the

⁴⁹ The devolved administrations in Scotland, Wales and Northern Ireland were bound by the Act from their inception in 1999. The aim of the HRA is to 'give further effect' in UK law to the fundamental rights and freedoms in the European Convention on Human Rights (ECHR). The Act makes available in UK courts a remedy for breach of a Convention right, without the need to go to the European Court of Human Rights (ECtHR) in Strasbourg. Under section 2 of the HRA, domestic courts must 'take into account' decisions of the ECtHR, whether they relate to cases against the UK or cases against other Council of Europe states. Domestic courts are not bound to follow Strasbourg decisions; in practice, they do apply their own interpretation and have sometimes made decisions that expressly divert from Strasbourg judgements in comparable cases.

cultural, historic and philosophical differences between nations and the need for sensitive matters of religion or belief to be closely scrutinised at the domestic level.

Determining whether there has been an interference with Article 9(1)

Sandberg (2011a: 83-86) identifies three ‘filtering devices’ that have been used by the ECtHR in Strasbourg to exclude claims by establishing that Article 9(1) has not been interfered with (also known as the ‘interference stage’). These are:

- The **definition** filter, which asks whether the religion or belief warrants protection. The ECtHR has seldom applied this filter.⁵⁰ The Court has clarified that the state cannot attempt to prescribe what constitutes a religion or belief and that these notions also protect ‘atheists, agnostics, sceptics and the unconcerned’.⁵¹ It has established that religion or belief is essentially personal and subjective and need not necessarily relate to a faith arranged around institutions, but must pass certain tests: for example, it must attain a certain level of cogency, seriousness, cohesion and importance and be worthy of respect in a democratic society.⁵² Newer religions and beliefs such as scientology⁵³ have been included within the definition, as have pacifism,⁵⁴ druidism,⁵⁵ atheism,⁵⁶ secularism,⁵⁷ communism⁵⁸ and veganism.⁵⁹ See section 5.2 for an examination of definitional matters in domestic jurisprudence.
- The **‘manifestation/motivation’** filter, which requires that the claimant’s actions manifest their religion or belief as opposed to being merely motivated by it; this includes a requirement that the claimant’s actions are prescribed by the

⁵⁰ A rare example is *Pretty v UK* No. 2346/02, 29.4.2002, concerning a belief in the notion of assisted suicide.

⁵¹ *Church of Scientology Moscow v. Russia* No. 18147/02, 5.4.2007, at para. 71.

⁵² Equality Act 2010 Explanatory Notes, para. 52.

⁵³ *X and Church of Scientology v Sweden* No. 7805/77, 5.5.1979.

⁵⁴ *Arrowsmith v UK* No.7050/75, 12.10.1978.

⁵⁵ *A.R.M. Chappell v UK* No. 12587/86, 14.7.1987.

⁵⁶ *Angeleni v Sweden* No. 10491/83, 3.12.1986.

⁵⁷ *Lautsi v Italy* No. 30814/06, 18.3.2011.

⁵⁸ *Hazar, Hazar and Acik v Turkey* Nos. 16311/90, 16312/90 and 16313/90, 11.10.1991.

⁵⁹ *X v UK* No. 18187/91, 10.2.1993.

particular religion or belief.⁶⁰ However, the ECtHR has in recent years chosen not to apply this distinction or to interpret it broadly to include any causal link between the claimant's action and their religion or belief and to include non-prescribed practices.⁶¹

- The '**specific situation**' rule, which applies where someone has voluntarily submitted themselves to a system of norms; for example, by entering into a contract,⁶² enrolling at a university⁶³ or submitting to military service.⁶⁴ It establishes that there is no interference with Article 9 where an individual has put themselves in a situation which limits their ability to manifest their religion, and where they can choose to leave that restrictive context, even if doing so requires some personal sacrifice. More recent decisions of the Court indicate that it no longer endorses such an approach; interference has been found despite the claimants' apparent acceptance of a restriction.⁶⁵

As the filters are applied only rarely by the ECtHR, the question of whether there has been an interference (also described as whether Article 9 is 'engaged') is commonly a formality; the Court then considers the merits of each case in detail using the criteria for justification under Article 9(2).

Determining whether interference with Article 9(1) is justified under Article 9(2)

Under Article 9(2), freedom to manifest one's religion or belief is subject only to such limitations as are:

- 'prescribed by law'; that is, they must be clear, publicly accessible, non-retrospective, and people must be able to understand the circumstances in

⁶⁰ *Arrowsmith v UK* No.7050/75, 12.10.1978.

⁶¹ For example, *Bayatyan v Armenia* No. 23459/03, 7.7.2011, the Grand Chamber of the ECtHR found that where opposition to military service is motivated by a genuinely held religious belief, Article 9 will be engaged. See also *Jakóbski v Poland* No. 18429/06, 7.12.2010, in which the Court found that the refusal of a Buddhist prisoner's request for vegetarian food fell within the protection of Article 9 even though vegetarianism was not a mandatory requirement of Buddhism.

⁶² *Stedman v UK* No. 29107/95, 9.4.1997.

⁶³ *Karaduman v Turkey* No. 16278/90, 3.5.1993.

⁶⁴ *Kalac v Turkey* No. 20704, 1.7.1997.

⁶⁵ For example, in cases concerning the prohibition on wearing the headscarf in universities and schools: *Şahin v Turkey* No. 44774/98, 10.11.2005; *Dahlab v Sweden* No. 42393/98, 15.2.2001; *Dogru v France* No. 27058/05, 4.12.2008.

which it might be imposed and foresee the consequences of their actions with a degree of accuracy; and,

- ‘necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’.

The principle of proportionality

The principle of proportionality provides a structured way to determine how to balance competing interests on any particular set of facts and in any particular context. To be ‘necessary’, interference with Article 9(1) must have a legitimate aim, i.e. it must reflect a pressing concern in a democratic society and have a specific purpose. It must also ‘be proportionate to the legitimate aim pursued’.⁶⁶ This includes a requirement that the restriction is not arbitrary, irrational or ineffective. The principle of proportionality is also commonly expressed as pursuing the least restrictive alternative or ‘not using a sledgehammer to crack a nut’.

In recent years, domestic courts have - controversially - shown a greater propensity to use the filters to find that interference has not taken place, short-circuiting any need for a discussion of justification. Much commentary focuses on this inconsistency and the uncertainty that now exists as to whether judges will find favour with Article 9 claims at either the interference or justification stage (see sections 5.3 and 5.4). 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.⁶⁷

4.3 Discrimination on the grounds of religion or belief

Laws prohibiting discrimination on grounds of religion or belief are also of recent origin. The legal landscape shifted with the 2000 EU Framework Employment Directive, implemented in the UK by Employment Equality (Religion or Belief) Regulations 2003, which introduced obligations on employers and providers of vocational training not to discriminate, victimise or tolerate harassment on grounds of religion or belief (Knights, 2007, Chapter 5; Vickers, 2008, Chapter 5). This was

⁶⁶ *Serif v Greece* No. 38178/97, 14.12.1999 at para. 49.

⁶⁷ For example, in *R (Watkins-Singh) v The Governing Body of Abedare 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.

followed by the Equality Act 2006 and the Equality Act 2010, which replaced the 2003 regulations and a raft of other anti-discrimination laws (Hepple, 2011).

The Equality Act 2010 prohibits direct discrimination, indirect discrimination, harassment and victimisation in relation to certain areas such as goods and services, employment and education.⁶⁸ This report focuses on direct and indirect discrimination.

Direct discrimination

Direct discrimination occurs when A treats B less favourably than A treats or would treat others.⁶⁹ The law provides protection against less favourable treatment 'because of a protected characteristic'; this includes association with someone who has a protected characteristic. For example, it is direct discrimination if A refuses to offer a job to B because B is a Muslim or because B's husband is a Muslim. It also includes less favourable treatment of someone because they are **perceived** to have a religion or belief, even if this is not in fact correct. In direct discrimination cases, the claimant must first prove facts from which the tribunal can conclude that unlawful discrimination has occurred. The burden of proof then passes to the respondent. Direct discrimination cannot be justified; there is no defence of reasonableness. The only defence open to the respondent is to prove that no discrimination occurred. Courts and tribunals have generally taken a restrictive approach to direct discrimination and successful claims are rare.⁷⁰

Indirect discrimination

Indirect discrimination occurs where an apparently neutral provision, criterion or practice puts persons with a particular protected characteristic at a disadvantage compared with others who do not share that characteristic **and** applying the provision, criterion or practice cannot be objectively justified. For example, if an employer introduces a new rota that requires all employees to be available for work on Sundays, this puts practising Christians at a particular disadvantage and may be indirectly discriminatory unless it can be justified; for example, because of a compelling business need.⁷¹

⁶⁸ Harassment on grounds of religion or belief is only prohibited in relation to employment.

⁶⁹ Equality Act 2010, s.13.

⁷⁰ See *Bodi v Teletext* [2005] ET Case No. 3300497/2005, 13-14 October 2005, in which the claimant successfully argued that he had not been shortlisted for a job on grounds of his Asian race and/or Muslim religion.

⁷¹ See *Williams-Drabble v Pathway Care Solutions* [2004] ET Case No. 2601718/2004, 2 December 2004.

The operation of indirect discrimination is comparable to that used in Article 9 cases in the sense that the court or tribunal determines whether there has been an interference (or 'disadvantage'), and if so, whether it can be justified. A key distinction is that the law on indirect discrimination does not protect solitary disadvantage; it must be shown that the provision, criterion or practice puts 'persons' of the claimant's religion or belief at a particular disadvantage as well as actually disadvantaging the claimant. This requirement to show group disadvantage has been criticised for leaving individual believers unprotected from indirect discrimination (Vickers, 2009a) (see section 5.4).

There have been a number of successful indirect discrimination claims, for example, relating to working hours⁷² and religious dress.⁷³ Other claims have, for various reasons, failed either on grounds of either interference (disadvantage)⁷⁴ or justification.⁷⁵ This has given rise to concern that some of the same factors which have inhibited the success of Article 9 claims may also prevent successful indirect discrimination claims in a manner which is unduly restrictive of claims based on religion or belief (see section 5.4).

Exceptions relating to religion or belief

The Equality Act 2010 contains exceptions permitting discrimination in certain limited and specified circumstances. Some relate to religion or belief. A distinction can be made between religion or belief exceptions that relate to employment⁷⁶ and those that relate to the provision of goods and services.⁷⁷ Both have proved contentious; we examine this controversy in sections 6.6 and 6.7.

⁷² For example, *Fugler v MacMillan - London Hairstudios Ltd* ET Case No. 2205090/2004, 21-23 June 2005, concerning a Jewish claimant who was disadvantaged by a requirement to work every Saturday when no attempt had been made by her employer to rearrange her duties.

⁷³ For example, *Noah v Sarah Desrosiers (trading as Wedge)*, ET Case No. 2201867/2007, 29 May 2008, concerning a Muslim applicant for a job in a hair salon whose interview was terminated because she was wearing a headscarf and the salon required stylists to display modern hair styles; the tribunal found that the respondent had accorded disproportionate weight to this business requirement.

⁷⁴ Most controversially, *Eweida v British Airways* [2010] EWCA Civ 80.

⁷⁵ For example, *Azmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07/MAA, 30 March 2007.

⁷⁶ Equality Act 2010, Schedule 9, paras. 2-3.

⁷⁷ Equality Act 2010, Schedule 23, paras. 2 and 29.

Public sector equality duty

The 2010 Act extends and strengthens the public sector equality duties. Previously, these applied only to race, sex and disability; the new single general public sector equality duty applies to all protected characteristics, including religion or belief. The duty has three elements:

- eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by the Act;
- advancing equality of opportunity between persons who share a relevant characteristic and persons who do not share it; and
- fostering good relations between persons who share a relevant characteristic and persons who do not share it.⁷⁸

The duty is placed on most central and local government authorities, health authorities, schools, and the police. It came into force in April 2011. See section 9.4 for a discussion of issues involved in implementing the duty in relation to religion or belief.

4.4 Contextualising legal cases

This section discusses the importance of contextualising legal judgments in order to determine their social as well as legal significance.

Legal judgments may raise important matters of principle. However, being highly fact specific, they are not **necessarily** representative of common experience or a reliable indicator of the place of religion or belief (or particular religions or beliefs) in society. There are invariably contingent reasons why certain cases come to court and others do not. Potential claimants may not wish bring cases or have the resources to do so.

The outcome of cases is often unpredictable and may appear contradictory. This is partly due to the heavy reliance on the principle of proportionality in assessing whether interference or disadvantage is justified in a given case (Vickers, 2010: 298-99) (see section 4.2). This makes it hard to 'read across' from one case to another because every case is fact-sensitive. For example, it may appear difficult to reconcile why one tribunal held that a Muslim security guard did not suffer indirect discrimination when his employer refused him permission to leave work early on a

⁷⁸ Equality Act 2010, Part 11, Section 149.

Friday to attend a mosque;⁷⁹ while another held that a Christian care worker did suffer indirect discrimination when her employer introduced a rota requiring her to work on Sundays and miss going to church.⁸⁰ In the former, the disadvantage was held to be a proportionate means of achieving a legitimate aim'; in the latter, it was not.⁸¹ Similarly, Employment Tribunal decisions may appear to show that it is proportionate to restrict the wearing of a cross at work,⁸² but not the wearing of the headscarf,⁸³ the proportionality decision having been weighed differently in each case.

In other instances, legal judgments may actually **be** contradictory; for example, the 'specific situation' rule has been applied inconsistently over time by the ECtHR, while recent domestic judgments which apply the rule restrictively are at odds with recent ECtHR judgments which have chosen to disregard it (see sections 5.3 and 5.4). It is particularly difficult to generalise from Strasbourg case law given the wide discretion granted to states by the ECtHR to determine the precise relationship between church and state and the place of religion or belief in the public sphere (see section 4.2).

Public responses to high-profile cases may make conflicts between religion or belief and other interests appear more intractable or prevalent than they actually are (Malik, 2008a: 6-7). This may be especially so where understanding is solely reliant upon media reports or the views of lobby groups and is not also informed by the detailed circumstances of each case and the reasoning in legal judgments. In particular, the prominence of cases concerning religion or belief and sexual orientation can be explained in part by the vigorous backing for such cases by organisations such as the Christian Legal Centre and Christian Concern (Afridi and Warmington, 2010: 10) and by consistently high-profile coverage in newspapers such as the *Daily Mail* and *Daily Telegraph*.

For all these reasons, caution is required when seeking to generalise from specific cases or assess their social, as well as legal, significance.

⁷⁹ *Cherfi v G4S Security Services Limited* EAT Case No. 0379/10/DM, 24 May 2011.

⁸⁰ *Williams-Drabble v Pathway Care Solutions* [2004] ET Case No. 2601718/2004, 2 December 2004.

⁸¹ See also Howard (2011a, b) for a discussion of the application of proportionality in cases concerning the wearing of religious symbols in British schools.

⁸² *Chaplin v Royal Devon and Exeter NHS Foundation Trust* ET Case No. 1702886/2009, 6 April 2010.

⁸³ *Noah v Desrosiers (trading as Wedge)* ET Case No. 2201867/2007, 29 May 2008.

4.5 Selection of significant or high-profile cases

This section introduces a selection of domestic legal cases relating to religion or belief that have established important precedents and/or been particularly contentious. See Appendix 8 for summaries of the cases referred to and also for the case references.

Cases relating to collective religious practice and the activities of religious organisations

These include cases concerning:

- exceptions in the Equality Act 2010 (and its predecessors) relating to employment:
 - *R (Amicus - MSF Section) v Secretary of State for Trade and Industry*
 - *Reaney v Hereford Diocesan Board of Finance*
- exceptions in the Equality Act 2010 (and its predecessors) relating to goods and services:
 - *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*
- the entry criteria of state-maintained schools with a religious character:
 - *R (E) v JFS Governing Body*

Cases relating to individuals' manifestation of their religion or belief

These include cases:

- in an employment context in relation to dress codes:
 - *Eweida v British Airways*
 - *Chaplin v Royal Devon and Exeter NHS Foundation Trust*
 - *Azmi v Kirklees Metropolitan Council*
 - *Noah v Sarah Desrosiers (trading as Wedge)*
- in an employment context in relation to working hours:
 - *Copsey v WWB Devon Clays Ltd*

- in an educational context in relation to dress codes:
 - *R (Begum) v Headteacher and Governors of Denbigh High School*
 - *R (Watkins-Singh) v The Governing Body of Abedare Girls' High School*
 - *R (Playfoot) (A Child) v Millais School Governing Body*

- in an educational context in relation to corporal punishment:
 - *R v Secretary of State for Education and Employment and others, ex parte Williamson*

Cases concerning individuals where discrimination on grounds of religion or belief and on grounds of sexual orientation have both been at issue

These include cases:

- where religious individuals have refused on grounds of conscience to provide goods or services to others on the grounds of their sexual orientation:
 - *Ladele v London Borough of Islington*
 - *McFarlane v Relate Avon Ltd*
 - *McClintock v Department of Constitutional Affairs*
 - *Hall and Preddy v Bull and Bull*

- where, in other circumstances, individuals claim to have been discriminated against because of their conscientiously-held beliefs that same sex relationships are morally wrong:
 - *R (Johns) v Derby City Council*

Cases concerning the definition of religion or belief

- *Grainger Plc v Nicholson*

4.6 Conclusion

The right to freedom of religion or belief and the law prohibiting discrimination on grounds of religion or belief have provoked a considerable amount of litigation, some of which has been highly contentious. However, these cases do not necessarily denote prevalent or entrenched problems in society; nor can we assume that they are a reliable indicator of the place of religion or belief (or particular religions or beliefs) in society.

As Sandberg (2011a: 130) notes, the law on equality, human rights and religion or belief reflects:

... a complicated and conflicted move towards a multi-faith society where the State seeks to facilitate (and regulate) a religious free market by increasing the quantity and reach of regulation.

For some, these new standards are welcome and might in turn be used to examine a number of long-standing legal provisions concerning religion or belief.⁸⁴ For others, the 'increasing encroachment of legal restrictions on what was hitherto a field of unregulated liberty is distinctly illiberal', undermining the autonomy of religious associations and at times constraining the very significance of religion (Rivers, 2007: 51). In Chapters 5-7 we explore these two broad perspectives in relation to particular themes and cases.

⁸⁴ For example, laws relating to religious offences; religion in schools, and the internal spiritual laws and practices of religious groups. See generally Sandberg (2011a), Chapters 7-9. See section 2.4 for a discussion of equality and human rights in relation to minority legal orders.

5. Case law on equality, human rights and religion or belief

5.1 Introduction

This chapter examines domestic case law concerning Article 9 of the European Convention on Human Rights and the law prohibiting discrimination on grounds of religion or belief and debates it has given rise to. It discusses the uncertainty that exists around the definition of 'belief'. It also examines the tendency for Article 9 rights to be construed narrowly in domestic courts, and the consequent debate about the institutional competence of courts and tribunals to rule on matters of religion or belief and to comprehend the significance of religions or beliefs to their adherents. The chapter also discusses the idea of a duty of 'reasonable accommodation' for religion or belief in the workplace. This chapter should be read in conjunction with Chapter 6 which focuses on the issue of competing interests relating to religion or belief and the way in which these have played out in law and public debate.

5.2 Matters of definition in relation to religion or belief

The lack of clarity as to what constitutes a religion or belief - and the instability this creates at the heart of the protection provided - arises frequently in legal and academic commentary (Ahdar and Leigh, 2005: 110-24; Griffith, 2007; Knights, 2007: 40-43; Sandberg, 2011a, Chapter 3; Vickers, 2008, Chapter 2).⁸⁵

Under the Equality Act 2010, religion means 'any religion' and belief means 'any religious or philosophical belief'; the lack of religion or belief is also covered. The European Convention on Human Rights (ECHR) also covers 'religion or belief'. As noted in section 4.2, the European Court of Human Rights (ECtHR) has given a wide interpretation to the meaning of religion or belief. Effectively, the defining boundary is not between religion and belief, but between protected beliefs and those that are too ill-defined to warrant protection.

The Explanatory Notes accompanying the Equality Act 2010 follow Strasbourg jurisprudence in explaining that a 'philosophical belief' must, among other things, 'attain a certain level of cogency, seriousness, cohesion and importance' and be 'worthy of respect in a democratic society'.⁸⁶ The 'respectability' requirement appears out of step with the protection for freedom of expression under Article 10 ECHR, which includes speech that offends, shocks or disturbs and not only inoffensive

⁸⁵ We consider here only human rights law and discrimination law; the definition of religion or belief is also significant in charity and registration law and, for example, in asylum cases. See Sandberg (2011a), Chapter 3.

⁸⁶ Equality Act 2010 Explanatory Notes, para. 52

speech.⁸⁷ Vickers (2010: 284-85) recommends removing the respectability hurdle, though respectability might still be a factor in deciding whether discrimination for manifesting a belief is justified.

This is not the only matter of uncertainty. The Explanatory Notes also state that beliefs should relate to ‘a weighty and substantial aspect of human life and behaviour’ in order to warrant protection. As Hepple (2011: 41) notes, this may leave scope for belief in a political philosophy (such as communism or free-market capitalism) to claim protection, though not a belief in a political party or action. This was a matter of concern for several of our interviewees who noted that, for example, extreme right-wing organisations might seek protection under discrimination law.

Other working definitions exclude this possibility. The British Humanist Association (BHA) (2007a: 8) has proposed the following minimum working definition of ‘religion or belief’:

A collective belief that attains a sufficient level of cogency, seriousness, cohesion and importance and that relates the nature of life and the world to morality, values and/or the way its believers should live.⁸⁸

Similarly, Vickers (2010: 285) would limit protection to beliefs which are ‘more philosophical or religious in nature, in that they relate in some way to the meaning attached to the world or to fundamental aspects of human existence’. These definitions allow scope for newer and minority religions or beliefs to be protected, along with subjective understandings of religion or belief, though not beliefs held only by individuals or small groups (Bamforth et al., 2008: 890-99).

⁸⁷ In a case concerning whether corporal punishment was a manifestation of parents’ and teachers’ religious belief, the House of Lords was clear that to limit protection only to beliefs which are respectable or of which the court approves is inappropriate: ‘in matters of human rights the court should not show liberal tolerance only to tolerant liberals’. See *R v Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15 at para 60.

⁸⁸ This definition was proposed in relation to charity law as part of the BHA’s campaign to have the advancement of non-religious beliefs for the public benefit accepted as a charitable object. The Charities Act 2006 specifically recognises that the promotion of religion is a charitable purpose. During the passing of the Act, humanist groups argued unsuccessfully that the promotion of non-religious beliefs should be given the same treatment as religious beliefs under law. After several years of negotiation, in October 2011, the BHA announced that the Charity Commission had allowed it to amend its charitable objects to include the advancement of humanism. See <http://www.humanism.org.uk/news/view/908>.

Domestic case law concerning the definition of belief

Case law in domestic tribunals has established that a belief in a political party is not covered (e.g. those of the British National Party);⁸⁹ however, controversially, belief in man-made climate change is,⁹⁰ as are anti-hunting sentiments,⁹¹ a belief in spiritualism and life after death,⁹² and a belief that public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion.⁹³ These cases have excited much negative commentary. Vickers (2010: 283) notes that ‘it becomes difficult to see where boundaries are between the types of belief that should be covered and those that should not’; for example, if a belief in man-made climate change warrants protection, then so might belief in any other scientifically-grounded theory. Further, the climate change case may have damaging (if unintended) consequences if applied in other contexts. It could, for example, mean that attempts to combat climate change could be viewed as the promotion of a ‘belief’, and therefore inappropriate for the state or public sector organisations (Vickers, 2010: 283-84). Pitt (2011: 403) notes that the inclusion of all religions and all beliefs within the rubric of a protected characteristic ‘leads to a real danger of trivialising the equality principle’.

Concerns about emerging case law on matters of definition were expressed by interviewees affiliated to groups situated in both the ‘religion’ and ‘belief’ strands. Some Christian interviewees objected to placing ‘idiosyncratic’ views or attitudes contingent on contemporary events on a par with beliefs held for millennia. David Pollock argued from a humanist perspective that recent judgments risked ‘watering down’ the concept of religion or belief such as to bring it into disrepute; this might, in turn, provoke a backlash resulting in a diminution of protection for all non-religious beliefs, including humanism.

⁸⁹ *Baggs v Fudge* ET Case No. 1400114/2005, 23 March 2005. See also *Kelly and others v Unison* ET Case No. 2203854-57/08, 28 January 2010, in which the Employment Tribunal found that ‘philosophical belief’ did not include ‘political belief’, on the basis that the Employment Equality (Religion or Belief) Regulations 2003 do not protect all political beliefs and opinions (in this case, beliefs based on Marxism/Trotskyism and the Socialist Party).

⁹⁰ *Grainger Plc v Nicholson* EAT Case No. 0219/09/ZT, 3 November 2009.

⁹¹ *Hashman v Milton Park, Dorset Ltd (t/a Orchard Park)* ET Case No. 3105555, 4 March 2011.

⁹² *Greater Manchester Police Authority v Power* EAT Case No. 0434/09/DA, 12 November 2009.

⁹³ *Maistry v BBC* ET Case No. 1313142/10, 29 March 2011.

Interviewees concerned with employment also expressed disquiet about the lack of definitional clarity created by case law. Steve Williams, Head of Equality at Acas, described it as a ‘problematic’ area for employers. Simon Langley, National Grid’s UK Lead Manager for Inclusion and Diversity, argued that the assessment of whether a belief enjoyed legal protection ‘shouldn’t be left as a judgment call for employers because judgment calls by definition expose both parties to risk’. Another equality specialist working for a large private sector employer, who wished to remain anonymous, noted that it was ‘exceptionally difficult’ to interpret the definition of ‘belief’: ‘It’s a big issue for us; line managers just can’t get their heads around it’. Alan Beazley, an Advice and Policy Specialist with the of the Employers’ Forum on Belief (now part of the Employers’ Network for Equality and Inclusion) commented that the ‘acid tests’ established through case law for the definition of belief were useful to employers, yet particular judgments had been ‘surprising’.

These comments suggest that the criteria set out in the Explanatory Notes to the Equality Act for determining what is a ‘philosophical belief’ are either insufficiently known about and/or insufficiently clear. Indeed, the only examples offered in the notes as beliefs that would be excluded are ‘any cult involved in illegal activities’ and ‘adherence to a particular football team’.⁹⁴ Other guidance documents deal with the question of definition only briefly (for example, Acas, 2011: 7). Taken as a whole, these concerns suggest the need for more detailed and accessible guidance for decision-makers which might assist them to achieve clarity and consistency in matters of definition of ‘belief’.

5.3 Article 9 in domestic case law

This section analyses selected cases in domestic courts where Article 9 has been at issue. Some commentators suggest that domestic courts have taken such a cautious approach to Article 9 that it has come to protect ‘only a very restrictive and conservative form of religious life’ (Sandberg, 2011a: 98).

Successive Article 9 claims have failed for reasons which have changed over time. In earlier cases, it was found that, although there had been an interference with the claimant’s Article 9(1) right, the interference had been justified under Article 9(2). That approach was evident in the case of *R v Secretary of State for Education and Employment and others, ex parte Williamson*, in which teachers and parents at four independent Christian schools claimed that mild corporal punishment was part of the duty of education in a Christian context.⁹⁵ The House of Lords held that there had

⁹⁴ Equality Act 2010 Explanatory Notes, paras. 52-53.

⁹⁵ [2005] UKHL 15.

been an interference with the claimants' Article 9(1) rights, but that the interference was justified under Article 9(2) because, among other reasons, it had the legitimate aim of protecting children as a vulnerable group.⁹⁶

In recent cases, courts have been more ready to reject claims at the interference stage, using the 'filtering' devices described in section 4.2. In particular, as Sandberg (2011a: 89-99) notes, courts have used the 'manifestation/motivation' requirement and the 'specific situation' rule. A leading case is *R (Begum) v Headteacher and Governors of Denbigh High School*. The majority in the House of Lords held that there was no interference with Article 9 in a situation where a girl voluntarily accepted a place at a school, since she had knowledge of its uniform policy, which did not permit the wearing of a *jilbab* (full length gown), and in a situation where she could have chosen to attend a school where the *jilbab* was permitted (Malik, 2008a).⁹⁷ The House of Lords, quoting selectively from ECtHR judgments, emphasised the specific situation rule to find that (in the words of Lord Bingham), interference with Article 9 'is not easily established'.⁹⁸ The judgment also stated that Article 9 'does not protect every act motivated or inspired by a religion or belief'.⁹⁹

The *Begum* decision was found to be an insuperable barrier to establishing interference in several subsequent cases. In one, a twelve-year-old school girl lost her claim for judicial review of a decision that she could not wear a *niqab* veil in the presence of male teachers; the judge ruled that because the claimant could have gone to another school which would allow her to wear the *niqab*, there was no interference with her rights.¹⁰⁰ Another application for judicial review on behalf of a schoolgirl who wished to wear a 'purity' ring as a symbol of her religiously-motivated commitment to celibacy before marriage was refused because the wearing of the ring was not considered to be a manifestation of that belief.¹⁰¹

⁹⁶ See Sandberg (2011a: 89) for a discussion of the impact of *Williamson* on subsequent lower court decisions.

⁹⁷ *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15. However, two Law Lords (Lord Nicholls and Lady Hale at paras. 41 and 92-99 respectively) differed from the other three in finding that Article 9 **had** been engaged, but that the interference was justified.

⁹⁸ Para. 24.

⁹⁹ Para. 22.

¹⁰⁰ *R (X) v Y School* [2006] EWHC (Admin) 298 at paras. 26-40.

¹⁰¹ *R (Playfoot) (A Child) v Millais School Governing Body* [2007] EWHC (Admin) 1698.

Another recent case, however, illustrates the unpredictability of Article 9 case law. In *R (Imran Bashir) v The Independent Adjudicator, HMP Ryehill and the Secretary of State for Justice*,¹⁰² the High Court held that disciplining a Muslim prisoner for failing to give a urine sample in a drugs test when he was in the midst of a voluntary fast breached his right to manifest his beliefs and was not proportionate. The ruling is relatively limited in its practical effect; however, it is notable for the way it sidesteps the specific situation rule.¹⁰³

5.4 The ‘filters’ used by domestic courts in religion or belief cases

The ‘specific situation’ rule and the requirement that claimants must show that they are ‘manifesting’ their religion or belief raise wider legal and conceptual questions. These relate to the institutional competence of courts and tribunals to rule on matters of religion or belief and to comprehend the significance of religions or beliefs to their adherents. This section examines the use of these filters and critiques of them. It refers to both free-standing claims under Article 9 and claims concerning discrimination on grounds of religion or belief, since tribunal decisions concerning discrimination now routinely refer to Article 9 case law. They have generally concluded that, as Sedley LJ did in *Eweida*, the jurisprudence on Article 9 ‘does nothing to advance the claimant’s case’ because of the restrictive interpretation of Article 9 in domestic courts.¹⁰⁴

The specific situation rule

The notion that voluntary submission to a system of norms creates a ‘specific situation’ which limits the claimant’s right to manifest their religion or belief is contested on both legal and ethical grounds. In *Copsey v WBB Devon Clays Ltd*, the Court of Appeal applied the rule (rejecting the appeal of a Christian claimant who

¹⁰² [2011] EWHC 1108.

¹⁰³ The Secretary of State argued that requiring a urine sample was not an interference with Article 9. He based this on case-law including *Begum* which provides that where a person has voluntarily accepted a situation where his religious beliefs are not accommodated, there is no interference. Mr Bashir, it was argued, had by committing a serious crime voluntarily accepted the restrictions of being in prison. HHJ Pelling QC rejected this analysis, being unconvinced that a choice of employment could be compared to being a prisoner. Judge Pelling notes (at para. 22) that none of the authorities that are considered by Lord Bingham in *Begum* concern the position of prisoners.

¹⁰⁴ Para. 22.

was dismissed after refusing to accept regular Sunday working), but strongly criticised it.¹⁰⁵

Commentators question whether such situations are always truly voluntary and whether the notion of surrendering one's rights by (say) signing a contract is consistent with the absolute right to **change** one's religion. Leader (2007: 725) argues that when two basic rights are at stake for an individual - such as the right to freedom of religion or belief and the right to work - the individual should be allowed to 'find a personal optimum' subject only to an institution's demonstration that it cannot go any further to accommodate that optimum; this is preferable to a 'unilateral power' for institutions to dictate the alternatives, with the consequence that individuals with strong beliefs 'withdraw into angry or cynical indifference towards [their] society'. In the context of the workplace, Vickers (2008: 52-53) similarly argues that the 'right to resign' should remain the residual protection, rather than the starting (and swift ending) point for the provision of protection.

The specific situation rule in the context of employment

The majority of our interviewees acknowledged that individuals whose religion or belief is important to them have a responsibility to make sensible career choices: as one put it, an Orthodox Jew should no more become a professional footballer required to play on Saturdays than a vegan should take a job in an abattoir. Participants of all types agreed that employers should not always have to accommodate an individual's religion or belief; observing one's religion or belief was not seen as 'cost free', especially where conflict with the law or job requirements is foreseeable. Put another way, it was widely agreed that everyone has a right to work but no-one has a right to do a particular job (or to make a living by providing particular goods or services). For example, the case of *Azmi v Kirklees Metropolitan Council*, in which a tribunal found that it was proportionate for a primary school to suspend a teaching assistant who wished to wear the full face-veil when providing teaching support to children, was generally felt to have been correctly decided. An exacerbating factor was that the claimant had not worn a veil when she attended the job interview or signalled that her religious beliefs placed any limitation on her working.¹⁰⁶

¹⁰⁵ [2005] EWCA Civ 932. Rix LJ argued (at paras. 65-66) that Strasbourg jurisprudence 'did not represent a body of consistent decisions' in cases where the employer, rather than the employee, sought to vary the employee's working hours.

¹⁰⁶ *Azmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07/MAA, 30 March 2007, at para. 8.

Participants also generally accepted that if an employee experiences a significant religious transformation that means they can no longer do an integral part of their job (for example, serving alcohol in a bar or supermarket), they may have to pay a personal sacrifice and exercise their 'right to resign'. Others noted, however, that there are circumstances in which it may be reasonable (and may make good business sense) for an employer to accommodate an employee's strongly-held belief, even if it is the employee who has 'moved the goalposts'; for example, if only a peripheral aspect of the job is affected. Such circumstances would form part of the proportionality decision in a given case.

One exception to this view came from Jasdev Singh Rai, commenting from a Sikh perspective, who could not envisage any circumstance where it would be reasonable to restrict a Sikh's professional options because of his obligation to wear a turban. For example, he noted that the technology existed to make bullet proof turbans which would allow Sikh police officers to join firearms teams, but police services had been unwilling to invest in it.¹⁰⁷

Many interviewees concerned with the 'religion' strand were troubled by what they saw as too wide an application of the specific situation rule in domestic jurisprudence. The most acute tensions were seen to arise in situations where the ethical basis of a job changes because of a change in the law. Malcolm Brown suggested that 'contracting out' of protection of the right to manifest religion or belief in such circumstances risks reducing employees to 'mere functionaries'. The case of *Ladele v London Borough of Islington* aroused particularly polarised views among our participants. The issue of 'conscientious objection' raised by this case is explored in detail in section 6.5.

The specific situation rule in the context of education

Some commentators view the notion of voluntarily contracting out of Article 9 as particularly problematic in the context of education. Knights (2007: 48) notes that the *Begum* decision was striking in that it elides the ECtHR decisions relating to education to those concerned with employment; however, it is questionable whether the provision of state-funded education can be so readily aligned with that of private employment. The majority of Law Lords in *Begum* based their decision on the fact that Shabina Begum had a free choice to attend another school. The minority held that, in reality, parents impose their choice of school on their children; that adolescents cannot foresee all the consequences of their decisions; and that moving

¹⁰⁷ See 'Sikh turbans banned from armed police operations', BBC News website, 23 April 2010.

schools can be both difficult and disruptive (see also section 6.8 for discussion of the implications of this case).¹⁰⁸

The manifestation requirement

Hambler (2008) distinguishes between ‘negative’ manifestation (such as a request for time off to fulfil religious obligations or to abstain from certain duties for reasons of religious conviction); ‘passive’ manifestation (such as wearing certain dress or symbols); and ‘active’ manifestation (such as distributing literature promoting a religion or belief). Hambler identifies in case law an emergent acceptance of the need for employers to accommodate requests for employees to take time off for religious observance.¹⁰⁹ However, passive and active¹¹⁰ manifestation of religion or belief, as well as negative manifestation that involves withdrawing from certain workplace tasks, appear to have enjoyed little additional protection since the Employment Equality (Religion or Belief) Regulations 2003 were introduced. This indicates that ‘privatised faith is much more acceptable in contemporary discourse than a faith which is holistic in the way it encompasses both the private and the public sphere’ (Hambler, 2008: 133).

Judgments relating to the right to manifest one’s religion or belief frequently involve consideration of whether a particular belief or practice is ‘core’ or ‘peripheral’ and whether or not it is prescribed by the religion or belief.¹¹¹ This in turn raises the profound questions of how far the law can comprehend religions and beliefs as normative systems on their own terms and how far it can accommodate the degree of subjectivity involved (McCrudden, 2011; Stychin, 2009).

¹⁰⁸ Para. 92.

¹⁰⁹ Especially, as noted above, where the employer, rather than the employee, seeks to change working patterns; for example, *Williams-Drabble v Pathway Care Solutions Ltd* [2004] ET Case No. 2601718/2004.

¹¹⁰ See *Greater Manchester Police Authority v Power* EAT Case No. 0434/09/DA, 12 November 2009 concerning a police trainer dismissed for bringing material relating to spiritualism to the workplace.

¹¹¹ A further consideration might be the sincerity of the professed belief; see Hambler (2011) for suggested tests for establishing sincerity in religion or belief cases.

Courts have traditionally been careful **not** to make determinations on matters of belief or practice.¹¹² However, some commentators suggest that in both Article 9 and religious discrimination cases, the courts' previous reticence has been replaced by a 'much more self-confident willingness to adjudicate contested issues touching on the religious sphere' (McCrudden, 2011: 30). It is also suggested that judges are more ready to determine what is core or peripheral with regard to Christianity than other faiths, even though this strays beyond the boundaries of their usual competence, possibly because they consider that they are more familiar with it.¹¹³ There is disquiet among some Christian commentators that the more significant the effect of non-compliance with a religious rule is for the adherent, the more likely it is that employers will have to accommodate the belief; this might give greater protection to more rule-bound (or even punitive) religions than to Christianity (Vickers, 2010: 299-300).

Such perceptions even prompted a call by the former Archbishop of Canterbury, Lord Carey, for a separate court structure for religious cases involving judges who have a 'proven sensibility to religious issues';¹¹⁴ this proposition was not advocated by any participants in our research or in any literature we have reviewed. However, interviewees situated in the 'religion' strand expressed concern about what they saw as an overly-restrictive approach to manifestation in domestic courts. For some, it suggested that religion or belief should be 'boxed away' or treated as a 'private eccentricity'. Barney Leith OBE of the Bahá'í community of the UK argued that domestic courts:

... have made more of a separation between belief and practice than I and many people of faith feel comfortable with; this is very challenging

¹¹² For example, in *R (Johns) v Derby City Council* [2011] EWHC Admin 375 (at para. 41), Munby J stated that: 'The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect. And the civil courts are not concerned to adjudicate on purely religious issues, whether religious controversies within a religious community or between different religious communities'.

¹¹³ For example, in *Playfoot*, the court applied an objective test to hold that the claimant was under no obligation by reason of religious doctrine to manifest her religion in the way she claimed. It is not only Christian claimants who have been affected by judicial determinations on matters of faith and doctrine. A similar test was applied in *R (Ghai) v Newcastle City Council* [2009] EWHC (Admin) 978, in which open air cremation was held (at para. 101) to be 'sufficiently close to the core of one strand of orthodox Hinduism' to warrant protection but to be only a matter of tradition and belief for Sikhs.

¹¹⁴ Lord Carey supported the applicant in *McFarlane v Relate Avon* [2010] EWCA Civ 880; see paras. 16-18.

because you may believe something in all conscience and ... yet there is a rhetoric that you can believe what you like but you are not necessarily free to act on your belief.

From a different perspective, the difficulty for secular courts of adjudicating doctrinal disputes as to what a religion requires is presented as an argument for **limiting** the protection afforded to religion (McColgan, 2009: 11). For example, in the case of *Williamson*, the House of Lords accepted the parents' and teachers' views as to the necessity of corporal punishment as 'religious'; this potential 'trump card' might have fatally undermined the prohibition of corporal punishment in schools had not the interference with those views been found to be justified under Article 9(2).

Interviewees from religion or belief groups emphasised the difficulties that judges (and other decision-makers) may face in determining matters of faith and doctrine. It was noted that the 'cross-fertilisation' of faiths complicates matters; for example, one Christian interviewee referred to the surprising number of Christians who believe in reincarnation. Jewish and Muslim interviewees gave instances of unresolved (or unresolvable) uncertainties in the interpretations of their faiths; for example, between Orthodox and Reform Judaism or between the four sources of Islamic law. It was noted that the lack of hierarchy between different traditions frequently precludes any definitive interpretation of 'core' or 'obligatory' practices. A Muslim participant added that 'religious and cultural baggage may become blurred' in such interpretations.

The issue of group disadvantage under discrimination law

The issue of what are 'core' or 'peripheral' beliefs has also arisen in discrimination cases, most controversially in *Eweida v British Airways*¹¹⁵ and *Chaplin v Royal Devon and Exeter NHS Foundation Trust*.¹¹⁶ In *Eweida*, a member of check-in staff wore a cross on a neck chain in breach of British Airways' uniform policy which prohibited visible religious symbols unless their wearing was mandatory. The Court of Appeal held that the uniform policy did not put Christians **as a group** at a particular disadvantage; there was no evidence that practising Christians considered the visible display of the cross to be a requirement of their faith.¹¹⁷ In *Chaplin*, which concerned a nurse who wished to wear a crucifix around her neck, the tribunal again found no evidence of group disadvantage; in this instance, another Christian nurse who worked with Chaplin and whose religious objection was weaker had removed

¹¹⁵ [2010] EWCA Civ 80.

¹¹⁶ ET Case No. 1702886/2009, 6 April 2010.

¹¹⁷ Para. 37.

her cross and chain and therefore was judged not to have been put at a particular disadvantage.

These judgments have been criticised for failing to protect beliefs held by individuals (or by a minority of believers within a larger religion or belief groups) (Pitt, 2011: 396-99; Sandberg, 2011a: 113-14; Vickers, 2009a). Pitt (2011: 397-98) notes that it is unclear from case law how many people need to be adversely affected in order for indirect discrimination to be established. She adds that the investigation of whether there is group disadvantage should be extended beyond the existing workforce to those who could potentially be employed by the same employer and that in the case of a large and diverse company, such as British Airways, this would probably be society at large.

It is not argued that the decisions in the two cases were necessarily incorrect, but rather that they should have been reached on the basis of an assessment of proportionality rather than at the interference stage. Such a change would bring discrimination law into harmony with Article 9 jurisprudence which expressly protects the manifestation of individual beliefs. The submission by the Equality and Human Rights Commission (EHRC) to the ECtHR in the case of *Eweida and Chaplin* follows this line of argument. It argues that group disadvantage may be difficult to identify in the context of diverse religious beliefs that, unlike other protected characteristics, are 'legitimately subject to autonomous interpretation by individual adherents'.¹¹⁸ It concludes that domestic case law 'currently fails adequately to protect individuals from religious discrimination in the workplace'.¹¹⁹

Overall, the concerns explored in this section suggest that courts and tribunals should ground their assessment of justification for interference in sociological rather than doctrinal or theological arguments; that is, they should assess whether interference was justified in relation to the particular social context in which it occurred, rather than whether the particular belief or practice was or was not 'core' or 'obligatory'. This does not preclude **any** scrutiny of belief or practice, particularly where (as the EHRC states), manifestations are 'less closely connected to requirements of a religion or belief'.¹²⁰ However, it suggests that such scrutiny should

¹¹⁸ Submission of the Equality and Human Rights Commission in the European Court of Human Rights, *Eweida and Chaplin v United Kingdom*, September 2011, para. 26.

¹¹⁹ Para. 30.

¹²⁰ Para. 31a.

occur at both the interference and justification stages in order that the merits of the case can be fully considered.

5.5 The concept of reasonable accommodation

Concerns about an overly-restrictive approach to religion or belief claims in domestic courts have prompted some commentators to call for the introduction of a specific duty on employers to make reasonable accommodation for the observance or practice of religion or belief.¹²¹ Such a duty exists on employers in the United States and some Canadian provinces (Vickers, 2008, Chapter 6). By extending the public sector equality duty to religion or belief, something akin to a duty of reasonable accommodation has now been imposed on public authorities (Hepple 2011: 43). The main difference between a reasonable accommodation duty and non-discrimination is that the former places a greater onus on the employer to accommodate employees' observance or practice of religion or belief (Vickers, 2008: 220). Such a duty may, therefore, create stronger protection for religion or belief claims depending on the threshold established for justifying any failure to accommodate (Vickers, 2008: 222-25).¹²²

A duty of reasonable accommodation has been advocated as a pragmatic response to the fact that 'religious belief is an important organising feature of many people's lives and that present arrangements are not even-handed in the extent to which they enable people to manage the competing demands upon them' (McColgan, 2009: 25). Examples of reasonable accommodation might include the provision of *halal* and *kosher* food in institutions where Muslim or Jewish employees were present in significant numbers; flexibility as regards appearance rules; and early finish times for observant Jewish workers on Friday evenings to permit compliance with Sabbath restrictions (McColgan, 2009: 26). Such a duty might also prevent litigation and divisive debate by avoiding 'hair-splitting' distinctions between direct and indirect discrimination arising from religion or belief (McColgan, 2009: 29; Hepple, 2011: 43). Another possible benefit would be to encourage consistency of practice across

¹²¹ The Independent Review of the Enforcement of UK Anti-Discrimination Legislation proposed that employers, schools and other institutions should be under a duty to make reasonable adjustment to accommodate a person's religious observance or practice, provided that this can be done without undue hardship for the employer's business or the conduct of the school or other institution (Hepple et al., 2000: 49).

¹²² In the United States, the threshold is very low; factors such as economic cost, inconvenience and complaints from other workers can be used to show that accommodation would cause 'undue hardship' to the employer (Vickers, 2008: 180-95). In Canada, the duty to accommodate is stronger, in terms of the expense or inconvenience that employers are expected to bear; however there is an onus on both parties to compromise and bear some cost (Vickers, 2008: 195-206).

employers: for example, Jit Jethwa observed from a Hindu perspective that Hindu employees experienced different treatment depending on whether they lived in London or elsewhere.

The EHRC conducted an informal public consultation in 2011 on whether a concept 'akin to reasonable accommodation for individuals wishing to manifest their religions or beliefs in the workplace should be incorporated into the approach to human rights in the UK' (EHRC, 2011).¹²³ Most religious respondents to that consultation either wanted the concept to be introduced immediately or to be further investigated.¹²⁴ Business representatives opposed the concept; it was perceived to be unclear and potentially unduly burdensome. Trade unions and lesbian, gay, bisexual and transgender (LGBT) respondents were concerned that it could 'act as a vehicle for religious people to discriminate and thereby threaten the rights of LGB and T people'.¹²⁵ Some religion or belief stakeholders, lawyers and academics were also opposed, suggesting there was no basis for treating religion or belief differently from any other protected characteristic. Some suggested that the effect of a duty of reasonable accommodation would be very similar in practice to that of non-discrimination and would not necessarily guarantee greater protection or consistency.

This research project did not ask participants expressly whether they favoured the introduction of a duty of reasonable accommodation. However, participants were asked about the criteria for deciding whether exceptions to general rules or practices should or should not be made on the basis of a person's religion or belief; for example if an employee wishes to wear certain clothing or symbols; distribute literature relating to their religion or belief; or have particular facilities provided. Such criteria would inform proportionality decisions regardless of the precise legal model used.

The extent and limits of reasonable accommodation

Among our participants, there was a high degree of consensus as to the **type** of factors which might in some circumstances reasonably restrict the manifestation of

¹²³ This was part of the Commission's informal public consultation inviting opinion on its submissions to the ECtHR in the cases of *Ladele*, *McFarlane*, *Eweida* and *Chaplin*); see section 1.3.

¹²⁴ EHRC (2011: 4-5).

¹²⁵ McColgan (2009: 28) suggests that this would not, in fact, be the case since '**reasonable** accommodation could not require an employer to override a prohibition on direct sex discrimination' (emphasis in original).

religion or belief in the workplace and the wider public sphere (i.e. that might constitute ‘undue hardship’ in relation to a duty of reasonable accommodation).¹²⁶ Agreement extended across interviewees and general survey respondents of all religious affiliations and none. The factors that were raised most consistently were:

- genuine health or safety concerns;
- cost and efficiency (taking into account the size of the employer);
- detrimental impact on colleagues (excluding pure offence);¹²⁷
- requirements for brand and uniformity;
- the capacity to communicate;¹²⁸ and
- the relative institutional power of the claimant.¹²⁹

We encountered a strong presumption across all types of interviewee **towards** the accommodation of religion or belief where these criteria do not apply or are not compelling. This was sometimes expressed as a presumption in favour of the principle of personal autonomy in the public realm. As David Pollock observed in relation to dress codes:

What people wear is a matter of personal freedom and autonomy. As with everything people say and do, it’s the effect on others that matters and it is only when others are affected that the law should have any purchase.

¹²⁶ A large number of general survey respondents with Christian affiliation stated that to be reasonable, restrictions should be stated upfront by employers and should apply equally to all religions or beliefs lest Christians find themselves less accommodated than those of other faiths.

¹²⁷ Interviewees from a variety of stakeholder groups, as well as several survey respondents, stated that pure offence should rarely be a determining factor in what beliefs or practices it is reasonable to accommodate; provisions in the Equality Act 2010 covering victimisation and harassment established the threshold for conduct in the workplace and beyond that there was, as one interviewee put it, ‘no right not to be offended’.

¹²⁸ This criterion was suggested by some interviewees and survey respondents concerned with both the ‘religion’ and ‘belief’ strands and other equality strands, including a Muslim participant. Those who suggested it proposed that it would often be reasonable to restrict the wearing of a full face veil in public-facing roles. This was also the argument which Jack Straw MP gave for asking constituents to remove the veil when meeting him. ‘I felt uneasy talking to someone I couldn’t see’, Jack Straw MP, 6 October 2006; <http://www.guardian.co.uk/commentisfree/2006/oct/06/politics.uk>.

¹²⁹ For example, it might be reasonable not to accommodate a Christian prison warden who wishes to wear a visible cross in a context where prisoners of other faiths or none might have reason to fear oppressive or biased treatment.

This was also underpinned for some interviewees by a broader principle of the inherent value of diversity in a workplace or public service. For example, Jon Benjamin of the Board of Deputies of British Jews argued that it would be ‘a terribly sad position to be in if non-Jewish schools were devoid of observant Jews’ because they did not accommodate flexible working around Jewish high holidays.

Many general survey respondents distinguished between the accommodation of religion or belief in relation to dress codes and what they saw as the more onerous duty of providing facilities (such as prayer rooms) or meeting dietary requirements (see also section 5.4). Many of those who identified as Christian noted that it was ‘going too far’ to expect employers actively to provide facilities; these should be regarded as ‘entirely discretionary’ and a ‘perk’. Moreover, employees might sometimes need to share the cost or take responsibility for their own requirements, for example by bringing their own food to work. Survey respondents of all affiliations were generally disinclined to accommodate the distribution of literature relating to religion or belief at work; many suggested that rules should be the same as for political literature, which might be placed on designated noticeboards but not be (as many put it) ‘forced on people’. Several Christian respondents argued that (as one put it) religious material should not be regarded as being ‘necessarily inappropriate ... or offensive simply because it contains material on areas of controversy’.

Interviewees generally acknowledged that decisions about what it is reasonable to accommodate are always fact-specific and may involve nuanced judgments as to the social context involved. Such decisions inevitably involve a degree of subjectivity. This was apparent in responses from interviewees and general survey respondents as to when it was reasonable to expect employers to accommodate employees’ religions or beliefs; for example, in a situation such as that faced by British Airways in *Eweida* or the hospital authorities in *Chaplin*.¹³⁰ ‘Common sense’ was frequently invoked - but what constitutes common sense was interpreted differently by different participants, including by those of the same religion or belief.

¹³⁰ Note that this section focuses on matters of justification rather than interference/disadvantage. The Court of Appeal in *Eweida* considered matters of justification (at paras. 30-39). It concluded that BA’s actions were a proportionate means of achieving a legitimate aim; therefore, even if indirect discrimination had been found, it would have been justified. It noted that the Employment Tribunal had concluded differently on the matter of justification; the tribunal found that prohibition of visible symbols was not proportionate because the eventual review which resulted in a relaxation of the code to permit the visible wearing of religious symbols could have taken place sooner had the (assumed) discriminatory impact of the code been analysed before November 2006.

The cases of *Eweida* and *Chaplin*

Malcolm Brown, representing the Church of England, sympathised with Nancy Eweida on the basis that her request to wear a visible cross harmed no-one and that 'doing things in public is how we live - our identity is played out in public'. However, Reverend Aled Edwards noted a personal view that some may, in the context of such debates, have been 'trying to make a point, rather than have a legitimate human right respected'. Charles Wookey of the Catholic Bishops' Conference of England and Wales added that:

What's important is that when people are recruited to roles, clear stipulations are made in advance about what the employer requires as regards dress. If that is done, the employee has no business kicking up later on ... I would veer on the side of the employer in these situations - they have a perfect right and sometimes a very clear need to have consistency of practice.

Muslim participants also gave different responses to the case. One suggested that Eweida should have been satisfied to wear the cross discreetly 'but not flaunt it'; others felt BA had been 'heavy handed' and that the judgment was 'unfair'. Concern was also expressed that the judgment could, in turn, stigmatise Muslims by creating the erroneous impression that Muslims who were permitted to wear headscarves were privileged over Christians. This concern may be well founded: some religious respondents to the EHRC's informal consultation on *Eweida* pointed to the perceived unfairness of granting accommodation to Muslims and Sikhs but not to Christians. Most (but not all) religious respondents to that consultation were also alarmed that limits on wearing a cross or crucifix were being set under what they saw as a 'secular agenda'.

Trade union participants in our research generally had little sympathy for Eweida. They noted in particular that she pursued legal action after compromises were offered and after BA had relaxed its uniform policy so as to permit the visible wearing of religious and charity symbols.¹³¹ Trade union respondents to the EHRC's consultation also felt the correct conclusions were reached in *Eweida* and *Chaplin* (EHRC, 2011: 2). Business respondents also felt the cases had been correctly

¹³¹ Media reports quote Eweida as having refused the compromise of wearing a cross as a lapel badge; 'BA cross women [sic] vows no compromise as 92-per cent of public back her', *Mail Online*, 26 November 2006; <http://www.dailymail.co.uk/news/article-418819/BA-cross-women-vows-compromise-92-cent-public-her.html#ixzz1aCYNW1Kj>. Eweida had also refused an accommodating offer by BA to move her (without loss of pay) to work involving no public contact; see *Eweida v British Airways*, para. 33.

decided and were concerned that the Commission's intervention could lead to greater regulatory burdens.

Among our interviewees, there was greater consensus across stakeholder groups around the outcome in the *Chaplin* case compared to that in *Eweida*.¹³² Malcolm Brown stated that:

We know the reasons why nurses can't wear anything dangling round their necks. It doesn't matter whether it's religious or not. It's a perfectly good pragmatic argument ... Where there is harm or genuine disadvantage, I think Christians should back off from the need to display their faith in public.

Several Christian interviewees noted that Chaplin could have worn the crucifix under her uniform. Aled Edwards gave weight not only to the health and safety argument, but also to the social context of the hospital ward: it appeared that a nurse 'was neither commissioned nor allowed' to wear the crucifix as a means of sharing his or her faith with patients. Chaplains were there to offer spiritual care.

Perceptions of reasonableness

The *Eweida* case has been particularly high profile. Politicians from each of the major UK parties criticised British Airways publicly in November 2006 and some (including two ministers) stated their intention to boycott BA.¹³³ The fact that the Court of Appeal subsequently found that the airline's actions **had** been a proportionate means of achieving a legitimate aim illustrates the gulf that can exist between different perceptions of what is reasonable or proportionate in a given set of circumstances. Public controversy has persisted since the Court of Appeal judgment and appears likely to reverberate further as the case heads to Strasbourg.

In summary, the response of our participants suggests a high degree of consensus around the **general** criteria for allowing or restricting accommodation of religion or belief, but differences of view as to how those criteria should be applied in particular cases. These differences were not purely between religious and non-religious participants: they were evident between, for example, Anglican participants. The introduction of a duty of reasonable accommodation would not necessarily produce

¹³² However, the vast majority of general survey respondents who identified as Christian and referred to the *Chaplin* case supported what they saw as her right to wear the crucifix.

¹³³ 'Second minister to boycott BA in growing row over Christian worker', *Mail Online*, 21 November 21; <http://www.dailymail.co.uk/news/article-417796/Second-minister-boycott-BA-growing-row-Christian-worker.html>.

greater certainty than the present indirect discrimination model, since the proportionality (or ‘undue hardship’) calculation has to be made in each case whatever the legal model adopted. In addition, it may be hard to achieve informed public discussion about the possible introduction of a duty of reasonable accommodation and its practical implications given the divisive nature of much public debate about religion or belief.

The European perspective

The presumption towards accommodation of religion or belief in the absence of compelling reasons for restriction contrasts strongly with approaches elsewhere in Europe. A review of discrimination cases in European Union states between 2004 and 2010 reported controversy around the implementation of non-discrimination provisions relating to dress codes and religious symbols (Do, 2011: 15). For example, the principle of neutrality in education in Belgium has been held to justify the prohibition imposed on teachers not to wear any visible religious, political or philosophical symbol on school premises. As noted in section 2.3, there have been fierce public debates in Europe about the wearing of the *hijab*, *niqab* or *burqa* in public with a ban on the concealment of the face in France and legislative proposals tabled in several other states.

Howard (2009: 9-12) identifies several reasons given in different European states for such bans. These include the need to deal with the threat of terrorism, both literally in the sense that a person in a *burqa* could hide a bomb under it and symbolically in the sense that the *hijab*, *niqab* or *burqa* are seen as representing ‘extremist Muslim politics’. Other reasons given are that these forms of clothing are a barrier both to social integration and, in the case of face coverings, effective communication. Bans have also been justified on the grounds that the *hijab*, *niqab* or *burqa* are symbolic of the oppression of women and that if some women wear them, even of their own free will, others who do not, may come under pressure from their community to do so.¹³⁴ Interviewees for this research did not mention any of these factors save for that relating to effective communication.

5.6 Conclusion

In this chapter, we have examined the growing, and frequently controversial, body of case law concerning equality, human rights and religion or belief. We noted the lack

¹³⁴ The issue of whether women or girls choose freely to wear a form of religious dress arose in the *Begum* case. Three Law Lords emphasised the possibility that Shabina Begum had been influenced or pressurised by her older brother to wear the *jilbab*. Lord Scott noted (at para. 80) that the ‘confrontational’ way the issue had been raised with the school was ‘very unlikely to have been chosen by Shabina, not yet 14 years of age...’.

of clarity surrounding the definition of 'belief' and the consequent uncertainty as to which beliefs warrant legal protection and which do not. This is an issue of pressing concern to employers (whose practical responses are discussed in Chapter 8).

We have seen that, overall, the law on equality, human rights and religion or belief has been interpreted cautiously in domestic courts. While some claims concerning dress codes and working hours have succeeded, most have failed. However, case law remains unpredictable with a recent, successful Article 9 claim (*Imran Bashir*) appearing to sidestep the hurdles erected in earlier cases such as *Begum*. Concern exists about the number of decisions by courts and tribunals that have excluded religion or belief claims at the interference stage, rather than considering the merits of the case by examining the justification for interference. In particular, the requirement to show group (rather than solitary) disadvantage is viewed by the EHRC, among others, as failing to provide sufficient protection for individual believers. Religion or belief groups and others also argue that courts and tribunals should ground their assessment of justification for interference in sociological rather than doctrinal or theological arguments.

It was acknowledged by nearly all participants in this research that individuals whose religion or belief is important to them have a responsibility to make sensible professional choices and may have to make personal sacrifices. Our research found consensus around the type of criteria (such as health and safety and the impact on others) which might reasonably restrict the manifestation of religion or belief in the workplace and the wider public realm.

We found an equally strong presumption towards the accommodation of religion or belief where these criteria do not apply or are not compelling. Views differed (including between co-religionists) as to how the criteria should be applied in particular instances. Nevertheless, these findings indicate a high degree of acceptance of what might be termed 'routine' accommodation of religion or belief, in marked contrast to approaches elsewhere in Europe. More controversial is accommodation of claims based on religion or belief where they compete (or appear to compete) directly with the interests of others, which is the subject of Chapter 6.

6. Competing interests in relation to religion or belief

6.1 Introduction

This chapter examines the legal and conceptual debates about competing interests in relation to equality, human rights and religion or belief. It does not comprehensively examine case law concerning competing interests, but focuses on those cases and debates that have been most contentious in the domestic context. The chapter explores the balancing of competing rights and equality grounds; debates about the nature of religion or belief as a protected characteristic; the perceived existence of a hierarchy between religion or belief and other equality grounds; and the issue of conscientious objection. It also examines the legal exceptions to the Equality Act 2010 which exist to deal with potential tensions but are themselves clouded in legal uncertainty. It concludes by examining the issue of legal 'overstretch' caused by the inclusion of religion or belief alongside other equality grounds.

6.2 Balancing competing rights

The need to strike a balance between competing interests is a perennial feature of human rights law (Knights, 2007, Chapter 3; Malik, 2008a). The test of proportionality generally requires some form of assessment as to how to weigh competing interests in a given case (see section 4.2). A balance may need to be struck between the rights of the individual and the obligation and interests of the state. Cases may also need to balance the competing interests of the individual and others; the individual and the religious group; the child and the parent; or a minority religion or belief group and the majority. The European Convention on Human Rights (ECHR) does not contain specific guidance on how to deal with competing interests; it is primarily the role of the domestic courts to strike a balance in each case. The European Court of Human Rights (ECtHR) affords a wide margin of appreciation to domestic courts to ensure that a fair balance is struck and that any interference is proportionate to the legitimate aim sought (Knights, 2007: 72).

There are several areas where competition may arise between substantive rights. For example, it may sometimes be necessary to balance the right to freedom of religion or belief (Article 9) with the right to freedom of expression (Article 10) (see Evans, 2009a, 2010).¹³⁵ In some instances, the balancing act is between two aspects of the right to freedom of religion or belief, namely the right to preach and express

¹³⁵ For example, in *Otto-Preminger Institut v Austria*, No. 13470/87, 20.9.1994, the ECtHR considered an application by a non-profit association which had been prevented from showing a satirical film set in heaven due to concerns about offending Christians. The Court rejected the Article 10 claim, recognising that the state had exercised a positive duty to repress expression that was contrary to the spirit of tolerance (Knights, 2007: 48).

views as against the right to be free from religion and not be subjected to improper proselytisation (Knights, 2007: 66-67).

The question arises as to whether a hierarchical analysis is required in order to resolve what might otherwise be intractable conflicts. Most commentators, viewing rights as indivisible and interdependent, reject this approach in favour of an analysis that seeks to balance and give importance to each right (Brems, 2008; Bribosia and Rorive, 2010; Zucca, 2007).¹³⁶ Discussing the intersection of the right to freedom of religion or belief and the right to freedom of expression, Evans (2009a: 233) argues that:

... it is both artificial and unhelpful to juxtapose them in an oppositional fashion or seek to determine a hierarchy of significance between them. Rather, it is necessary to identify the important contribution of both rights to the functioning of a tolerant, plural and democratic society and seek to ensure there is a maximising of both rights in situations of tension, rather than a relativising of the one in the interests of the other.

The key, Evans suggests, is to identify the core principles which inform the assessment of the legitimacy of any restriction to the freedom of religion or belief in particular instances.

Legal principles to resolve situations where rights conflict

International human rights law provides a frame of reference for the practical resolution of situations where rights appear to conflict.¹³⁷ Principles established in human rights law include:

¹³⁶ For example, in *Şahin v Turkey*, concerning a headscarf ban, Judge Tulkens in her dissenting judgment stated (at para. 4) that: 'In a democratic society, I believe it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other. She added (at para. 41) that: 'It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society"'. The case of *Trinity Western University v British Columbia College Teachers* [2001] 1 SCR 772 in the Canadian Supreme Court raised the issue of a conflict between freedom of religion and the constitutional right to equality; see Malik (2008a: 28-29) for discussion of this case.

¹³⁷ For a comprehensive analysis of principles established in international human rights law concerning religion or belief, see Evans (2009b) and Organisation for Security and Cooperation in Europe (2004).

Non-discrimination

Any restriction should not be discriminatory in the sense that it bears more directly or more harshly on the followers of one religion or belief than of another (see Evans, 2009b: 35-40).

Neutrality/impartiality

The state is required to act in a neutral fashion as between religions and as between religious and non-religious forms of belief. This means that any protection or restriction should be generic and not focused on a particular religion or belief.¹³⁸

Fostering pluralism and tolerance

This is seen as a goal in its own right as a means of preserving democracy; it requires religious adherents to accept a fairly high degree of challenge to their belief systems in the pursuit of this goal.¹³⁹

Respect for the right of others to believe

This principle is a key factor when assessing the necessity of any interference with the manifestation of a religion or belief; it establishes the duty of the state to create a 'level playing field' between different parties, with one side being free to present their point of view, and the other to reject it. This is also expressed as respecting the 'believer' rather than the 'belief' (Evans, 2009b: 30). This has come into play in cases concerning the restriction of proselytising activities which run the risk of subjecting individuals to pressure which they might be powerless to resist.¹⁴⁰

Proportionality

As explained in section 4.2, this principle provides a structured way to determine how to balance competing considerations in any particular context. Interference with the right to manifest one's religion or belief must have a legitimate aim and be necessary in a democratic society for the purpose of achieving that aim. The means employed

¹³⁸ For example, in *Manoussakis and Others v. Greece* No. 18748/1991, 26.9.1996, concerning the right of Jehovah's Witnesses to set up a temple without authorisation, the ECtHR (at para. 47) stated that: 'The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate'.

¹³⁹ The Court recognised the tension caused by pluralism in *Serif v Greece* No. 38178/97, 14.12.1999, involving the prosecution of a man claiming to be the Mufti of a Muslim community and the potential for unrest arising out of rival claims to this role. The Court stated (at para. 53) that: 'The role of authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.

¹⁴⁰ For example, *Larissis and others v Greece* Nos. 140/1996/759/958–960, 24.2.1998.

must be proportionate to the legitimate aim pursued; that is, the least restrictive alternative must be pursued.

Legality

Restrictions on the right to manifest one's religion or belief must not be arbitrary or irrational. They must be clear, publicly accessible, non-retrospective, and people must be able to understand the circumstances in which it might be imposed and foresee the consequences of their actions with a degree of accuracy.

Human rights as a 'non-negotiable floor' in competing equality claims

Malik (2008a: 10) recommends that competing interests that arise in equality law should be resolved by treating human rights standards as a 'non-negotiable floor' which binds all the relevant parties; for example, where there is a conflict between a religious or cultural practice and gender equality. Human rights values and principles, Malik suggests, also provide decision-makers with a substantive set of positive values with which to design policy and practice. An example is the principle of personal autonomy, which was endorsed by our interviewees as an approach to the accommodation of religion or belief (subject to reasonable limitations; see section 5.5). The practical utility of human rights as an overarching framework within which to approach equality duties was underlined by health and social care practitioners who participated in our Cardiff roundtable; their experience is discussed in detail in section 9.2.

'Substantive' and 'peripheral' aspects of competing rights

The literature contains other criteria to guide legal reasoning in cases where rights appear to conflict. Brems (2008: 5) distinguishes between the 'substantive' and 'peripheral' aspects of conflicting rights as a guide to deciding which to prioritise in any given case. This criterion necessarily entails an evaluation of the seriousness of the interference caused by the respective exercising of one right at the expense of another. However, several interviewees were doubtful about the practical value of this criterion as a guide to decision-making. They argued that assessments about substantive and peripheral aspects of rights cannot be made in the abstract but must be grounded in the social context in which the case occurs, including the relative power of the protagonists. Malcolm Brown observed that:

This relates to ... power because [I might be able to] concede what might look to me to be a peripheral issue but someone else might not be in a position to concede anything. If you're vulnerable, conceding anything feels like defeat.

The procedural approach

Bribosia and Rorive (2010: 25) propose another criterion for adjudicating competing rights cases. They emphasise the need to verify the quality of the decision-making procedure implemented by the 'authority' involved in a given case. This might also involve a consideration of **which** authority should decide the boundaries of religious accommodation in each case; for example, the legislature, the courts, or non-legal institutions and authorities, such as employers or schools.

In *Begum*, the Court of Appeal held that the school had not followed a proper decision-making procedure when determining whether there had been an infringement of an Article 9 right; it had not expressly applied the proportionality test (Malik, 2008a: 377-78). However, this was overturned by the House of Lords. It held that the question was whether or not the school had, in the end, acted in a way that was permissible under the ECHR rather than whether or not the school had asked itself the right questions.¹⁴¹ Moreover, the Lords held that the school had taken immense pains to devise a uniform policy which conformed to the requirements of mainstream Muslim opinion; it would be irresponsible of any court to overrule the decision of the school authorities in such circumstances.¹⁴² The judgment underlines the extent to which groups such as school governing bodies are on the 'front line' of decision-making about the 'complex social and political challenges posed by multiculturalism ... and identity politics' - decisions which may need to withstand considerable scrutiny as claims make their way into legal process (Malik, 2008b: 384).

Dignity as a basis for resolving competing interests

Human dignity is a core human rights value and is central both to religious and non-religious perspectives on rights (McCrudden, 2008, 2011). Some commentators propose that dignity could be used instrumentally to help resolve competing rights or equality claims (Moon and Allen, 2006). This suggestion arises partly from the use of dignity as a value underpinning applied human rights practice in public services.

McCrudden (2011: 35) observes that there is a consensus across human rights texts around a minimum core concept of dignity. This encompasses the intrinsic worth of the individual human being; the need for this intrinsic worth to be recognised and respected by others; and the requirement that the state should be seen to exist for the sake of the individual human being, and not vice versa. However, the way in which these elements are understood is context-specific, varying over time and

¹⁴¹ Paras. 32-33.

¹⁴² Paras. 33-34.

between different jurisdictions and religious and non-religious traditions. Moreover, dignity may be invoked by both sides of a dispute to support their particular claims.

Interviewees in this research differed as to how far dignity might be useful to resolve competing rights or equality claims. Some viewed it as having practical value: it underpinned and provided a common metric for efforts to promote fair and equitable treatment in the workplace or wider community. This view was expressed in particular by practitioners who used the concept of dignity in, for example, the delivery of healthcare (see also Afridi and Warmington, 2010: 31). However, others noted that dignity is a ‘slippery’ concept. Malcolm Brown observed that Christians are followers of someone who ‘abandoned all dignity’ in the Easter story:

Having that foundational narrative, we understand dignity in a different way to other traditions that don’t have that self-abnegating, self-sacrificing element at the heart of their belief ... You can’t alight on a word like dignity as if it had the same cultural meaning across the board ... Our concern is what happens to vulnerable people but we reserve the right to make **ourselves** vulnerable in pursuance of our religion.

McCrudden (2011: 38) suggests that there is a ‘golden opportunity’ for engagement between religious organisations and human rights law as regards the meaning of human dignity, given its centrality to both. However, the absence of consensus suggests that dignity does not presently provide a secure foundation for principled decision-making when interests compete either inside or outside the courtroom.

6.3 Competing interests in equality law

The Equality Act 2010 is underpinned by the assumption that religion or belief can be protected in the same way and broadly to the same extent as other protected characteristics. However, tension arises when there is an incompatibility between giving effect to the principle of non-discrimination to protect one group (e.g. women or lesbian, gay, bisexual or transgender (LGBT) people) at the same time as protecting another (e.g. those with a religion or belief) (Dinham and Shaw, 2009). This section explores some of the legal and conceptual difficulties that have arisen as a result of the inclusion of different characteristics in the same Act (see also section 6.8).

In recent years, cases concerning tension between the ‘religion’ strand and sexual orientation have been exceptionally high profile. Stychin (2009: 733) notes that ‘the construction of rights in conflict and in need of balancing pervades the relationship of sexuality and religion’. As discussed in section 4.4, contentious judgments

concerning competing interests do not mean that friction is prevalent or entrenched in society. Nor is it the case that the resolution contained in a specific judgment is necessarily that which will or must be followed in every setting; for example, different circumstances may affect the proportionality decision in relation to the justification for indirect discrimination.

Contentious cases have prompted debate about how to create a coherent equalities framework given the proliferation of protected equality grounds and the inevitability of tension between them. This debate involves consideration of whether or not religion or belief is essentially different from other protected characteristics.

The nature of religion or belief as a characteristic

We found little consensus in the literature or among our interviewees about the nature of religion or belief as a protected characteristic compared to others.

One argument advanced for seeing religion or belief as essentially different from other characteristics is that it is chosen by the individual and is therefore more akin to a political belief than an ‘essential, immutable element of the individual’s birthright or identity’ (Lester and Uccellari, 2008: 569).¹⁴³ A counter-argument is that a high percentage of religious adherents stay in the religion or belief group into which they were born or brought up (Vickers, 2011: 138; Perfect, 2011: 9-10). It is also argued that to see religion as a personal choice is to take too individualistic a stance and to ignore more communal and cultural understandings of religious identity (McCrudden, 2011).

Among our interviewees, the understanding of either religion or belief as a choice appeared to be personal rather than institutional. There was no clear divide between groups situated in the ‘religion’ and ‘belief’ strands. Interviewees, including those affiliated to the same religion or belief, expressed subtly different understandings. Many recognised that individual experience of religion or belief is variable and subjective; it might be the result of one’s upbringing, a moment of conversion or an act of will. It was observed that Paganism is always expressly chosen, while for other religions or beliefs, tradition, culture and nationality are significant contributory elements of ‘religious’ or ‘belief’ identity. Distinction was also made between religious observance or conversion and indelible markers of identity; for example, there is no liturgical capacity in Catholicism to ‘un-baptise’ someone, while Orthodox Judaism adheres to the law of matrilineal descent.

¹⁴³ In *Eweida v British Airways* (at para. 40), Sedley LJ noted that all protected characteristics apart from religion or belief are ‘objective characteristics of individuals: religion and belief alone are matters of choice’.

Debate about religion or belief as a matter of choice is sometimes connected to that of whether sexual orientation is a chosen characteristic. One interviewee considered that if the manifestation of religion or belief were to enjoy lesser protection from discrimination on that basis, so should the manifestation of sexual orientation. By this account, both religion and sexual orientation are distinct from other protected characteristics because they involve a degree of personal appropriation about one's belief and identity and how one chooses to live as a result (Stychin, 2009). For interviewees concerned with the LGBT (and sometimes also the religion) strand, this bracketing together of the religion and sexual orientation strands is unfounded and has damaging consequences. Reverend Sharon Ferguson of the Lesbian and Gay Christian Movement argued that:

The fundamental faiths believe that [sexual orientation] is a lifestyle choice; they ... say we can be 'cured' of our homosexuality. If we can get over the idea that either faith or sexuality are chosen it would be easier to address discrimination. You can't choose whether you believe in God; you can choose what you believe **about** God. The law does not protect a person's right to impose their theology - their understanding of God - on other people.

A firmer basis on which to distinguish religion or belief from other characteristics was suggested by some interviewees situated in both the 'religion' and 'belief' strands. They suggested that religion or belief is *sui generis* because it has intellectual content; it both proscribes and prescribes certain behaviour that impinges on adherents to the religion or belief and, indirectly, on others. Further, unlike other protected groups, some religion or belief groups may seek to recruit new followers.

Some interviewees concerned with the 'belief' strand and other equality strands felt that the inherent differences they perceived to exist between religion or belief and other characteristics created an argument for religion or belief to enjoy more limited protection. For some, the inclusion of religion or belief in the public sector equality duty is particularly problematic; for a detailed discussion, see section 9.4.

By contrast, interviewees situated in the 'religion' strand generally argued that, even if religion or belief **is** inherently different, this does not warrant giving it lesser protection. For some, this was grounded in the centrality of religions or beliefs to their adherents. Charles Wookey stated that humans are 'meaning-seeking creatures' and therefore a propensity to form and live by particular religions or beliefs is as important to the human experience as any other characteristic. Further, interviewees noted that some fundamental human rights protect chosen actions rather than immutable

characteristics, most obviously the right to freedom of expression; the fact that religion or belief may be chosen does not create a firm basis for relegating its importance.

For some participants concerned with both religion or belief and other equality strands, **all** protected characteristics are distinct and subject to conceptual uncertainty. One Christian interviewee argued that:

The aggressive assertion of rights should be resisted. Let's live with a degree of bemusement; let's not pretend that we know clearly things that we don't know clearly. Let's move carefully and courteously.

Participants from trade unions and other equality specialists argued for a focus on the social reality of **acts** of discrimination rather than the nature of characteristics. Amanda Ariss of the Equality and Diversity Forum (EDF - a national network of equality and human rights organisations) argued that:

How people perceive you, rather than what you actually are, is often the basis on which discrimination occurs; you're discriminated against because you're called Mohammad regardless of what you believe or do.

Sam Dick, Head of Policy at Stonewall, observed that abstract discussions about the nature of different characteristics were often a distraction:

What employers should discuss is what does dignity and respect look like in this or that place. And that cuts across all the equality strands.

In summary, there are contested understandings about the nature of religion or belief as a characteristic enjoying legal protection. The lack of consensus is particularly evident in relation to whether religion or belief is chosen or immutable. Less contestable is the observation that religion or belief is distinct in having intellectual content. What is clear is that the inclusion of religion or belief alongside other protected characteristics has stretched concepts of equality and non-discrimination in often uncomfortable ways (section 6.8).

6.4 Debate about a hierarchy between protected characteristics

A further question arises from discussion about whether protected characteristics are inherently different: is there - or should there be - a hierarchy of protection between different characteristics, with discrimination on grounds of religion or belief being treated differently from discrimination on other grounds? One participant captured

this idea by observing that religion or belief had become the ‘Cinderella’ of protected characteristics.

For some commentators, the concept of a hierarchy between equality grounds is anathema; rather, the imperative is to seek to harmonise them using human rights as a non-negotiable base (Malik, 2008a: 10) (see section 6.3). It is argued that the creation of a hierarchy could lead to the ‘disappearance’ or lack of acknowledgment of individuals or groups that experience discrimination on more than one ground, such as young, Muslim homosexual men (Danish Institute for Human Rights, 2007: 19). Bribosia and Rorive (2010: 72) argue that the establishment of a hierarchy of grounds is ‘fraught with risk’; they argue for greater coherence within European non-discrimination law to ensure that judges are not first in line in negotiating the ‘minefield of internal conflicts that can occur within the principle of equality’.

We encountered strong objection in principle to the notion of a hierarchy from some religion or belief groups and others concerned with other (or all) equality strands. Amanda Ariss felt that:

It would be wrong for there to be a hierarchy of grounds ... Equivalence of protection is very important. That might take slightly different forms in terms of the form of law ... but the **purpose** is to achieve an equivalent quality of protection.

Similarly, Sam Dick argued that hierarchy was an unhelpful concept: all protected groups had a ‘shared right to be treated with dignity and respect and to have a level playing field’.

However, it is arguable that a hierarchy already exists within discrimination law; for example, direct discrimination on the grounds of age is capable of being justified unlike direct discrimination on any other ground. Analysing religion or belief cases relating to the workplace, Vickers (2010: 293-94) argues that courts have generally applied only a moderate level of review of employer decision-making, compared to the much stricter review in cases relating to race and gender. Vickers (2010: 301-02) argues that the emergence of a *de facto* hierarchy ‘may be inevitable given the lack of consensus over so many issues regarding religion’ and ‘would be the lesser of two evils given that the alternative is a levelling down in the protection on grounds such as race and gender’. For example, if business needs can be used to justify indirect discrimination on grounds of religion or belief, then the same justification might in theory be introduced to justify sex or race discrimination. Similarly, McCrudden (2005) suggests that there is a danger in seeking to create a ‘false consistency’

between grounds since to do so may mask differences such as the levels of social exclusion experienced by the different groups and the socio-political context in which discrimination occurs. McColgan (2009: 1) proposes an attenuated form of protection against discrimination on grounds of religion or belief due to the inevitability of conflict between these and other grounds (see also Okin, 1998). By this account, the acknowledgement of a hierarchy is necessary in order to protect the integrity and coherence of the equalities framework.

Vickers (2008: 228) argues that hierarchies are also likely to occur given the variety which exists in the understanding of what is meant by equality; for example, the symmetrical model of protection focused on individual justice as against models focused on group justice or tackling social exclusion. Different grounds of discrimination, she suggests, may fit better with different understandings of equality (see also section 9.4). Vickers (2008: 229) argues that the concept of proportionality is the best route to achieving a consistent approach and ensuring proper consideration of the interests at stake in each case. Proportionality is also sufficiently flexible to take into account the different contexts in which religion or belief discrimination may occur, both within national jurisdictions and across Europe. Thus courts 'can consistently require employers to act proportionately, without dictating the factual outcome of cases' (Vickers, 2008: 229).

Debate about the 'trumping' of religious claims

A number of high-profile cases - principally, *Ladele* and *McFarlane* - have given rise to concerns in some quarters that religious discrimination claims are too readily 'trumped' by the aim of preventing discrimination on grounds of sexual orientation. Sandberg (2011a: 116) argues that the restrictive interpretation of Article 9 in domestic case law was underscored by the decisions in *Ladele* and *McFarlane*, in which 'the laudable aim of preventing discrimination on grounds of sexual orientation was used to annihilate the equally laudable aim of preventing religious discrimination'.

Some Christian interviewees also highlighted the case of *R (Johns) v Derby City Council*, concerning a Pentacostalist Christian couple who wished to become short-term foster carers, but whose application was deferred because their negative views about same-sex relationships were not in line with the National Standards for Fostering Services. A few interviewees suggested that the *Johns* case showed that sexual orientation would always 'trump' claims based on religious discrimination. In fact, the judgment makes no such assertion, but a more limited statement giving priority in the particular circumstances of the case to national standards and statutory guidance aimed at protecting looked after children. This discrepancy illustrates the

way in which judgments are sometimes taken out of context or given a more expansive meaning or significance in public discourse than the facts of the case warrant.¹⁴⁴

One Christian interviewee argued that:

The law has drifted into a position where it is asserting a hierarchy of rights with some rights trumping others. The right to freedom of religion ... has been relegated by comparison with the right to equal treatment in respect of other issues, most obviously sexuality ... If this hierarchy of rights becomes ideological and entrenched, it will lead to great difficulty in the future.

This view is not universally held. In the consultation conducted by the Equality and Human Rights Commission (EHRC), responses received from a wide number of business representatives, trade unions and LGBT stakeholders, and some religion or belief groups, supported the reasoning of, and conclusion reached by, the appeal courts in *Ladele* and *McFarlane* (Equality and Human Rights Commission (EHRC) 2011: 3). Trade union and LGBT stakeholders were concerned that any other conclusion 'might provide legal legitimacy for homophobic views'. Some highlighted what they perceived as a growing campaign by Christians 'to seek the right to discriminate against LGB and T communities under the guise of seeking religious equality and human rights'. Such claims are commonly couched in terms of the right to conscientious objection, the subject of the next section.

6.5 The issue of conscientious objection

Protection of the right to conscientious objection is not new. The principle originated with war and was extended when laws to legalise abortion in defined circumstances were introduced in 1967. Medical staff also have legal rights to opt out of carrying out abortions, embryo research, fertility treatment and withdrawing life-prolonging treatment. In recent years, there have been claims that the principle should be extended to new and diverse situations. For example, some Christian, Muslim and Jewish pharmacists claim the right to refuse to dispense the 'morning after'

¹⁴⁴ Munby LJ stated (at para. 93) that, while there is no hierarchy between protected rights concerning religion and sexual orientation, there may be a tension between equality provisions concerning religious discrimination and those concerning sexual orientation. He added that where this is so, Standard 7 of the National Minimum Standards for Fostering (on 'Valuing Diversity') and the Statutory Guidance on Promoting the Health and Well Being of Looked After Children 'must be taken into account and **in this limited sense** the equality provisions concerning sexual orientation should take precedence' (emphasis added).

contraceptive pill, including the right not to refer patients on to other providers.¹⁴⁵ It is such claims for the **extension** of the right to conscientious objection that this section examines.

There is a disjuncture between, on the one hand, public and philosophical discussion of cases that concern matters of conscience and, on the other, legal judgments that consider these issues. Public and philosophical debate is frequently couched in terms of protection (or not) for conscientious objection (e.g. British Humanist Association, 2011c; Wolfe, 2009). Legal judgments restrict the term to its conventional meaning of abstention from military service (European Court of Human Rights, 2011). Thus, in *Ladele* and *McFarlane*, the Court of Appeal did not refer to the claimants as conscientious objectors, but focused its reasoning on the proportionality of the restriction of their right to freedom of religion or belief and the nature of a reasonable accommodation in each situation. These judgments suggest that conscientious objection should be viewed as, at most, a **residual** form of protection, to be invoked only if situations have not been resolved through consideration of proportionality or accommodation. To view conscientious objection as the 'entry point' for discussion in situations such as that in *Ladele* is at odds with the legal approach both at the domestic and European levels.

An illustration of the disjuncture between legal and wider public debate is the response to the EHRC's consultation on the cases of *Ladele* and *McFarlane*. Most religious respondents to the consultation viewed these cases as concerning the principle of conscientious objection to same-sex relationships that should have resulted in exemptions being granted to both employees (EHRC, 2011: 3). Many thought the situation of *Ladele* and *McFarlane* analogous with the right that medical staff have to be exempted from duties concerning abortion. Effectively, this is an argument for individuals to enjoy a similar type of exception to that granted to religious groups and religious employers whose beliefs clash with the obligations placed upon them (see sections 6.7 and 6.8). Other religion or belief groups, as well as respondents concerned with other equality strands, were troubled by this view.

¹⁴⁵ See 'Christian chemists "will be forced out" under morning-after pill rules', *The Telegraph*, 9 August 2011. In September 2010, the General Pharmaceutical Council issued *Guidance on the provision of pharmacy services affected by religious and moral beliefs*. These state that if pharmacy professionals' beliefs prevent them from providing routine or emergency hormonal contraception, they must refer patients to an alternative appropriate source of supply within the timeframe required for treatment to be effective. This might include telephoning ahead to check that there is a pharmacist available who can provide the service and that they have the relevant stock.

These arguments were mirrored among participants in this research. The cases, and the principles they raise, were the most contentious of those we reviewed - certainly more so than cases concerning dress codes and other forms of accommodation for religion or belief. This does not necessarily mean that such disputes are prevalent; for example, participants at the Cardiff roundtable noted that when the Welsh Local Government Association had been prompted by *Ladele* to review whether similar issues had occurred in Wales, no local authority said that they had.

The case of *Ladele*¹⁴⁶

This section focuses on the leading case of *Ladele*, described as ‘iconic’ by Dr Don Horrocks of the Evangelical Alliance. The case concerned a registrar employed by the London Borough of Islington who refused on grounds of religious conscience to perform civil partnership ceremonies. Islington insisted that she should undertake at least some of these duties,¹⁴⁷ disciplined her and threatened her with dismissal. She alleged that she had suffered discrimination on the grounds of religion or belief. At the appeal, Islington argued that they could not lawfully have acted in any other way in the light of the provisions of the Equality Act (Sexual Orientation) Regulations 2007 and that *Ladele* was in breach of Islington’s published ‘Dignity for All’ equality and diversity policy.

The Court of Appeal held that Islington’s policy decision to designate all registrars as civil partnership registrars had a legitimate aim: ‘fighting discrimination, both externally, for the benefit of the residents of the borough, and internally in the sense of relations with and between their employees’.¹⁴⁸ The Dignity for All policy was held to be of ‘overarching’ policy significance, while implementing the policy did not impact on *Ladele*’s religious beliefs: ‘she remained free to hold those beliefs and free to worship as she wished’.¹⁴⁹ Moreover, *Ladele* was employed in a public role by a public authority; she was being required to perform a ‘purely secular task’ as part of her job and her refusal to perform that task ‘involved discriminating against gay people in the course of that job’.¹⁵⁰ The fact that other local authorities had decided

¹⁴⁶ See Stychin (2009) for a comparative analysis of *Ladele* and other domestic cases and North American case law, where the question of balancing religious freedom and LGBT rights has been considered in the context of competing constitutional rights.

¹⁴⁷ Islington offered a temporary a ‘temporary measure’ of only having to officiate at civil partnerships which involved no ceremonies but *Ladele* refused this compromise (*Ladele v LB Islington* at para. 10).

¹⁴⁸ Para. 46.

¹⁴⁹ Para. 51.

¹⁵⁰ Para. 52.

not to designate registrars who shared Ladele’s beliefs as civil partnership registrars, and that such decisions ‘may well be lawful’, did not undermine the court’s finding that Ladele was neither directly nor indirectly discriminated against, nor harassed.¹⁵¹

Principled arguments for extending protection for conscientious objection

This section considers the argument that conscience is, as one academic interviewee argued, ‘a tender plant that should be nurtured’: that it should, as a matter of principle, enjoy special legal protection beyond the usual considerations of proportionality and accommodation. The principle of protecting conscience based on religion or belief was advanced by some, mainly Christian participants. One deplored the ‘aggressive pursuit of people who in conscience can’t do something’. Dr Don Horrocks argued that:

Coercion should not be used against people who have a religious conscience. [They] cannot be morally complicit in amoral situations. There should be no coercion, or sackings, unless you want a public sector with no Christians in it, because that is discriminatory.

Andrea Williams of Christian Concern emphasised the price paid by public servants who wished to abstain from certain tasks on conscientious grounds:

The issue is whether in the public sphere you are going to compel people to act against their conscience ... It’s wrecking. We’re taking away people’s livelihoods and losing experienced people from the system – it’s so disproportionate.

General survey respondents who identified as Christian also tended to support broader protection for conscientious objection; one noted that conscience should be ‘esteemed’. Many added that the belief underlying the objection should be demonstrably genuine. Others acknowledged that, in some circumstances, employers may find it hard to relieve people of certain duties; for example if the task was central to the role (like serving alcohol in a bar or restaurant). The majority of Christian respondents strongly opposed the judgment in *Ladele*.

Some Muslim interviewees also objected in principle to the judgment in *Ladele*. Shaykh Faiz Siddiqi of the Muslim Arbitration Tribunal noted that ‘in a liberal state I shouldn’t be forced to act against my conscience’.

¹⁵¹ Para. 75.

It was also argued that being a public servant should not necessarily be a bar to exercising the right to conscientious objection. The requirement was to provide the service in a non-discriminatory way, which did not necessarily require each public servant to deliver every part of that service. In a similar way, Julian Rivers argued that:

Suddenly we've got a state-sponsored sexual orthodoxy and [Ladele] was on the wrong side of the line. It's a dangerous logic that every individual must be prepared to share the ethic of the state as a whole (see also Rivers, 2007).

These arguments were generally advanced by interviewees in favour of special protection for beliefs rooted in religious conscience. They could also be used to support the protection of conscience inspired by non-religious beliefs. Simon Barrow of the non-denominational Christian think-tank Ekklesia noted that rooting conscientious objection in religious credentials does not automatically confer greater legitimacy, as was recognised in the judgment in *McFarlane*.¹⁵²

Arguments in favour of a pragmatic approach

Some interviewees situated in the 'religion' strand, including majority and minority religion or belief groups, advanced pragmatic arguments for the extension of the right to conscientious objection. For some, these were additional to principled arguments; for others, they were simply a 'common sense' approach to a difficult situation such as that in *Ladele*.

This approach was commonly expressed in utilitarian terms. It was argued that Islington could have exercised discretion (as other councils had reportedly done) not to designate Ladele as a civil partnership registrar; the key question was, what was the **harm** in doing so? A participant involved in inter-faith issues stated that 'conscience can't be made cost-free for the individual - but neither should it be too expensive'. It had been open to Islington to decide not to designate all registrars as civil partnership registrars:

It's not **wicked** to do so and it might in fact be preferable to do so ... Equality provides a framework in determining what is just ... but that doesn't mean we

¹⁵² Laws LJ (at para. 24) stated that, 'The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other ... The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself'.

shouldn't try to reach informal accommodation in ways which don't put people in a difficult position.
(emphasis in original)

This utilitarian view was also expressed by some Muslim, Sikh and other interviewees from minority religion or belief groups.

The assessment of harm was acknowledged to be context-specific. If, hypothetically, Ladele had been the only registrar on Orkney, her refusal to officiate at civil partnerships would have materially affected the right of others to receive that service in a non-discriminatory way. However, in Islington, it was assumed to have been possible for duties to be allocated so as to maintain the service unaffected **and** protect Ladele's conscience. Malcolm Brown, representing the Church of England, argued that:

What appeared to be missing from the judgment was the idea of who was actually harmed ... and that comes down to the way the law is being interpreted very much on the basis of the hypothetical damage to a hypothetical claimant.

The judgment in *Ladele* refers to the fact that her refusal to officiate at civil partnerships caused offence to at least two of her gay colleagues, who felt 'victimsed' by her conduct; however, the case did not turn on this point.¹⁵³

A different 'lens' was applied to the problem by practitioners from the health, social care and voluntary sectors in the roundtable held in Cardiff. The majority view was that 'if it can be managed, it should be managed' without resort to disciplinary action or litigation. This was also described as keeping the conflict 'under the radar' if it is practicable to do so. It was argued that a same-sex couple should not receive a service from someone who doesn't fundamentally accept same-sex relationships. As one participant noted:

In a functioning team ... you don't say that staff members must take the next client that comes through the door because it's their turn. You have a discussion about people's expertise and experience and ability to build a rapport with a service user. This person does not have LGBT sensitivity, so they are not the best person to deliver the service. It's about 'horses for courses'.

¹⁵³ Paras. 8 and 52.

The 'quality of service' lens appears a strong basis for arguing that - in the interests of service users - Ladele should not have been **compelled** to officiate at civil partnerships. However, the precise form of accommodation is still open for debate. Sam Dick observed that it is open to councils in Islington's position to facilitate the individual's continued employment within the organisation, but in a role that doesn't bring the conscientious objection into play:

We encourage employers to be flexible, not in terms of saying 'you need only deliver half of your job' but in terms of finding a different role. None of that should undermine the principle that whatever job you do, you don't discriminate or create an intimidating, humiliating or discriminatory atmosphere for colleagues.

This suggests the need for mutual compromise and the desirability of avoiding disciplinary action and litigation. It also establishes a principled objection to extending protection for conscientious objection where it allows an individual, on the basis of their religion or belief, to discriminate against others on another equality ground. Simon Barrow argued that the outcomes of pragmatic accommodation had to be examined in each case:

Accommodation is good if it's about making the service work and if it's about adaption towards inclusion. But if it's adaption towards prejudice, whether based on religious or other grounds ... then [it] becomes a problem.

Principled objections to extending protection for conscientious objection

Some interviewees situated in both the religion and belief strands, and in other equality strands, argued against extending the right to conscientious objection for a variety of reasons. Trade union interviewees and those concerned with employment also did so. Their arguments did not rule out pragmatic responses in some circumstances, but emphasised the risks inherent in a 'free-for-all unregulated endorsement of conscientious objection' (Pollock, 2011b: 42).

A key concern is that public services could become 'undeliverable' or at least unreliable for certain users; for example, those wishing to access hormonal contraception in a situation where a pharmacist does not wish either to dispense it or take active steps to ensure they receive the service elsewhere. Concerns have been accentuated by developments at the Council of Europe level, where efforts to address 'the increasing and largely unregulated occurrence' of conscientious objection in health services were obstructed after concerted lobbying by religious

organisations.¹⁵⁴ David Pollock expressed concern that in some places, the Catholic Church encourages followers to seek to make the law on abortion and contraception a ‘dead letter’ by use of conscientious objection.¹⁵⁵

It was also argued that if public office holders, representing the state, the law or the community, are permitted to opt out of delivering services on conscientious grounds, this could damage the ethos and reputation of the service. This was especially so in the case of public officials (like Ladele) whose role has a symbolic and not merely a bureaucratic function. Khalid Sofi of the Muslim Council of Britain said he had advised Muslim registrars that:

Delivering a service as a registrar is a broad national duty, which means you have to deliver it to everybody. If you want to make exceptions because of religion or belief, it’s going to create a tension which I would not support. If you’re in a public position, then you have to say that you don’t want to do the **whole** job, not that you don’t want to do **part** of the job.

(emphasis in original)

¹⁵⁴ In July 2010, the Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe introduced a resolution to develop ‘comprehensive and clear regulations’ covering conscientious objection, especially in the field of reproductive health; see *Women’s access to lawful medical care: the problem of unregulated use of conscientious objection*, Doc. 12347 20 July 2010. Following intervention by religious opponents, the resolution was amended and prefixed with the following statement: ‘No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason’; see *The right to conscientious objection in lawful medical care*, Resolution 1763 (2010), adopted 7 October 2010. The European Humanist Federation argued that the statement removes individuals and institutions from liability for their conduct, contradicting basic concepts of the rule of law that require that persons who have been harmed have a right to have access to review procedures before an independent body. See <http://www.humanistfederation.eu/download/129-CoE%20re%20rejn%20of%20consc%20obj%20resolution.pdf>. The amended resolution also appears to be contradictory in stating that the practice of conscientious objection is ‘adequately regulated’ in ‘the vast majority of Council of Europe states’ (para. 3), yet also inviting member states to develop ‘comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services’ (para. 4).

¹⁵⁵ In 2007, Pope Benedict invited pharmacists to ‘address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia’. See *Address of His Holiness Benedict XVI to members of the International Congress of Catholic Pharmacists*, Consistory Hall, 29 October 2007.

The 'specific situation' rule (see section 5.4) was invoked by some interviewees to suggest that those with strongly-held beliefs should make responsible choices that avoid foreseeable conflict with the law or professional standards, or else to bear a degree of personal sacrifice. Richard Rowson, a moral philosopher, argued that:

Services are delivered in context of multicultural society, so there is an obligation not to make professional judgments from a particular private or culturally-specific perspective. It should be made clear to new joiners that one cannot tolerate requests for exemptions if they can't be tolerated within the overall objective of the profession or organisation (see also Rowson, 2006).

This view was expressed by some Christian, Muslim and Jewish interviewees, as well as others from minority religion or belief groups. Most of these interviewees also felt that the requirement for public servants not to 'pick and choose' who they served extended to existing employees (like Ladele) who encountered problems of conscience because of changes to law or policy. Most also felt that it was right that providers of private goods and services should not be able to pick and choose who they serve on conscientious grounds. The case of *Hall and Preddy v Bull and Bull*, concerning Christian hoteliers who said they only let double rooms to mixed-sex married couples, was viewed by these interviewees as a useful precedent in this regard.¹⁵⁶

Some interviewees - again, both religious and non-religious - were concerned that proliferating requests for conscientious objection might damage the integrity of the equalities framework. Several noted that it would be unthinkable to refuse guests at a hotel on the basis of, for example, their race or their religion or belief; it was no more acceptable to do so on grounds of sexual orientation. One Christian interviewee argued that:

To classify people and then refuse them services is inappropriate. It seems so obvious when looking back to America in the 1960s; it was abhorrent to do that to black people. I think it is wrong to offer a service

¹⁵⁶ This case was intensely controversial among our general survey respondents: Christian-affiliated respondents voiced strong support for the Bulls' conscience to be protected. Note that this case went to the Court of Appeal after interviews for this project were completed; the Court of Appeal dismissed the hoteliers' appeal. See *Bull and Bull v Hall and Preddy* [2012] EWCA Civ 83.

and then be selective as to who should or shouldn't be able to take that service up based on your own preferences.

Similarly, an LGBT participant argued that LGBT people should not have to 'renegotiate' hard-won legal rights to accommodate the conscientious objection of religious believers (see also Stychin, 2009: 748).

In its submission to the ECtHR on *Ladele* and *McFarlane*, the EHRC supported the decisions of the domestic courts. It noted that:

An employer's refusal to accommodate the manifestation of a discriminatory religious belief in cases where discrimination in the provision of public services results will generally be justified by reference to the legitimate aim of eliminating discrimination and advancing equality...¹⁵⁷

It adds that state services must be provided on an impartial basis and employees cannot expect their public functions to be shaped to accommodate their personal beliefs.¹⁵⁸

Deciding the extent and limits of conscientious objection

No participant in our research argued either for an untrammelled right to conscientious objection or enforced uniformity in every instance. All agreed on the desirability of avoiding disciplinary action or litigation wherever possible. In public discussion, arguments coalesce around the criteria by which to decide which exercises of conscientious objection are acceptable and should be accommodated in laws and procedures, and which not. Pollock (2011b: 38-42) proposes a range of possible conditions which might be placed on the exercise of conscientious objection. These include conditions not examined elsewhere in this section; for example, that the conscientious objection should be to a proximate action (such as carrying out in vitro fertilisation (IVF) treatment) rather than a remote one (such as conducting an administrative role in an IVF department); and that children must be protected from damage to their education or health by placing limits to their parents' power over them Pollock (2011b: 42).

¹⁵⁷ Submission of the Equality and Human Rights Commission in the European Court of Human Rights, *Ladele and McFarlane v United Kingdom*, para. 57.

¹⁵⁸ Para. 56.

Also critical is the **process** by which decisions are made and resolutions achieved. Stychin (2009: 755) argues for a model of rights based on ‘democratic dialogue and compromise’, in which:

... pragmatic solutions will be preferred to ideological stalemates. This is pluralism at the coalface, in which purity is foregone, solutions may not be pleasing to participants, and agreements are contingent and partial.

For Stychin (2009: 752-53), nuanced analysis of the context in each case is preferable to abstract determinations on how to balance competing rights or the pursuit of victory in a zero-sum game:

Engaging with context, and accommodating what otherwise would appear to be irreconcilable world views, will not necessarily satisfy anyone, and it may appear to be the triumph of pragmatism over principle ... But it seems well suited to the social reality of pluralism around religion and sexuality today.

Contextual analysis might focus upon the sincerity of subjective belief; a consideration of whether the right at issue is core to the system of beliefs (secular or religious); the degree of difficulty involved in accommodation by the employer; whether accommodation would significantly impair the exercise of the competing right; and the material consequences of any impairment (Stychin, 2009: 752). In order that this discussion can take place, it may be necessary to agree certain ‘ethical rules of engagement’ as a condition of entry into the public sphere, such as openness to ‘the other’, good faith and mutual respect (Stychin, 2009: 754); these ‘ground rules’ for public debate are discussed in detail in section 7.8.

The search for compromise may reveal common ground that might not otherwise be made apparent. Stychin (2009: 754) observes that LGBT people and people with religious faith who object to same-sex relationships may find common ground based on their shared rejection of the ‘public-private’ or ‘belief-conduct’ dichotomy; such distinctions serve to ‘marginalize, silence and closet, hollowing out rights by separating belief from manifestation’. Put another way, neither group wishes to be forced (or forced back) ‘into the closet’.

Several participants in our research acknowledged that deciding the extent and limits of conscientious objection is an area of unresolved difficulty requiring broad public discussion. While some suggested that this is essentially a ‘religious’ versus ‘secular’ debate, our research suggests that the lines are not so clearly drawn. Members of

religion or belief groups argued both for and against extending protection for conscientious objection. Moreover, some Christian participants commented that the rights of LGBT Christians (and other LGBT believers) wishing to receive civil partnerships or other services are centrally at stake in this debate - a consideration that is overlooked in debates framed as religious versus secular.

6.6 Legal exceptions for religion or belief relating to employment

As noted in section 4.3, discrimination law recognises the potential for conflicts and makes exceptions to deal with these situations. These exceptions apply to religious groups, including religious employers, rather than to individuals. The exceptions have proved controversial and are surrounded by considerable legal uncertainty, giving rise to concerns that they may be misunderstood and misapplied. In this section, we examine the exception relating to employment.

The Equality Act 2010 contains an exception from laws prohibiting discrimination on grounds of sex, marriage and sexual orientation.¹⁵⁹ This applies where certain criteria are met. The criterion that has attracted most controversy is that the employment must be ‘for the purposes of an organised religion’.

The employment exception originally contained in the Equality Bill would have made two significant changes to this wording. One related to the definition of employment ‘for the purposes of an organised religion’ and the other related to the requirement for it to be applied in a proportionate manner. Both changes were defeated at Committee stage in the House of Lords after sustained opposition by the Anglican and Catholic Churches, which objected that the changes would make them and other faiths more vulnerable to legal challenge.¹⁶⁰ As a result, the exceptions contained in the 2010 Act are similar to those in its predecessor. However, significant legal uncertainty remains. This is exacerbated by the fact that the Explanatory Notes to the Act contain wording which goes beyond the text of the actual exception, as explained below.

The definition of ‘employment for the purposes of an organised religion’

The Equality Bill originally sought to define for the first time the type of employment covered by the exception. The draft bill would have defined it as employment that ‘wholly or mainly involves leading or assisting in the observation of liturgical or

¹⁵⁹ Equality Act 2010, Schedule 9, para. 2

¹⁶⁰ See, for example, the statement issued on behalf of the Rt Revd Michael Scott-Joynt, Bishop of Winchester; the Rt Revd Michael Langrish, Bishop of Exeter and Chair of the Churches Legislation Advisory Service; and the Rt Revd Peter Forster, Bishop of Chester: ‘Equality Bill: Churches must not face further restrictions’, 23 January 2010. Available at: <http://www.churchofengland.org/media-centre/news/2010/01/preqbill230110.aspx>.

ritualistic practices of the religion, or promoting or expanding the doctrine of the religion'. This change would have meant that, for example, diocesan youth officers were not covered by the exception as they had previously been.¹⁶¹ Religious opponents of the change argued that the definition failed to understand the nature of religious life and was unworkable in that it might even exclude some clergy.¹⁶²

However, the absence of **any** definition creates a lack of clarity (Joint Committee on Human Rights (JCHR), 2010: 6) and 'a real risk that the exception may be used more widely than is warranted by the definition' (Pitt, 2011: 402). The Explanatory Notes to the Act state that the exception is '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'.¹⁶³ This accords with the judgment in *R (Amicus - MSF section) v Secretary of State for Trade and Industry* which emphasised the narrowness of the exception.¹⁶⁴ However, Sandberg (2011a: 120) notes that the text of the exception does not expressly convey this restricted meaning and therefore the precise scope of the phrase remains unclear.

The proportionality requirement

The employment exception originally contained in the Equality Bill required explicitly that its application be proportionate. Since this change was rejected in the House of Lords, the exception in the Equality Act 2010 does not, on its face, require proportionality.

¹⁶¹ See *Reaney v Hereford Diocesan Board of Finance* [2007] ET Case No. 1602844/2006, 17 July 2007.

¹⁶² See, for example, Catholic Bishops' Conference of England and Wales, *Equality Bill: Submission to the Scrutiny Committee*, 27 May 2009.

¹⁶³ Equality Act 2010 Explanatory Notes, para. 790.

¹⁶⁴ [2004] EWHC 860 (Admin). The *Amicus* judgment held that the exceptions strike the appropriate balance between individual rights to freedom of religion and belief; freedom of religion as an associational right; and the right to non-discrimination on the ground of sexual orientation. However, it emphasised the narrow scope of the exceptions. Richards J stated that the exception was 'on its proper construction, very narrow. It has to be construed strictly since it is a derogation from the principle of equal treatment; and it has to be construed purposively so as to ensure, so far as possible, compatibility with the [EU] Directive'.

This appears to make it vulnerable to challenge under European Union (EU) law.¹⁶⁵ In November 2009, the European Commission sent a reasoned opinion to the UK stating that exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers are broader than that permitted by the relevant EU Directive; this is in part because they do not specify that the objective must be legitimate and the requirement proportionate.¹⁶⁶ To date, this opinion has not been followed by infringement proceedings against the UK (as has been urged by the Trades Union Congress, among others).¹⁶⁷

The parliamentary JCHR (2010: 6) notes that the removal of the express requirement of proportionality ‘runs the risk of generating legal uncertainty and misleading organisations who wish to make use of this exemption as to the true nature of the test to be applied in law’. The JCHR added that the absence of an express proportionality requirement does not remove the requirement to read the legislation in conformity with EU law; that is, subject to a requirement of proportionality.¹⁶⁸ Further uncertainty is created by the fact that the Explanatory Notes to the Act appear to impose additional requirements that are not found in the text of the exception, including one relating to proportionality (Sandberg 2011a: 121-22).¹⁶⁹

Employers with an ethos based on religion or belief

The 2010 Act also provides an exception allowing employers with an ‘ethos based on religion or belief’ to discriminate on the grounds of religion or belief.¹⁷⁰ This applies

¹⁶⁵ The Explanatory Notes to the EU Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation states that a ‘double test of a justified aim and proportionate way of reaching it (i.e. in the least discriminatory way possible) is required’; COM(2008) 426 2008/0140, p. 8.

¹⁶⁶ See EU press statement IP/09/1778, ‘Employment equality rules: reasoned opinion to the UK; cases closed for Slovakia and Malta’, 20 November 2009. For a copy of the reasoned opinion, see <http://www.secularism.org.uk/uploads/ec-reasoned-opinion.pdf>.

¹⁶⁷ Trades Union Congress, *Infringement proceedings on religious exemptions in Equality Act 2010*, 2010/01155, 2 August 2010.

¹⁶⁸ This requirement was also recognised in the judgment in *R (Amicus MSF Section) v Secretary of State for Trade and Industry*.

¹⁶⁹ They state that the exception is ‘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’; further, the organised religion may only discriminate when it is ‘crucial to the post’ to do so and where it is a ‘proportionate way of meeting the criteria’. See Equality Act 2010 Explanatory Notes, para. 790.

¹⁷⁰ Equality Act 2010, Schedule 9, para. 3.

where being of a particular religion or belief is an 'occupational requirement'. This requirement must be a proportionate means of achieving a legitimate aim.

Tribunals have established that each post must be evaluated separately; the exception does not permit an organisation to fill all vacant posts with persons of a particular religion or belief.¹⁷¹

Implementation and impact of the employment exceptions

Most interviewees representing religion or belief groups were broadly happy with the exceptions model, even if they regretted the lack of clarity surrounding the text of the exceptions. Malcolm Brown, Director of Mission and Public Affairs for the Church of England, noted that the exceptions allow the Church valuable space to resolve internal arguments, such as that about women's ordination. However, he acknowledged that the exceptions were difficult in terms of public presentation:

Either something is a universal provision or it isn't ... that's why religion or belief is a problematic test case because [it's not] susceptible to that kind of universalism. You have to make exceptions and then it looks as if we're resiling from the principle. Actually what we're saying is that we want to be able to form positions from our own tradition and view of the world. I think this is a proper model of society as a 'community of communities'.

A small number of religious participants were uncomfortable with the model. One Christian participant argued that the exceptions should be 'tested virtually to destruction' because 'the presumption should always be in favour of equality'. Robust recruitment procedures, he suggested, would be a better way of ensuring that religious organisations filled vacancies with the most suitable candidates. Some academic participants were also uncomfortable with the exceptions model. Russell Sandberg of the Centre for Law and Religion at Cardiff University noted that it tended to 'put religion on the back foot'; it was too easily forgotten that its purpose was to facilitate religious freedom. Further, Sandberg argued that judicial emphasis on the narrowness of the exceptions (as in *Amicus*), reinforced by concerns raised by the European Commission, could mean that 'they will simply cease to exist'.

Our research suggests a disjuncture between, on the one hand, this perception that the exceptions are being interpreted too narrowly by courts and tribunals and, on the other, a concern that they are being applied too widely in practice (British Humanist Association, 2007b: 31-32). This concern was raised by interviewees concerned with

¹⁷¹ *Hender (Louise) v Prospects* ET Case No. 2902090/2006, 13 May 2008; *Sheridan (Mark) v Prospects* ET Case No. 2901366/2006, 13 May 2008.

equality strand/s and/or employment. Amanda Ariss noted that some (but not all) EDF members:

... have concerns that [the exceptions are] interpreted on the ground as being wider than in fact they are - and they think that's a practical problem because people can't challenge every instance, either because they don't know the law or they don't have the resources to.

Stonewall (2007: 5) states that the employment exception has been 'flagrantly abused by some organisations that have used it to unfairly discriminate against gay employees in a way which was certainly not envisaged when it was introduced'. It is not possible to substantiate this observation as evidence relating to implementation of the exceptions has not been systematically collected. Malik (2008a: 36) proposes that the JCHR should gather and report on evidence from civil society organisations about their experience of the exceptions.

A further concern was raised in relation to the exception allowing employers with an 'ethos based on religion or belief' to discriminate on the grounds of religion or belief. Joy Madeiros, Public Policy Director of Faithworks (which supports Christian groups delivering community-based services)¹⁷² argued that there is insufficient guidance to help religion or belief groups articulate their ethos and apply the exception properly:

[Many] religion or belief charities don't have a great deal of experience in recruitment and thus how to make fair decisions. What I mean by this is that while they might be very clear about their religious doctrines, they must also think through the relation of their belief systems to everyday behaviour in order to define their ethos, so that when they decide to recruit a Christian rather than a non-Christian, they can justify why they have done it. I know of well-known Christian organisations that apply a blanket exception and this is not acceptable. It leads to a closed environment and an environment in which the relationship of the religious ethos to the work is not thought through.

This concern may be partially addressed by initiatives which establish principles and standards for (among other things) employment practices among religion or belief

¹⁷² Joy Madeiros is also Managing Director of Oasis UK, a charity that delivers services including health, volunteering, youth and community programmes, to which Faithworks belongs.

groups.¹⁷³ Some interviewees situated in the religion strand acknowledged that consensus does not always exist as to when being of a particular religion or belief is an ‘occupational requirement’; for example, whether and in what circumstances the exception covers ancillary or support staff. One Christian interviewee noted that there is a tendency for religion or belief organisations to seek to create ‘religiously homogenous workplaces’ which might not, in fact, be a proportionate means of achieving a legitimate aim.

Sandberg (2011a: 129) argues that the complexity of the employment exceptions and the uncertainty of their ambit and scope ‘will inevitably lead to further litigation’. This research points to a similar conclusion. It also suggests the need for more evidence as to the impact of the exceptions ‘on the ground’ and greater guidance for religious organisations to which they apply.

6.7 Legal exceptions for religion or belief relating to goods and services

Under the Equality Act 2010, ‘organisations relating to a religion or belief’ can, in certain circumstances, discriminate on the grounds of religion or belief or sexual orientation in the way they operate, provided their sole or main purpose is not commercial.¹⁷⁴ In some situations, such organisations and people acting on their authority can restrict or refuse:

- membership of the organisation;
- participation in its activities;
- use of any goods, facilities or services that it provides; and
- use of its premises.¹⁷⁵

¹⁷³ The ‘Faithworks Charter’ establishes principles for churches and Christian agencies ‘committed to excellence in community work and service provision’; see <http://www.faithworks.info/Standard.asp?id=7432>. The ‘VISIBLE Communities’ initiative provides an accredited scheme for community organisations (including religion or belief groups) to achieve nationally recognised standards in areas including equality; see <http://visiblecommunities.org.uk/index.php?page=1>.

¹⁷⁴ Equality Act 2010, Schedule 23, para. 2. For a full definition of an ‘organisation relating to religion or belief’, see para. 2(1).

¹⁷⁵ Schedule 3, para. 29 of the Equality Act 2010 provides an additional exception for ministers allowing them to provide a service only to persons of one sex or separate services for persons of each sex. This must be for the purposes of an ‘organised religion’ and 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.

In relation to a service user's (or would-be service user's) religion or belief, the exception only applies where a restriction is necessary:

- to comply with the purpose of the religion or belief organisation; or
- to avoid causing offence to members of the religion or belief that the organisation represents.¹⁷⁶

In relation to sexual orientation, the exception only applies only where it is necessary:

- to comply with the doctrine of the organisation; or
- to avoid conflict with the strongly held convictions of a significant number of the members of the religion or belief that the organisation represents.¹⁷⁷

Sandberg (2011a: 124-25) notes that there is no legal articulation of the difference, if any, between an 'organisation relating to religion or belief' and the term used in the employment exception, an 'organised religion'. The only evident difference is that the latter relates to 'religion' rather than 'religion or belief'. An 'organised religion' might also be expected to be a narrower category than an 'organisation relating to religion or belief', but this is not specified in the Act.

The exception in relation to services delivered on behalf of a public authority

The sexual orientation exception does not apply when organisations relating to a religion or belief contract with a public authority to provide a service. This means that the exception does not cover Roman Catholic adoption agencies. This attracted intense controversy prior to the enactment of the Employment Equality (Sexual Orientation) Regulations 2007.¹⁷⁸ Cardinal Cormac Murphy O'Connor, then leader of the Catholic Church in England and Wales, requested an opt out for Catholic adoption agencies. His call was supported by the Church of England hierarchy, underscoring the extent to which the issue was seen as having relevance for other Christian-based welfare services (Stychin, 2008: 10). Adoption agencies were given

¹⁷⁶ Equality Act 2010, Schedule 23, para. 2(6).

¹⁷⁷ Equality Act 2010, Schedule 23, para. 2(7); in relation to sexual orientation discrimination, the definition of an 'organisation relating to religion or belief' is slightly more restricted; see para 2(11).

¹⁷⁸ <http://www.catholic.org/featured/headline.php?ID=3985>.

a period of time to adapt to the provision after which discrimination by such agencies on grounds of sexual orientation became unlawful.¹⁷⁹

The case of *Catholic Care*

The Leeds-based agency Catholic Care sought - unsuccessfully - to circumvent the requirement by amending its charitable objects so as to bring itself within an exception for charities in the Equality Act 2010.¹⁸⁰ The charity argued that restricting its service to mixed-sex couples (and thereby continuing to raise donations from its members and prevent its closure) was a proportionate means of achieving a legitimate aim within the meaning of Article 14 ECHR, which bans discrimination.¹⁸¹ The agency described the legitimate aim as ‘the prospect of increasing the number of children (particularly “hard to place” children) placed with adoptive families’. It argued that the proposed discrimination was proportionate to achieving this aim because the service denied to same-sex couples would be available via other voluntary adoption agencies and local authorities.

The Charity Tribunal rejected these arguments. It held that the agency’s aim was legitimate, but would not be achieved by its proposed method.¹⁸² Moreover, the proposed discrimination was not a proportionate means of achieving its legitimate aim: the services available to same-sex couples from others could not be relied upon to justify the charity’s own less favourable treatment.¹⁸³ The tribunal held that the charity had not proved that permanent closure of its adoption service was the inevitable consequence of its inability to discriminate.¹⁸⁴ Moreover, the possible

¹⁷⁹ Prime Minister Tony Blair reportedly sought a compromise which would have allowed Catholic agencies to refer same-sex couples to other agencies but not offer the service themselves, but this was not supported by the Cabinet; ‘Blair retreats over opt-out for gay adoption’, *The Telegraph*, 25 January 2007.

¹⁸⁰ *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007, 26 April 2011.

¹⁸¹ Paras. 35-41.

¹⁸² Paras. 49-52. This was because, among other reasons, Catholic Care’s proposed means of operation would be likely to reduce the pool of potential adopters by (a) excluding same sex couples from assessment by the Charity itself and also by (b) risking the loss of suitable same sex couples to the adoption system as a whole by subjecting them to the ‘particularly demeaning’ experience of discrimination on the grounds of their sexual orientation.

¹⁸³ Para. 53.

¹⁸⁴ Paras. 54-58.

closure of the service did not outweigh the detriment to same sex couples and the detriment to society generally of permitting the discrimination.¹⁸⁵

The case was highly controversial among our participants. Some participants from religion or belief groups deplored the decision of the Charity Tribunal. These included not only Catholics and other Christians, but also, for example, Sikhs, Jews and Buddhists. Their arguments were similar to those made about the individual claim in the *Ladele* case; that it was, in the circumstances, both possible and desirable to accommodate legitimate conscientious belief.¹⁸⁶

These participants contested the basis of the tribunal's proportionality decision; they argued that it would have been possible for same-sex couples to use other adoption services and that the interests of children were best served by keeping the Catholic agency open by allowing it to discriminate. As one Christian survey respondent put it:

It is not at all clear why the rights of a same sex couple to access adoption services **anywhere** are more important than the right of a Catholic couple to access adoption in a context that is sensitive to the needs of their protected characteristic identity **somewhere**.
(emphasis in original)

Roddy Minogue, Chief Executive of Catholic Care, commented that the issue did not affect his agency alone:

If you don't allow religious groups ... to undertake or continue their practice then there is nothing left at all ... More exceptions should be the order of the day.

Charles Wookey argued that 'simply from the point of view as to what would serve or not serve the common good, [the agency had] a strong argument'.

¹⁸⁵ Para. 59.

¹⁸⁶ The right of individuals conscientiously to object to placing children with same-sex couples arose in *McClintock v Department of Constitutional Affairs* EAT Case No. 0223/07/CEA, 31 October 2007. The refusal of a magistrate to place children with same-sex couples was found not to have triggered the Religion or Belief Regulations. This was because his objection was found not to be based on a religious or philosophical belief, but on his belief that children were being used as guinea-pigs in a social experiment. The Appeal Tribunal held (at para. 62) that even if it had been found that McClintock had suffered discrimination on grounds of his religion or belief, 'the Department was fully justified in insisting that magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws to which they have a moral or other principled objection'.

However, the empirical basis of this utilitarian argument was disputed by others who supported the tribunal's decision. Reverend Sharon Ferguson argued that sexuality is not a determinant of parenting skills; allowing LGBT people to adopt or foster was in the best interests of children and the overriding imperative was to secure the widest pool of prospective parents.

The significance of public funding

A wider principle at stake in the *Catholic Care* case is that the agency could not be exempted from anti-discrimination law because it was receiving a public subsidy to provide a public service. One Christian interviewee argued that in this case:

The dangerous principle was enunciated that the reason you could not reach a pragmatic judgment ... that respected conscience as well as equality was that [the agency] was in receipt of public money. It was not a problem for the NHS doctors who [are] exempted from practising abortion. That's why I think this is going backwards.

An academic interviewee, Julian Rivers, argued that the notion that 'ethics flow with money' was 'irrational, wrong and illiberal' (see also Rivers, 2007).

Other interviewees expressed the opposing view that organisations receiving public money should abide by equality law. This included several Christian participants, others from minority religion or belief groups, and participants concerned with other equality strand/s. One equality specialist argued that the delivery of public services was not a 'pick and mix' matter:

There is a problem when plurality is taken to mean reserving the right to discriminate. And wouldn't people feel very aggrieved indeed if we said that there were agencies that said we're not going to accept Catholics as foster parents? It's disingenuous to interpret that as plurality. I can't believe people would accept the discrimination in reverse.

Reverend Alan Green from Tower Hamlets Inter Faith Forum defended the existence of agencies with different principles; however, he saw the issue of public funding as critical:

You can't expect to be out of step with government thinking and luxuriate in that. There is no reason why the agency shouldn't be respected for its stand, but that's no reason to give taxpayers' money to groups that take that sort of stand. That's what a Christian organisation ought to expect.

Graham Sparkes of the Baptist Union of Great Britain similarly argued that where public money is involved, the ‘secular duty of the state to be sensitive to everyone would generally override the sensibilities of one particular group’.

The adaptability of religious organisations

A related area of disagreement was the capacity that religious institutions have to ‘change their spots’ when the law shifts. Catholic participants noted that the law on same-sex adoption (the Adoption and Children Act 2002) had caused a 180 degree shift in how the law perceives the work of Catholic adoption agencies. This marked a rupture rather than an approach of allowing social divisions to work themselves out over time. Richard Kornicki, a spokesman for the Catholic Bishops’ Conference of England and Wales, argued that:

We believe in objective, definable moral truth ... The state believes that moral truth is what the mood of the day says it is. Those two things are bound to differ - and we don’t mind them differing, but we do mind that difference suddenly turning what was normal and lawful for the past 2,000 years into something unlawful.

Catholic participants commented that the speed of the change meant that religious organisations faced difficulty in adapting their ethos, along with their constitutional and funding arrangements (see also Rivers, 2007: 34).

However, Simon Barrow noted that some religious groups **had** been able to ‘adapt and accommodate themselves within the public sphere even where there are strong internal disagreements’.¹⁸⁷ Other participants concerned with the LGBT strand commented that same-sex adoption rights had been long fought for; the perception that the law was ahead of social norms was disputed and, in any event, was not viewed as a valid reason for being allowed to opt out of it.

The symbolic importance of legal cases

Stychin (2008: 7) notes that the Catholic adoption issue assumed a ‘symbolic importance’ far beyond its practical relevance; it unleashed controversy about human rights, sexuality, religion, secularism and the limits of tolerance of minorities. The hierarchies of the Catholic and Anglican Churches, and their sympathisers, viewed

¹⁸⁷ For example, Faithworks, which supports Christian organisations to deliver community-based services, argued when the sexual orientation regulations were enacted in 2007 that they ‘do not pose a threat to Christians ... This is not an argument about Christian morality. It is rather a discussion about discrimination and prejudice, and ensuring that our services are delivered inclusively and in non-discriminatory ways’. See <http://www.faithworks.info/Standard.asp?id=7671>.

the principle at stake as concerning ‘the extent to which the discourse of equality and gay rights trumped the sincerely held faith-based views of a minority’, views which were being expressed through the provision of adoption services (Stychin, 2008: 8). For Rivers (2007: 35), such cases show that ‘religions are now seen not primarily as beneficiaries of rights of protection from the state, as subjects enjoying religious freedom, but as potential sources of human rights breaches’. The consequence, he argues, is that a ‘new moral establishment is developing, which is being imposed by law on dissenters’. Andrea Williams of Christian Concern argued that cases which concerned the rights of LGBT people are:

... not just about their emancipation but about the redefinition of culture and of family and marriage. It’s a wholesale redefinition of what society is - the bedrock of our law and society has been totally overthrown. It’s not just about rights, but about turning society on its head.

Such perceptions have created palpable anxiety among some, mainly Christian, participants in this research. However, our research indicates that this anxiety is not universally shared, either by Christians or other religion or belief groups.

6.8 The problem of legal ‘overstretch’

The cases and issues examined in this chapter and in Chapter 5 highlight the problem of ‘overstretch’ in domestic equality and human rights law concerning religion or belief (McColgan, 2009: 15; Pitt, 2011). This section examines how this ‘stretching’ of legal provisions has taken place and its implications for domestic legal debate concerning religion or belief. Legal practitioners and scholars at our London roundtable identified two interrelated areas in which the law is under strain.

The interplay of Article 9 and equality provisions

The first relates to the relationship between, on the one hand, protection for the manifestation of religion or belief under Article 9 and, on the other, protection against direct and indirect discrimination under the Equality Act 2010. Roundtable participants commented that there is a lack of clarity about this relationship that is not always recognised; the two concepts do not map neatly onto one another and this has sometimes led to confused debate about religion or belief claims in the domestic context.

The lack of clarity arises partly from a disjuncture between the understanding of freedom of religion or belief in the domestic and international contexts. In the international arena, the preoccupation is with the **persecution** of religious individuals

or groups and the protection against persecution afforded by Article 9 ECHR.¹⁸⁸ In the domestic context, the preoccupation is with **discrimination** that emerges primarily in the context of social exclusion or inclusion. Several roundtable participants commented that the (international) Article 9 ‘persecution’ analysis and the (domestic) discrimination law ‘social exclusion’ analysis are essentially different yet these differences are often elided in the domestic context. Consequently, there is a need to differentiate more clearly those situations that are most appropriately addressed on the basis of freedom of religion or belief and those that are best addressed on the basis of non-discrimination.

The *Begum* case was given as an example. Several participants endorsed the minority view of the Lords in *Begum* regarding the undesirability of requiring the claimant voluntarily to ‘contract out’ of her Article 9 rights (see sections 5.3 and 5.4). As one noted:

The classic religious freedom analysis doesn’t work in *Begum*. When the majority [in the House of Lords] start using the classic ‘contracting out’ doctrine to say “there is no interference [with her Article 9 rights]”, you have to ask, “what is she contracting out **of**?” This is basic education; she’s a marginalised young woman and the sort of person you want to be accommodated in mainstream education. It’s not a **persecution** issue at all.

(emphasis in original)

In a similar way, several authors argue that ECtHR judgments upholding headscarf bans in part because headscarves are ‘hard to reconcile with the principle of gender equality’ are, in fact, inimical to gender equality (Malik, 2008a: 21-23; Marshall, 2006).¹⁸⁹ In these cases, it is argued, restrictions on the manifestation of religious belief are felt disproportionately by minority women who may be forced to choose between adherence to religious obligation and the pursuit of education or employment.

‘Conflict’ cases such as *Ladele* also throw into sharp relief the lack of clarity about how protection of the manifestation of religion or belief under Article 9 maps onto direct and indirect discrimination under the Equality Act. Roundtable participants acknowledged the perception in some quarters that sexual orientation claims

¹⁸⁸ And analogous provisions such as Article 18 of the International Covenant on Civil and Political Rights.

¹⁸⁹ *Şahin v Turkey* No. 44774/98, 10.11.2005, para. 111.

routinely 'trump' those based on religion or belief (see section 6.4). As one participant noted in relation to *Ladele*:

What you're dealing with is the religious person's claim to have a right to discriminate directly balanced against the [issue of whether they have suffered] indirect religious discrimination. But it gets muddled when you're trying to map that onto whether - if it's a manifestation of her religion or belief - that means that a person like Ladele should have had **more** than an ordinary protection from indirect discrimination.
(emphasis in original)

As discussed in section 6.5, this 'more than ordinary' protection is commonly argued in public debate in terms of the right to conscientious objection. With *Ladele* and the related case of *McFarlane* pending at the ECtHR, participants noted that domestic legal debate on this issue is likely to take some time to be resolved.

Strains within the equality framework

The second area in which legal provisions are subject to strain is related to the inclusion of religion or belief alongside other characteristics in the Equality Act 2010. Some commentators detect a long-term conceptual difficulty in the inclusion in the same Act of equality grounds which are qualitatively different from each other and which sometimes conflict (see also sections 6.3 and 6.4).

As we have seen, one effect of this is to generate tension - especially between the religion and sexual orientation strands - which might not otherwise become so visible or so tense. However, the strain upon established legal concepts is not confined to cases involving direct tension between competing grounds. Other cases, too, illustrate how concepts that have developed comfortably in relation to other equality grounds - such as the distinction between direct and indirect discrimination - have caused an uncomfortable stretch in relation to religion or belief. *Azmi* is one such case (McColgan, 2009: 11). *Azmi's* claim was that the school's action (in refusing her request to wear a full-face covering while acting as a classroom assistant) amounted to direct discrimination on grounds of religion or belief, for which there exists no defence of justification. However, this claim failed: the Employment Appeal Tribunal held that the discrimination at issue was indirect and that it was justifiable because of the impact on her job function. Some commentators argue that tribunals' general reluctance to find direct discrimination in religion or belief claims is problematic (Fitzpatrick, 2007: 10). The suggestion is that cases are forced down the indirect

discrimination route for the purposes of justification.¹⁹⁰ In *Azmi*, it is not hard to see why the appeal tribunal chose to do so. However, the consequence may be to shrink the concept of direct discrimination across **all** equality grounds and so 'infect the whole statutory discrimination regime' (McColgan, 2009: 14; see also Pitt, 2011).

Legal practitioners and academics at our roundtable acknowledged that not all religion or belief cases face these difficulties. As one noted, the anti-discrimination framework 'works very neatly in ... straightforward cases where you're dealing with a disinclination to embrace [religious difference] and especially where religion maps onto ethnicity' as in the case of *Watkins-Singh*. However, public attention is likely to continue to focus on those cases where the law is under strain, and especially where claims based on religion or belief clash with the equally-protected claims of others.

6.9 Conclusion

This chapter has examined competing interests that arise in relation to religion or belief and how they have played out in legal cases and public debate. Some of the main conclusions to emerge are:

- There are contested understandings about the nature of religion or belief as a protected characteristic. The lack of consensus is particularly evident in relation to whether religion or belief is chosen or immutable. Less contestable is the observation that religion or belief is distinct from other characteristics in having intellectual content and both proscribing and prescribing certain behaviour which impacts on adherents to the religion or belief and, indirectly, on others. As a result, some commentators propose an attenuated form of protection for religion or belief.
- The inclusion of religion or belief alongside other protected characteristics in the Equality Act 2010 has stretched legal concepts in often uncomfortable ways. One effect has been to generate conflicts - especially between the 'religion' strand and sexual orientation - which might not otherwise have become so visible or so tense. Cases concerning religion and sexual orientation were the most contentious of those we reviewed. However, legal judgments concerning competing interests do not necessarily mean that such friction is prevalent or entrenched in society.

¹⁹⁰ In *Azmi*, the appeal tribunal accepted a teaching assistant wearing a balaclava helmet as a comparator to a Muslim teaching assistant wearing a veil in order to establish that the discrimination was indirect and not direct. Fitzpatrick (2007: 47) argues that this was an 'embarrassing means of reaching a conclusion on the direct discrimination issue'.

- Tensions concerning the religion and sexual orientation strand have prompted calls, mainly from some Christians, for an extension of the right to conscientious objection to new and diverse situations, such as a pharmacists' right to refuse dispense hormonal contraception or a registrar's right not to officiate at a civil partnership. Other (both religious and non-religious) voices raise objections to extending protection for conscientious objection where it allows an individual, on the basis of their religion or belief, to discriminate against others on another equality ground. No participant in our research argued either for an unrestricted right to conscientious objection or enforced uniformity in every instance. All agreed on the desirability of avoiding disciplinary action or litigation wherever possible.
- While public debate is frequently couched in terms of protection (or not) for conscientious objection, legal judgments are not. In *Ladele* and *McFarlane*, the Court of Appeal focused its reasoning on the proportionality of the restriction of their right to freedom of religion or belief and the nature of a reasonable accommodation in each situation. These judgments suggest that conscientious objection should be viewed as, at most, a **residual** form of protection, to be invoked only if situations have not been resolved through the usual considerations of proportionality or accommodation.
- Interviewees deployed a mixture of types of argument in support of their positions on particular cases: utilitarian arguments ('what is the harm in letting X do what he or she wishes to do?'); arguments based on general principles ('people delivering public services shouldn't be allowed to pick and choose who they deliver them to'); and empirical arguments (for example, competing 'evidence' as to the suitability of prospective adoptive parents or foster carers). Each may be a valid contributor to decision-making in a given case. However, the relative weight to be accorded to each will vary in each case and decision-makers may need policy guidance as to how to perform this balancing exercise.
- The debate about religion or belief claims competing with others is sometimes portrayed as 'religious' versus 'secular'; however, our research suggests that the lines are not so clearly drawn. Members of religion or belief groups argued both for and against extending protection for religiously-inspired conscientious objection. This is not surprising since legal cases reflect ideological and theological disputes that are also taking place within some religious organisations.

- The exceptions in the Equality Act 2010 designed to deal with competing interests in relation to religion or belief are controversial and are clouded in legal uncertainty. This is caused both by ambiguity in the text of the exceptions and discrepancies between the text and the Explanatory Notes. This has generated concerns that the exceptions may be misunderstood and misapplied. Further litigation concerning the exceptions appears likely.
- There is a lack of clarity about the relationship between protection against discrimination on grounds of religion or belief and freedom of religion or belief under Article 9. Consequently, there is a need to differentiate more clearly those situations that are most appropriately addressed on the basis of freedom of religion or belief and those that are best addressed on the basis of non-discrimination.

In the next chapter, we explore the social impact and significance of the law. This considers the discussion that has opened up within Christianity (and to a lesser extent other religious communities) about the impact of equality and human rights law on religions and their adherents and how to respond to it.

7. Responses to equality and human rights law in relation to religion or belief

7.1 Introduction

This chapter examines the impact of law, and responses to it, outside the courtroom. It identifies ‘narratives’ about the impact and significance of equality and human rights law in relation to religion or belief. These narratives are not entirely distinct in relation either to their content or to those that articulate them; however, they capture broad attitudes and understandings about the law. We pay particular attention to the Christian ‘marginalisation’ narrative which is exceptionally high-profile in contemporary public and media debate.

This chapter also examines the limitations of law as a means of addressing discrimination and the perceived problem of excessive litigation. The chapter also presents interviewees’ views about the role of the Equality and Human Rights Commission (EHRC). The chapter closes with a discussion of approaches to resolving dilemmas or disputes relating to religion or belief in social contexts.

7.2 Attitudes to the law

Trade unions, those concerned with equality strand/s, and groups situated in the ‘belief’ strand generally viewed the expansion of legal protection for, and regulation of, religion or belief as positive. David Pollock commented that domestic case law was ‘beginning to make a coherent whole’ (with the exception of those relating to the definition of belief; see section 5.2). Sally Brett, Senior Equality Policy Officer for the Trades Union Congress, was ‘pleased with the direction of travel’ in religion or belief cases.

Some, but not all, interviewees affiliated to minority religion or belief groups shared this positive view. Differences of opinion were apparent between co-religionists. For example, some Muslim, Sikh and Hindu interviewees viewed equality and human rights laws as guarantors of a level playing field between religions and beliefs and (as one Muslim interviewee put it) an ‘ally’ of communities that face particular disadvantage. Some also described equality and human rights as being congruent with the values at the heart of their beliefs. Khalid Sofi commented that theological perspectives which might suggest a tension with conferring equal treatment on grounds of sexual orientation or gender may not be resolvable:

... but that **doesn't** mean that Muslims can discriminate: everyone is treated equally and that's the end of it.

(emphasis in original)

It was noticeable that Muslim, Sikh, Hindu and Jewish participants in this research did not generally voice concern about the ‘trumping’ of religious interests. Some had sympathy with Christian claimants in cases concerning matters of conscience. However, even where they acknowledged that theological positions held by some of their adherents might conflict with gender or lesbian, gay, bisexual and transgender (LGBT) equality, they did not perceive this as something that was likely to bring them into conflict with the law. Jasdev Singh Rai of the British Sikh Consultative Forum, observed that:

The big issue is about [the imposition] on Christians of secularist values, which are that all sexual orientations should be accepted by law. It’s a conflict between two streams of European thought - between the secularists and the Christians ... We won’t ever accept a homosexual priest in the *gurdwara* [Sikh place of worship]. But will the law get its way round that? I don’t think so.

Such comments suggest that the absence of ‘competing rights’ cases involving non-Christian claimants does not necessarily denote the absence of competing interests or of discrimination in these communities. Rather, it may indicate a sense that the law is perceived to have little or no purchase on the operation of some religious associations or communities defined by religion - and that litigation is not the preferred route for resolving any tensions that do arise.

7.3 The Christian ‘marginalisation’ narrative

The most distinct - and vehemently argued - narrative was that relating to the perceived marginalisation of Christianity. This has, in turn, opened up debate about how, if Christians are being marginalised, they should best respond. Differences of view emerged within our research both about the diagnosis of the ‘problem’ and the most appropriate response (see also section 7.4).

Some commentators who think that Christianity is being marginalised view this as a problem created, or at least exacerbated, by laws which promote equality and diversity. An inquiry into ‘the freedom of Christians in the UK’ by Christians in Parliament (2012: 5) identifies as its main finding that:

Christians in the UK face problems in living out their faith and these problems have been mostly caused and exacerbated by social, cultural and legal changes over the past decade.

The Christian Institute (2009: 5) argues in its report, *Marginalising Christians: Instances of Christians Being Sidelined in Modern Britain*, that there is a 'growing feeling that "equality and diversity" is code for marginalising Christian beliefs'. The report cites cases such as *Ladele*, *Eweida*, *Catholic Care* and *Hall and Preddy v Bull and Bull* as evidence for this claim. It catalogues 'cases of discrimination' against Christians in recent years in the legal and social sphere. These include instances of intolerance towards Christian teachers and pupils; violent attacks on Christian clergy and churches; 'prejudiced stereotypes' of Christians in the entertainment media; misapplication of public order laws which have caused Christians to be detained for expressing their faith in public; and an 'astonishing level of intolerance' against Christians by public authorities.

Several of the examples involve misinterpretations of the law; for example, an instance in 2006 when several firemen were disciplined by the Strathclyde Fire Board employers for refusing to march in a 'gay pride' rally. The employer later apologised for having failed to take into account the firemen's religious beliefs (Christian Institute, 2009: 47). Such examples suggest a need to distinguish (perceived) problems with the law itself from problems arising from its misapplication, which may be addressed by, among other means, improved guidance for employers and public authorities.

Other examples in the report are expressions of opinion about intolerance; for example, the report quotes BBC presenter Jeremy Vine, a practising Anglican, as saying that he did not think he could mention his literal belief in Christ on his radio show. Such opinions may be well-founded but are not in themselves proof of actual intolerance or hostility.

The report is selective in its account of case law; for example, it states that in one case, *Amachree v Wandsworth Borough Council*, a housing officer was dismissed for gross misconduct after initially being suspended for suggesting 'in general conversation' to a terminally ill service user that she could 'seek help from God' (Christian Institute, 2009: 48). The Employment Tribunal judgment in the case notes that this version of events was disputed by the service user, who had complained to the council that she had been left 'shocked' and 'very upset' after a 'half hour lecture' by the officer suggesting that she was ill because she did not believe in God.¹⁹¹ The judgment also clarifies that the officer was dismissed on two counts of gross misconduct, the second relating to a press release issued with his permission by his

¹⁹¹ *Amachree v Wandsworth Borough Council* ET Case No. 2328606/2009, 9 August 2010, para. 13.

legal representative, the Christian Legal Centre (CLC); this had breached the service user's confidentiality by revealing facts from which she could be identified.¹⁹²

The significance of legal judgments

The *Amachree* case illustrates the perils of quoting selectively from complex legal judgments, especially when those partial accounts achieve media prominence.¹⁹³

This is particularly important given the centrality of certain legal cases to the argument that Christianity is being marginalised in Britain. The vast majority of Christian respondents to the general survey undertaken for this research cited cases such as *Ladele*, *McFarlane* and *Johns* as evidence that Christians are being penalised for their beliefs and that significant areas of public life are being placed 'out of bounds' for Christians. Typical comments were that equality law had created a 'general atmosphere of intolerance and intimidation' for Christians and that 'other religions and lifestyle choices have been given preferential treatment in the legal system over and above the Christian faith'. With a few exceptions, respondents based their view that Christianity is being marginalised or penalised on their understanding of legal cases rather than on personal experience.

Some Christian interviewees also viewed certain legal cases as pivotal - particularly those relating to matters of conscience (see section 6.5). For these participants, there are general problems with the way domestic courts and tribunals have handled religion or belief cases, which have in turn been particularly disadvantageous to Christians. The problems they identify include an overly narrow judicial interpretation of Article 9 (see section 5.3); a tendency for judges to stray beyond the bounds of their competence to interpret matters of religious doctrine (section 5.4); and the perceived 'trumping' of religious rights, especially where they conflict with claims based on sexual orientation (sections 6.4 and 6.5). One interviewee hoped the UK cases going to the ECtHR would bring about a 'sensible rebalancing' in which religious rights would be accorded greater weight than in the domestic courts. Dr Don Horrocks saw the cases as evidence of a wider movement to place religion 'at the bottom of the pile of human rights in a clear hierarchy:

¹⁹² Paras. 19, 26 and 28.

¹⁹³ See, for example, Melanie Phillips 'Just for once, the Archbishop is right ... treating Christians as cranks is an act of cultural suicide', *Mail Online*, 14 December 2009. This states that the housing officer 'encouraged a client with an incurable medical condition to believe in God' and that, 'As a result, [he] was marched off the premises, suspended and then dismissed from his job'.

What we feel is that the human rights and equality agenda is being used as a blunt instrument to silence religion ... through legal decisions in the courts. People are prepared to go to court on political agendas and certainly the secular humanists are using equality legislation to remove religion from the public sphere. They are trying hard to do it, and they have had some success.

It is difficult to interpret whether the prominent legal cases do, in fact, indicate a broad trend of anti-religious or specifically anti-Christian discrimination. The Christians in Parliament inquiry report (2012: 5) ventures that:

The recent wave of Christians in the courts does not in and of itself demonstrate that Christianity is badly treated. However, the frequency and nature of the cases indicates a narrowing of the space for the articulation, expression and demonstration of Christian belief.

As noted in section 4.4, legal judgments may raise important matters of principle but, being highly fact specific, are not necessarily representative of common experience or a reliable indicator of the place of religion or belief (or particular religions or beliefs) in society. Chapter 3 established that there is an inadequate evidence base concerning religious discrimination of all kinds. Perceived or reported instances of religious discrimination may differ from legal definitions of discrimination and this makes it hard to aggregate from specific instances of prejudice or hostility to establish a pattern of discrimination. By any measure, Muslims experience discrimination of a greater frequency and seriousness than other religious groups (section 3.4). Joyce Miller, who has led on community cohesion for the Religious Education Council of England and Wales, argued that British Muslims' experience of racism, religious hostility, social deprivation and educational underachievement:

... combine to form a totally different experience from that of an individual Christian who feels they are persecuted ... Christians and Christianity have huge power in this country; the individual legal cases are unfortunate and misguided - but this doesn't compare at all to ... the experience of whole minorities.

As noted in section 3.4, the nature and extent of discrimination against Christianity has not been comprehensively studied but is likely to vary with class, skin colour and type of Christianity, as well as by geography and between rural and urban locations. This suggests the need for a more nuanced analysis of the incidence of

discrimination against Christians and its causes than the generalised marginalisation' narrative presently articulates.

Diverse perspectives on the 'marginalisation' narrative

As we have seen in relation to issues such as conscientious objection (section 6.5) and reasonable accommodation (section 5.5), there is no single Christian perspective on the impact of equality and human rights law. Some interviewees with Christian affiliation disagree that Christianity is being marginalised and view this narrative principally as a response to a loss of privilege.

Some Christian interviewees argued that the 'marginalisation' narrative makes it harder for Christians to engage effectively in debates about the role of faith in the public realm. Reverend Alan Green argued that:

It's incredibly unhelpful that our engagement with those issues is to complain about a loss of privilege. It gives all the wrong messages ... It seems to me very strange for Christians, looking at the model of Jesus, to say we're losing status, power or public persona. What Jesus teaches is that we should expect if we are doing our job of ... responding to the needs of the poor and outcast that we will get into trouble for it - not that we get the seat at the top table.

Reverend Aled Edwards observed that some 'pressure groups' had harnessed legitimate concerns that religious faith isn't given the same force in law as other interests to 'make a point to such an extent that they won't grasp the debate' in all its subtlety. By this account, legal cases have achieved notoriety because they tap into a sense of fear and unease among particular sections of Christianity. Jonathan Bartley of the non-denominational Christian think-tank Ekklesia commented that these fears were 'genuinely held and widespread' but, in his view, 'misguided'.

Simon Barrow of Ekklesia argued that the use of Christianity as a single label in conflict with the equality and human rights agenda is 'an ideological attempt by people with a certain set of interests to block change' and a 'misuse of a diverse understanding of Christianity'. This divergence, he suggests, is between a subversive, radical tradition and a dominant, conservative tradition which is fearful that Christianity is losing its privileged status:

Many Christian institutions ... have built into their structures deep inequalities, particularly between men and women and in the area of sexuality and sexual identity. Therefore ... they see the equality culture as

questioning coming from the outside, rather than asking themselves if they've been getting it wrong in terms of their own Christian self-understanding and welcoming the opportunity to revisit how it is they've ended up with a message which looks totally different to how it began 2,000 years ago.

Members of smaller mainstream Christian denominations described how this debate has played out among their members. Frank Kantor, Secretary for Church and Society of the United Reformed Church, commented that concerns among members of his church about cases such as *Ladele*, *Eweida* and *Hall and Preddy v Bull and Bull* were couched in terms of the 'persecution' of Christians. His response was to ask:

Is it persecution, or marginalisation, or is it simply a perceived loss of privilege ... in society? This is an important distinction. Within the Christendom era ... the Christian churches of Europe felt we had a right to occupy a central position ... We have to reconfigure how we [make the] transition from the centre to ... find our voice from the margins of society with those who are marginalised.

For the Anglican Church, the debate plays out differently. Malcolm Brown, spokesman for the Church of England, acknowledged that the preponderance of Anglicans (and 'token Anglicans') means that:

The Church of England retains residual strengths as a social institution so we have to be particularly careful not to present ourselves as a suffering minority which just doesn't ring true ... There's a subtlety about not playing the persecuted card ... and [we need to] understand when minorities **do** need to play that card.
(emphasis in original)

Brown suggested that equality law 'changes the nature of the questions' that are being asked of the Anglican Church; for example, in relation to issues such as civil partnerships on religious premises. The issue of LGBT rights was a 'major bone of contention' **within** the Church and consequently:

We're harassed ... by the much more certain Christian pressure groups for whom that is almost the only cause that they're fighting. It's been pushed into the limelight as a source of conflict in a way we wouldn't have chosen.

Julian Rivers, Professor of Jurisprudence at the University of Bristol, noted that internal ideological or theological disputes are exacerbated when one side gains an advantage by ‘capturing’ the language of equality and human rights in support of its position. For example, on the issue of women’s ordination, the church enjoys the legal liberty to make up its collective mind according to its own governance structure; characterising the non-ordination of women as an ‘issue of equality and human rights only makes the matter more controversial or litigious’.

Malcolm Brown argued that rancorous debate about LGBT rights and sexual ethics masks a deeper conceptual difficulty that the Church has with some aspects of equality legislation. This difficulty stems from the fact that equality law seeks directly to regulate the conduct of individuals. Brown gave the example of the case of *Hall and Preddy v Bull and Bull*:

Not long ago, the law would have been on the side of the [Cornish hotel] owners but now things have changed; the difference is that we **didn’t** use to prosecute hotel owners who **did** let same-sex or unmarried couples rent rooms; now the ... law is intruding in a way that it didn’t before to enforce a social consensus. That’s a major conceptual change in how people’s lives relate to the legal structures. [The Church of England] keeps a low profile on this because it always comes out in the media as ‘the church bashes gays’. But even church people who are entirely relaxed about homosexuality are wary of the way this appears to be a legal intrusion. (emphasis in original)

Brown added that the effect of this change was to bypass social institutions such as churches and faith communities in which many people develop their sense of morality. This could be damaging since faith communities are important sites where equality and human rights are discussed and enacted; undermining such communities in the name of equality was therefore counter-productive.

In summary, debate about the place of Christianity in British society entails nuances which are not adequately captured by ‘blanket’ statements about the marginalisation of the majority religion. The debate is played out not only between Christians and those of another, or no, faith, but also between and within different Christian traditions and denominations. Some Christian interviewees were concerned that too vociferous a movement against the perceived sidelining of Christianity could, paradoxically, decrease the effectiveness of efforts to uphold the rights of Christians in specific instances. However, the intensity of concern among Christians who **do** believe that their faith is marginalised and penalised is evident from the responses to

the general survey. These responses suggest the equality law is viewed as the primary vehicle by which marginalisation or persecution occurs.

7.4 The role of litigation

In this section, we explore differences of view as to the role of litigation in pursuing claims based on religion or belief. This discussion connects to the previous section in that litigation is most actively pursued on behalf of Christian claimants by groups that combine a litigation and campaigning role.

The Christians in Parliament report (2012: 5) comments that:

Some of the legal activity, associated campaigning and media coverage has been unwise and possibly counter-productive to the positive role that Christians play in society.

Some interviewees were critical of what they perceived as excessive or misguided use of litigation pursued by some Christian activists. Criticism was voiced by a range of interviewees representing religion or belief groups, other equality strand/s and business organisations. The litigation strategy and campaigning of the Christian Legal Centre (CLC)¹⁹⁴ was described by one interviewee concerned with employment as ‘deliberately provocative’. Several Christian interviewees singled out the *Johns* case (litigated by the CLC) as one which should not have been pursued.¹⁹⁵ However, Andrea Williams of Christian Concern, the CLC's sister organisation, argued that litigation is an important means of achieving justice for claimants whose situation would otherwise go unnoticed:

It matters to these individuals and society also has to understand what's going on. Otherwise what happens is that people resign and none ever knows about it ... People ... are scared to speak for fear of being branded a bigot ... The *Johns* judgment is seriously unjust, wrong and illiberal.

¹⁹⁴ The Christian Legal Centre is the sister organisation of Christian Concern, formerly known as Christian Concern for Our Nation. See <http://www.christianconcern.com/christian-legal-centre>.

¹⁹⁵ Another case referred to by one interviewee as being weak on the facts and badly argued was that of *Haye v London Borough of Lewisham* ET Case No. 3301852/2009, 16 June 2010, concerning a council employee who was dismissed for sending an email from her work account to Reverend Sharon Ferguson of the Lesbian and Gay Christian Movement which the tribunal described (at para. 36) as ‘highly offensive, homophobic ... aggressive and violent’. It was submitted by the CLC on behalf of the claimant that this was a case about free speech and that the email was a legitimate expression of her religious beliefs - arguments that found no favour with the tribunal.

Justice must be done and we won't rest until it is. The alternative is to do nothing - then the Johns don't foster and no one knows about it.

Concern about the risk of excessive or misguided use of litigation was expressed by some Christians who felt that religious interests need to be defended through forms of social action such as mediation, negotiation, guidance and public argument, with litigation used only as a last resort. Dr Don Horrocks commented that:

We are great supporters of mediation before going to court. We are not a group that wants to take things to court. We should reserve [litigation] for issues of real strategic importance.

Richard Kornicki argued that:

Some cases with a high media profile are doing more damage to the religious cause than they could possibly know. Arguing a poor case on the basis of alleged 'victimhood' is not helpful.¹⁹⁶

Charles Wookey argued that 'picking a fight with the whole equalities framework' was unnecessary and could be counter-productive:

We have to be vigilant in cases where Christians might be discriminated against, but there's a presumption that the whole thrust of this legislation is about victimising Christians which I don't think it is. And there's a danger that we provoke a kind of secularist response if we make that presumption.

Some interviewees were concerned about the 'collateral damage' that might be done to claimants whose cases had become particularly high-profile as a result of campaigning. For example, in the case of *Amachree v Wandsworth*, a press release issued by the CLC with the claimant's permission contributed to his eventual dismissal by breaching the confidentiality of a service user, an action which

¹⁹⁶ In the *Johns* judgment, Munby LJ (at paras. 32 and 34) described the arguments advanced by the Christian Legal Centre as being couched in 'extravagant rhetoric', 'at best tendentious in their analysis of the issues' and 'a travesty of reality'.

constituted gross misconduct (see section 7.3).¹⁹⁷ We are not aware of research documenting the experience of claimants across a range of cases.

Jonathan Bartley noted that the dynamic of events leading up to high-profile cases was similar: there had been little or no mediation; each side had acted defensively and when campaigning groups became involved, positions became polarised and entrenched. Bartley argued that:

There is a clear agenda from pressure groups to whip things up. Cases which could be sorted out locally are jumped on ... and when they lose a case, it contributes to the narrative that Christians are being persecuted, so it becomes a vicious circle.

Many interviewees viewed litigation as symptomatic of failure, whoever instigated it. This included those who had been involved in legal action, such as Kashmir Singh of the British Sikh Federation who advised the claimant's family in the 'expensive and protracted' *Watkins-Singh* case. One Christian interviewee argued that:

Nobody apart from a few radicals on one side or another should be coming anywhere near a court or be wasting people's time and money. It's not by accident that those cases have come to court - it's indicative of a loss of perspective amongst us. I don't need to side with one group or another; I'd like everyone to behave with a degree of courtesy to each other. It obviates the need to say 'my rights are going to trump yours'.

In summary, there was a broad consensus among our interviewees that litigation is a weapon of last resort to be reserved for cases of strategic importance. This might include cases which establish new and important principles or that test an uncertain area of law. Concern was expressed most strongly by interviewees who viewed excessive or misguided use of litigation as detrimental to the purpose of protecting religious believers from discrimination.

7.5 The limitations of law

Allied to concern that there has been excessive litigation concerning religion or belief is a view that the law is limited in its capacity to address complex questions of

¹⁹⁷ Andrea Williams of Christian Concern rejected the suggestion that Mr Amachree's case had been damaged by the press release as 'he would have been fired anyway' and the publicity ensured that Wandsworth Council could not 'get rid of [him] quietly'. She added that 'It's last resort to use the media ... The client has to make a judgment and they understand what could happen. We care about our clients very deeply and we would never put them in any media exposure that we felt they couldn't handle'.

multiculturalism and social identity in modern Britain. As one London roundtable participant put it, ‘courts may simply not be the right place to have this conversation’. As this section examines, the law may also be used in ways that have unintended consequences.

Addressing structural disadvantage

Some commentators argue that litigation and divisive debate about, for example, symbols of faith may be ‘diverting attention from the real problems of disadvantage and exclusion experienced by ethno-religious groups’ (Hepple, 2011: 43). Some interviewees, especially those from minority religious communities, viewed the law as, at best, irrelevant to addressing structural discrimination and disadvantage.

Interviewees from Muslim communities argued that over the past decade, they had been at the ‘receiving end’ of a largely top-down process of defining and redefining individuals and communities. Wahida Shaffi of the Bradford Muslim Women’s Council commented that public discourse about racism had been eclipsed by a focus on religious (Islamic) identity. While ‘race’ and ‘religion’ were equally valid in any discussion around human rights and inequality, the preoccupation with a particular approach to ‘socially engineered integration’ had not addressed deep-seated problems of poverty and disadvantage in her community (see also section 3.3). Shaffi added that her community had been alarmed at how cases concerning the wearing of face veils could ‘play into the hands of far right organisations’ or become the subject of provocative media coverage. This reminds us that the significance of cases should be assessed by how they reverberate in the social sphere as well as for the legal principles they enshrine.

The limitations of law to address inequality was sometimes framed within a larger perceived tension between the ‘religious’ and the ‘secular’ worlds (see section 2.5). Shaykh Faiz Siddiqi of the Muslim Arbitration Tribunal observed that:

I don’t think we’re going to see equality emerging through the arm of the law. Individual cases may highlight the problem but will never eradicate it. That can only be done through a global discussion between faith and secularity.

That ‘global discussion’ may also need to entail tensions within the concept of equality itself. This tension is between the traditional notion of formal equality, requiring that cases be treated alike, and substantive notions of equality, requiring equality of opportunity and outcome to address the relative disadvantage and social exclusion of particular groups (Bribosia and Rorive, 2010; McCrudden, 2005; Vickers,

2011). The public sector equality duty is one vehicle through which substantive equality might be addressed in relation to religion or belief; this is discussed in section 9.4.

Unintended consequences of equality law

Interviewees situated in both the religion and belief and other equality strands argued that equality law has produced unintended consequences which must be recognised and responded to. In particular, it was seen as having encouraged an undue insistence on the assertion of competing identities and set different groups on an ‘intellectual collision course’ (see also sections 6.4 and 6.8). Legal interventions could in turn make positions more entrenched and compromise harder to achieve. Charles Wookey argued that:

We have to think carefully about the way that equality legislation has been developed and used if we’re not going to ... sow social division based on people’s assertion of their identity based on protected characteristics. That’s the opposite of what we want to do - and it’s a continuing risk.

Interviewees identified the potential for adversarial approaches to be pursued **both** between different religions or beliefs **and** between religion and claims based on other equality grounds. Malcolm Brown, Director of Mission and Public Affairs for the Church of England, referred to this as a kind of ‘me too-ism’:

One of the anxieties we have about the culture of equalities is that it can transmit the idea that ... if other faiths are protected in some of their practices because they’re intrinsic to that faith, then we ought to be protected in practices which actually aren’t intrinsic to ours. It changes the way people think about the practice of their faith - it’s an unintended consequence.

This observation appeared to be borne out by a large number of responses to the general survey from those identifying as Christian; for example, one commented that either ‘everything goes or nothing goes’, while another argued in favour of ‘one law for all ... if a Christian nurse can’t wear a cross then a Muslim nurse can’t wear her religious accoutrements’.

Reverend Sharon Ferguson argued that:

The law gives people permission to change their thinking. Because [the characteristics] are kept separate, it supports this notion that there is a

conflict between being gay and being a person of faith. It means that within the gay community, faith is seen as the enemy. [Part] of my work is trying to bring faith to the LGBT community and the views on that side of the fence are just as entrenched.

Several interviewees spoke of the need to lower the emotional temperature of discussion about religion or belief since ‘copy-cat’ claims for legal recognition and protection were suppressive of debate. A participant involved in inter-faith matters argued that competing claims should be viewed within the context of ‘good relations’ and not only equality:

Equality provides a framework in determining what is just ... but that doesn't mean we shouldn't try to reach informal accommodation in ways which don't put people in a difficult position. The question 'what are reasonable expectations about the way in which people should behave?' is a different question from 'what does the law require?' It's part of living in a comfortable society [to resolve disputes] short of litigation, even where I could **choose** to litigate.
(emphasis in original)

This observation has implications for the ‘good relations’ mandate of the EHRC, which are discussed in the next section.

7.6 The role of the Equality and Human Rights Commission

Established under the Equality Act 2006, the EHRC has a mandate to promote equality, enforce the law, protect human rights and ensure good relations in society. It has powers to enforce equality law and can take legal cases on behalf of individuals to test and extend the right to equality and human rights, as well as legal action to prevent breaches of the Human Rights Act.

The Commission's work on religion or belief

Legal interventions

The EHRC has intervened in a number of cases concerning religion or belief (see also Appendix 8). These include the following interventions:

- *Ladele and McFarlane v UK* and *Eweida and Chaplin v UK*; in the former, the EHRC supported the decision of domestic courts (section 6.5); in the latter, it argued that domestic case law ‘currently fails adequately to protect individuals from religious discrimination in the workplace’ (section 5.4).

- *Hall and Preddy v Bull and Bull*: the EHRC funded and led the discrimination claim against the owners of a Cornish hotel who refused to let a double room to a same-sex couple. The EHRC also funded both Mr Preddy and Mr Hall's successful defence to Mr and Mrs Bull's appeal.
- *Johns v Derby City Council*: the EHRC adduced evidence on, inter alia, the impact of views opposed to, and disapproving of, same sex relationships and lifestyles on the development and well-being of children and young people, including gay and lesbian children and young people.¹⁹⁸
- *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*: in the appeal of the adoption agency, Catholic Care, to the High Court, the court accepted the EHRC's argument that the Charity Commission is a public authority and must therefore consider the Human Rights Act when making decisions on charity applications.¹⁹⁹
- *R (E) v JFS Governing Body*, concerning the school's refusal to admit a child because his mother converted to Judaism in a progressive synagogue (see section 9.3). The EHRC argued that the school's use of an ethnic-based test in selecting students did not comply with the Race Relations Act and that it had to intervene in order to preserve the same protection against racial discrimination for Jews as for anyone else.²⁰⁰
- *Ghai v Newcastle City Council*: the EHRC argued that to deny the claimant an open air funeral pyre for his own funeral would breach his rights under Article 8 ECHR (the right to private and family life), as well as under Article 9.
- *O'Donoghue and Others v United Kingdom*: the EHRC submitted to the ECtHR that an indiscriminate scheme requiring immigrants without settled status to pay large fees to obtain permission from the Home Office to marry anywhere other

¹⁹⁸ *Johns v Derby City Council* at para. 23.

¹⁹⁹ [2010] EWHC 520. The matter was remitted to Charity Commission to reconsider, the results of which are discussed in section 6.7.

²⁰⁰ See <http://www.equalityhumanrights.com/hafan/canolfan-cyfyngau/2009/december/commission-welcomes-supreme-court-ruling/>.

than in an Anglican church was a violation of the right to freedom of religion, among other rights.²⁰¹

The EHRC has produced or commissioned research on religion or belief in Britain (Perfect, 2011; Weller, 2011; Woodhead, 2011; Woodhead with Catto, 2009) and maintains a Religion or Belief Network for those interested in religion or belief issues from an equalities or human rights perspective.²⁰² The Commission provides generic guidance on equality, human rights and religion or belief on its website.²⁰³

Critical perspectives

A number of interviewees concerned with both the religion and belief strands, as well as other equality strands and employment, were critical of what they knew of the EHRC's track record on religion or belief. The nature of the criticism varied.

Strong criticism came from those Christian interviewees who objected to the Commission's intervention in cases concerning religion or belief and sexual orientation. They saw the EHRC as partial and lacking credibility in relation to its religion or belief mandate. This was expressed as 'supporting fashionable bandwagons' and being 'partisan and narrow - in with the secularists and the gay lobby'. One noted that the Commission had 'never intervened on behalf of religion or belief'.²⁰⁴

Other religion or belief groups were also critical of the EHRC's record. Jasdev Singh Rai commented that, 'There's a lack of competence right from the top [of the Commission] in this sensitive area'. Singh Rai had not viewed the Commission as a credible potential mediator in the dispute over the staging in Birmingham of *Behzti* (Dishonour), which depicted rape and murder in a *gurdwara* and was believed by some Sikhs to have maligned Sikhism (for further details on this issue, see Nye and Weller, 2012: 40). Jon Benjamin of the Board of Deputies of British Jews observed

²⁰¹ No. 34848/07, 14.12.2010. The Home Office scheme purported to prevent sham marriages but did not, in fact, address the question of whether the proposed marriages were genuine or not. The ECtHR ruled that the scheme had led to multiple violations of Convention rights, including Article 14 (freedom from discrimination) read together with Article 9; the scheme has subsequently been abolished.

²⁰² <http://www.equalityhumanrights.com/publications/our-research/research-services/#3>.

²⁰³ <http://www.equalityhumanrights.com/about-us/vision-and-mission/our-business-plan/religion-belief-equality/>.

²⁰⁴ This comment was made before the Commission's intervention in the cases of *Eweida* and *Chaplin*.

that the EHRC was ‘not a body that we would necessarily regard as our first port of call’. He had also found the Commission ‘unhelpful’ with regards to its intervention in the *JFS* case, which he said had not been preceded by consultation with the Board of Deputies; however, there had been a welcome acknowledgement of this subsequently. The National Secular Society criticised the Commission’s decision not to take up several issues which the society had brought to its attention; such as equality concerns related to the Schools Standards and Framework Act 1998 (see section 9.3).

Several interviewees covered by both the religion and belief strands commented on the demise of the Religion or Belief Consultative Group (RBCG) which was formed in 2004 and from 2008 acted as the advisory body to the EHRC on religion or belief.²⁰⁵ Accounts of the group’s demise in 2010 varied, but appeared to reflect, among other issues, a fissure between the religion or belief strands and a lack of trust both between RBCG members and in the EHRC’s competence and impartiality in the area of religion or belief. Some interviewees noted that trust in the EHRC was damaged by the appointment as a Commissioner in 2007 of Joel Edwards, then head of the Evangelical Alliance. His appointment, despite his view that same-sex relationships are sinful, drew criticism from, among others, the National Secular Society, LGBT organisations and some trade unions.²⁰⁶

Some equality specialists and trade unions we interviewed expressed more general reservations about the Commission’s work on religion or belief. One noted that it appeared to have ‘ducked the issue’ of competing rights and equality claims as being ‘too difficult’. This was a missed opportunity, since ‘one of the arguments for bringing the equality remits together is that it would be a more powerful and thoughtful way of bringing these difficult areas together’. Several interviewees from religion or belief

²⁰⁵ The RBCG was formed under the auspices of the Department for Trade and Industry as a reference group for the religion or belief strand during the pre-parliamentary and parliamentary stages of Bill which became the Equality Act 2006 and which established the Equality and Human Rights Commission. It subsequently redefined its role as a strand-related consultative group. It was chaired throughout by Barney Leith OBE of the Bahá’í community of the UK. After a period of declining attendance, in February 2010, the Church of England, the Catholic Bishops’ Conference, the Free Churches’ Group, the Methodist Church and the Salvation Army withdrew from the RBCG. The remaining members were various representatives of smaller faith communities, the British Humanist Association and the National Secular Society. Agreement could not be found on continuing the RBCG and it was wound up. This information was provided in correspondence with Barney Leith in May and November 2011.

²⁰⁶ See ‘Interview: new equality commissioner on gays as sinners’, *Pink News*, 6 November 2007. See also ‘EHRC commissioner row’, *Equal Opportunities Review*, 1 December 2007.

groups and those concerned with other equality strands suggested there was confusion among employers about the balance of the EHRC's advice-giving and enforcement roles. It was suggested that these 'carrot' and 'stick' functions should be better articulated to the public given the contentious nature of this equality strand.

Criticism of the EHRC was not universal. A small number of interviewees, mainly from minority religion or belief groups, considered that negative views of the Commission's record were problems of perception rather than substance. Several also acknowledged that any national human rights institution was likely to have encountered difficulty due to the variegated nature of religion or belief and complexity of competing equality claims. The commissioning of this research was also acknowledged by several interviewees to be a valuable step to inform policy options relating to religion or belief.

Potential roles for the EHRC

Interviewees suggested three broad areas in which the EHRC could play a constructive role: 'myth-busting'; developing guidance; and developing its 'good relations' mandate. These roles were viewed as inter-linked as a means of avoiding litigation through improved decision-making and greater use of conciliation and mediation.²⁰⁷

Myth-busting

Several interviewees concerned with both the religion and belief strands, other equality strands and employment advocated a myth-busting role about legal cases and issues which have prompted divisive debate. This was viewed as a way of changing the 'mood music' and discouraging divisive public debate. Simon Barrow argued that:

The establishment of an evidence base for public discussion is a major issue - an equality body ought to try to put on record a reasonable and fair account of the legal contestation. Otherwise the evidence base becomes limited to quite distorted press accounts.

²⁰⁷ In its March 2011 consultation paper, *Building a Fairer Britain: Reform of the Equality and Human Rights Commission*, the Government Equalities Office (2011c) proposed to remove the EHRC's mediation and conciliation powers and aspects of its good relations mandate 'because we believe it creates unrealistic expectations about what an equality regulator and national Human Rights Institution can achieve'. In its initial response to the consultation, the EHRC argued that this could lead to an increase in lengthy and expensive litigation by forcing private and public sector organisations down the more costly compliance rather than conciliation route. See <http://www.equalityhumanrights.com/about-us/vision-and-mission/government-consultation-on-our-future/>.

Shaista Gohir of the Muslim Women's Network UK, suggested that by publishing accessible summaries of cases, the EHRC could help dispel the erroneous impression that 'Muslim groups are seen as given priority by being allowed to wear headscarves whereas a Christian can't wear a cross' - an impression which had been damaging to community relations. Carola Towle, National Officer (lesbian, gay, bisexual and transgender equality) for Unison, argued that the EHRC needed to 'prick the bubble of the perception' that tension between sexual orientation and religion was either inevitable or impossible to resolve.

Guidance

Several interviewees suggested that the EHRC could provide accessible, practice-based guidance that 'brings the legislation to life' and supports principled decision-making. Lucy Vickers, Professor of Law at Oxford Brookes University, suggested that, in keeping with guidance on, for example, gender equality, religion or belief guidance could extend beyond strict legal requirements to establish 'rules of thumb for managers that are easily achievable, good practice'. Rose Doran, Senior Advisor with the Local Government Group, commented that the Commission could also showcase examples of good practice from public authorities and equip communities to hold public bodies to account for their duties in relation to religion or belief. It was noted that guidance should establish the value of using human rights principles as a basis for handling competing equality claims.

It was acknowledged that controversy surrounding certain cases meant that the drafting of guidance by the EHRC would be sensitive. It may also need 'bridge some gaps' or areas of uncertainty, for example concerning the definition of belief (section 5.2). We examine employers' perspectives on existing guidance in section 8.5.

Some religion or belief groups expressed a preference for developing their own guidance which would address issues of particular concern for their adherents. For example, Richard Kornicki suggested from a Roman Catholic perspective that 'we need to provide clarity to our community so they know what the law does or doesn't require and what the law permits'. However, he suggested that the Catholic Church would be likely to seek the EHRC's endorsement of the guidance as an accurate reflection of the law. Jit Jethwa of the Hindu Forum of Britain suggested that religion or belief groups could be used more extensively as a source of expertise for such guidance. Several Muslim interviewees noted that mosques would be effective 'transmitters' of key messages from the EHRC.

Good relations

Several interviewees, mainly but not only from the religion strand, argued that the EHRC's work on religion or belief naturally rests with its mandate to promote good relations. Reverend Aled Edwards, who is a member of the EHRC's Wales Committee, argued that a powerful form of social action was to bring together groups or individuals who do not normally interact:

If the Commission becomes a purely regulatory body with a stick, those conversations might become more difficult.

Yann Lovelock of the Network of Buddhist Organisations similarly argued that the EHRC could play an 'honest broker' role in order to prevent the need for litigation, a role that government agencies could not credibly play. Interviewees from minority religious communities viewed this role as extending to developing closer links with communities. Dr Husna Ahmad of the Faith Regen Foundation suggested that this should not be confined to consultation on issues that the Commission chose to prioritise.

Pragna Patel of Southall Black Sisters called for the EHRC to acknowledge and respond to disparities of power on the basis of class, caste, gender, disability and sexuality within minority religious communities. She suggested that the Commission needed to monitor the effects of including religion or belief as a protected characteristic in the Equality Act 2010 and particularly its inclusion within the public sector equality duty:

[The EHRC] should work with the most vulnerable, those with less chance to articulate inequalities. They need to argue for the interest of those who don't have power, not those who already have it. They need to look at what religion being an equality strand means for communities since it is often the most authoritarian interpretations that are dominant and they have specific consequences for the human rights of the most vulnerable within [those communities].

No interviewee called for the EHRC to be involved in more legal intervention. While it was acknowledged that this might sometimes be necessary to test areas of the law and establish clarity, the overwhelming emphasis across our interviews was the need to avoid litigation, support principled decision-making and encourage more temperate public debate.

7.7 Approaches to dispute resolution outside the courtroom

If litigation is to be used selectively, there is a requirement to pre-empt or resolve disputes relating to religion or belief by other means. These might be disputes involving competing equality strands; between an individual and an employer; or in a community setting (see also Afridi and Warmington, 2010; Malik, 2008a). Drawing on discussion of legal cases and issues in preceding chapters, this section examines principles and practical approaches that were proposed by our interviewees as a basis for pre-empting or resolving disputes in the workplace or community. These were often described as ‘rules of thumb’ that might guide employers, service providers or other groups when disputes involving religion or belief arise. Each is congruent with the human rights legal principles outlined in section 6.2, though they were often expressed in non-legal terms.

Principles or ‘rules of thumb’ underpinning dispute resolution

Proportionality

As we have seen, the principle of proportionality is central to judicial consideration of whether interference or disadvantage based on religion or belief is justified in a given case. The principle was also considered invaluable for decision-makers outside the courtroom, though it was often expressed in different language; for example, ‘using the least restrictive option’ or ‘not using a sledgehammer to crack a nut’. The House of Lords judgment in *Begum* established that there is no procedural requirement for employers or other institutions to show that they have applied a step-by-step approach to achieving proportionality as courts or tribunals do (section 6.2). However, several interviewees argued that such an approach may assist decision-makers to ‘get it right’ by ensuring that they consider whether a particular intervention has a legitimate aim and whether the means employed are an effective and proportionate method of achieving it. This is one of the key ways that human rights principles provide a practical framework for making decisions in difficult situations (see also Afridi and Warmington, 2010: 25-28).²⁰⁸

‘Do no harm’

The principle most frequently invoked by interviewees was that of ‘do no harm’. This was also expressed as ‘do as you would be done by’ and ‘equality without infringing the rights of others’. At a general level, the principle suggests a position of mutual restraint, according to which individuals or groups refrain from asserting human rights or equality claims if to do so entails harm to others; for example, because it

²⁰⁸ For guidance on human rights as an aid to decision-making, see <http://www.equalityhumanrights.com/human-rights/human-rights-practical-guidance/key-messages/>.

compromises health and safety or places an undue burden on colleagues. As discussed in section 5.5, the ‘do no harm’ principle was raised in relation to requests for reasonable accommodation of religion or belief in the workplace. In this context, the principle was considered a useful means of distinguishing situations in which claims for reasonable accommodation are refused for compelling reasons as opposed to merely a disinclination to embrace religious or cultural difference.

The principle was also invoked in favour of allowing individuals conscientiously to object to certain tasks if no material harm was caused to colleagues or to people using a service (section 6.5). However, the application of the principle was controversial in this context since perceptions of harm differed. For example, some interviewees would have accommodated Lilian Ladele’s request to abstain from performing civil partnerships on the grounds that no-one would have been harmed by so doing; it was argued that harm to a **hypothetical** claimant should not be a bar to accommodation. However, others perceived the need to consider the actual or potential harm to the reliability and non-discriminatory ethos of the service and consequently to others using or delivering that service. These participants also observed that in *Ladele*-type situations, colleagues of the person seeking conscientiously to object may experience harm beyond pure offence, and may not always feel able openly to express the effect upon them. These differences of view remind us that perceptions of harm are always context dependent and could therefore form part of the assessment of proportionality in a given instance.

‘There is no right not to be offended’

It is important to distinguish between harm and offence. As noted in section 5.5, interviewees and survey respondents from a variety of stakeholder groups stated that pure offence should rarely be a determining factor in the resolution of disputes; provisions in the Equality Act 2010 covering victimisation and harassment established the threshold for acceptable conduct and beyond that there was, as one interviewee put it, ‘no right not to be offended’. The notion of vicarious offence was considered to be suppressive of open discussion about religion or belief in social contexts. Malcolm Brown, spokesman for the Church of England, suggested that this principle applied whoever was claiming to be offended:

We have this concept of religious offence ... [yet] it seems to me that the idea that the purpose of a religion is to be offended doesn’t fit with what we believe about God - it appears to be running to the defence of a deity who can perfectly well look after himself! [At the same time] if others are offended by the public expression of someone’s religion, or even a person

attempting to argue religious questions in public ... I think that is copycat behaviour and it's quite unacceptable.

Respect for the value of religions and beliefs to their adherents

Several interviewees from religious groups proposed as a 'rule of thumb' simply the recognition that religions are important to their adherents.²⁰⁹ It was argued that religion was too often viewed in a knee-jerk way as 'the problem', or as an impulse that 'overspills into violence or irrationality' and should be constrained in the private sphere. As argued above, this observation does not necessarily entail protection from offence for a particular religion; however, it establishes at the minimum a respect for the intrinsic value of religions to their adherents. As noted in section 6.2, this is also expressed as respecting the 'believer' rather than the 'belief' (Evans, 2009b: 30).

This principle is concerned with the very basis for protecting freedom of religion or belief and prohibiting discrimination on grounds of religion or belief. This is sometimes viewed instrumentally; for example, in relation to advancing social cohesion and inclusion or fostering civic virtue (Ahdar and Leigh, 2005: 52-63). For some commentators, stronger arguments for protection rest on the realisation of a common good. Evans (2009a: 200) argues that, 'When individuals and belief communities are able to enjoy their freedom of religion or belief democratic society itself is a beneficiary'.

Personal and institutional autonomy

As noted in section 5.5, the principle of personal autonomy was endorsed by many interviewees as an approach to the accommodation of religion or belief. The suggestion is that individuals should be free to pursue their own preferences subject only to reasonable limitations imposed in the interests of others. The principle of personal autonomy was given nuanced interpretation by many of our participants. It was acknowledged that it will sometimes have to be balanced against the integrity of the organisation and the imperative to achieve its objectives. As noted in section 5.4, nearly all participants argued that individuals whose religion or belief is important to them, have a responsibility to make sensible career choices that avoid foreseeable conflict with the law or professional practice; moreover, they may sometimes have to make considerable personal sacrifices.

Several interviewees from religion or belief groups emphasised the principle of institutional autonomy. According to this principle, religions or beliefs are expressed

²⁰⁹ Interviewees invoked this principle specifically in relation to religious belief; however, it might apply equally to the holder of a philosophical belief for whom that belief is of overriding importance.

primarily in institutions that are separate from the state and these institutions should be free to organise their own internal life largely free from state intervention.

The liberal concern with individual autonomy may sometimes be in tension with that of institutional autonomy. As discussed in section 2.3, both are integral to the concept of 'progressive multiculturalism' in a religiously- and culturally-diverse society.

However, predominant weight may need to be given to the interests of vulnerable individuals where they conflict with those of the dominant members of a group. Malik (2008a: 17-20) advocates a 'zero tolerance' approach to practices that involve violence or coercion towards vulnerable individuals. In such contexts, there is also a need to promote the autonomy of those individuals and to empower them within the community concerned since they may not wish, or be able, to exit it.

The inherent value of diversity

Several interviewees commented that diversity is an inherent social good. This connects to normative arguments for multiculturalism (section 2.3); as one interviewee put it, this is an argument in favour of society (and particular social institutions) resembling 'a salad rather than a stew'. By this account, each individual in a social institution benefits from being part of a diverse whole. Religion or belief is one aspect of that diversity. This proposition underpins the presumption towards the accommodation of religion or belief in the absence of compelling reasons for restriction (examined in section 5.5). It helps explain why institutions should bear a degree of inconvenience or cost to permit such accommodation, such as the cost of providing prayer or reflection rooms or meeting dietary requirements. Several interviewees observed that this proposition is also supported by pragmatic arguments; for example, that employees who feel comfortable in a workplace are likely to be more committed and productive. Interviewees acknowledged that these arguments applied not only to religion or belief. For example, one noted that a large employer in Wales had accommodated a request by an individual who was HIV positive to have a protected space where they could discreetly take their medication; this was analogous to requests for prayer or reflection rooms, since both involved a recognition that 'we are not all the same'.

7.8 Ground rules for conducting public debate

This section examines some 'ground rules' proposed by research participants and in the literature for conducting public debate on religion or belief.

A persistent theme of this research was that public discussion of equality, human rights and religion or belief is sometimes unduly intemperate and tends to accentuate conflict. An example of such conduct is that of a columnist in an independent

Anglican newspaper, who described the leadership of gay rights organisations as ‘the Gaystapo’.²¹⁰ Some sections of the mainstream media were viewed by many interviewees as playing an unhelpful role in shaping and exacerbating conflicts (see also Afridi and Warmington, 2010: 27). Several interviewees concerned with the religion or belief and other equality strands proposed ground rules for approaching public discussion or negotiation of differences in particular settings. These approaches are not peculiar to disputes connected to religion or belief. However, interviewees acknowledged that the existential importance of religions or beliefs to their adherents, and the potential for tension with other equality strands, can make such disputes appear intractable and in greater need of principled approaches to resolution.

Respecting the integrity and legitimacy of others’ positions

One ground rule was the requirement to respect the integrity and legitimacy of the position of each party to a dispute. It was noted that impugning the motives of others tends to close down any possibility of dialogue. Reverend Aled Edwards recalled that during the debate in the Church in Wales about the ordination of women to the priesthood:

Integrity was an important principle. There seemed to be a value in describing both positions as having integrity even though they were passionately opposed. When people feel anger and where there is legitimacy to their conviction, it goes a long way if you recognise that legitimacy.

Stychin (2009: 754) argues that conditions - or ‘ethical rules of engagement’ - should be attached to entry into the public sphere (see also section 6.5). He suggests that acceptance of these conditions is a minimum requirement for groups or individuals who seek to negotiate a particular outcome in a context where competing interests are at stake. One set of conditions is proposed by the 2008 Bouchard-Taylor Commission in Quebec; this was aimed at addressing what it called a ‘crisis of perception’ with regard to the accommodation of minority religious and cultural practices, stemming largely from erroneous or partial understanding of such practices. It suggested as a set of ethical reference points for any negotiation process:

²¹⁰ The columnist, Alan Craig, stated that ‘gay-rights stormtroopers take no prisoners as they annex our wider culture, and hotel owners, registrars, magistrates, doctors, counsellors, and foster parents ... find themselves crushed under the pink jackboot’. See ‘Anglican newspaper defends “Gaystapo” article’, *The Guardian*, 8 November 2011.

... openness to the Other, reciprocity, mutual respect, the ability to listen, good faith, the ability to reach compromises, and a willingness to rely on discussion to resolve stalemates. The institution of a culture of compromise largely centres on all of these factors that foster the coordination of action and the peaceful, concerted resolution of disputes. (Bouchard and Taylor, 2008: 55)

Jennifer Nedelsky (cited in Stychin, 2009: 753) suggests that tolerance must extend to viewpoints that are incomprehensible to oneself. This requires an 'imaginative capacity to put ourselves in the position of another' and 'taking others' perspectives into account in order not to be limited by one's own interests and idiosyncrasies'.

The role of mediation

Several interviewees acknowledged that where each party to a dispute struggles to recognise the integrity of the other's position, the intervention of a mediator can be critical. Aled Edwards underlined the value of:

... conduits or ambassadors who have access to the sides of the debate and the capacity to hold both views with respect.

An example of this was the role he played in the case of Shambo, a bullock sacred to a Hindu monastic community, which was ordered to be slaughtered after testing positive for bovine tuberculosis.²¹¹ The community used the mediation to request a police guard of honour for Shambo as he was taken away:

So a community experiencing a degree of grief in terms of their faith values could see honour being shown to them. It also meant that Shambo left ... in relative peace. The police were able to say 'we have a job to do here in law but we will do it in a way that doesn't unnecessarily offend you'. That sense of meeting what is not an unreasonable request goes a long way.

Interviewees noted that 'grassroots' mediation has also used to resolve disputes within religious communities. Tehmina Kazi of British Muslims for Secular Democracy noted that the Mosques and Imams National Advisory Board (MINAB) had offered to mediate between Dr Usama Hasan and the trustees of his mosque in east London

²¹¹ *R (Swami Surayanda) v Welsh Ministers* [2007] EWCA Civ 893.

(where some service users had objected to his publicly-stated views on evolution and women who choose not to cover their hair).²¹² Had it not been for mediation:

...the whole issue would have been about their freedom of religion versus his freedom of speech. So I think it is very important to empower groups like MINAB, who do a lot of grassroots work to prevent these issues making it to the courts.

Mediation may also take place within families; for example, the east London-based charity Positive East, which supports people living with HIV-Aids, had, according to its Community Development Officer Fazal Mahmood, 'acted as a bridge where [someone's] sexual orientation confronts the religious positioning of their family'. The charity had also played this role at a community level; for example, it had facilitated dialogue between religious groups and those concerned with other equality strands on issues such as hate crime and forced marriage.

Several interviewees noted that spending cuts had imperilled their organisation's capacity to conduct community-based mediation or provide informal advocacy. It is not possible to generalise from these observations about the impact of cuts to third sector organisations; however, the value of intermediate organisations is evident from the instances of mediation cited in this section.

The process of negotiation

Several interviewees emphasised that the resolution of disputes concerning religion or belief is not a 'zero sum' game. Amanda Ariss suggested that decision-makers should 'resist the psychological temptation automatically to side with one party or another' even though it may be uncomfortable to tell both parties to a dispute that they can't have all their demands met. Steve Williams of Acas commented that the first step towards negotiating differences was to reach agreement on the exact nature of the problem; too often, disputes were magnified by erroneous or mismatched perceptions. This may be especially the case where discussion is conducted in public view. Williams noted that mediation has the best chance of succeeding before legal claims are made, 'by which time relationships are generally shattered'.

²¹² See 'London imam subjected to death threats for supporting evolution', *The Guardian*, 6 March 2011.

The importance of a safe environment

Several interviewees recognised that ‘good faith’ solutions are more easily achieved in a safe environment. This was especially important in relation to minority religious communities created by post-war immigration. Reverend Alan Green noted that:

... an immigrant community that is vulnerable and feels itself under threat and is worried about losing its values and direction needs a great deal of nurture in order to ... engage openly with the values of liberal British culture. It can't just be enforced or imposed, either by a more enlightened Muslim position [or] ... by government.

Wahida Shaffi expressed the need for ‘small localised spaces’ where groups can work out what equality and human rights mean in relation to religion or belief in particular localities:

Discussions ... in the public sphere are robust and argumentative ... media-driven and government-driven ... We should have these discussions in a manner that is far more constructive. There is inevitably a lot of fear around these issues; it has been a very tense and dark period in the last decade, for Muslim communities in particular.

Participants also advocated the creation of safe spaces for discussion within workplaces and public institutions.²¹³ Several health and social care practitioners at the Cardiff roundtable commented that there was a strong perception that if someone ‘said the wrong thing’ about religion or belief and equality in public sector setting it could be ‘career threatening’. One noted that ‘the moment you say something contentious or ignorant, people put you into a little box’. Practical examples of implementing equality, human rights and religion or belief in the health and social care setting are examined in section 9.2.

7.9 Conclusion

Communities defined by religion or belief appear to have markedly different attitudes towards equality and human rights law. Interviewees from minority communities tended to view the law as a guarantor of a ‘level playing field’ and an ‘ally’ of communities that face particular disadvantage. At worst, the law was deemed by

²¹³ The approach of the supermarket Asda has been positively evaluated for, among other initiatives, its communication forums which include daily site meetings, weekly ‘Listening groups’ and monthly representative meetings. Action on religion or belief has emerged from the forums; for example, ways to celebrate certain religions within a store and the introduction of prayer rooms in a number of stores (Foster, 2009).

these interviewees to be irrelevant to the achievement of substantive equality and the amelioration of disadvantage.

By contrast, there is a strong narrative articulated by some strands of Christian opinion which sees equality law as the primary vehicle by which Christianity is being marginalised and penalised in modern Britain. However, this view is not universally shared by Christians and some view the 'marginalisation' narrative as a response to a loss of privilege. The evidence base concerning discrimination against Christians (and those of other religions or beliefs) is incomplete; however, the evidence that does exist suggests the need for a more nuanced analysis of the incidence of discrimination against Christians than the generalised 'marginalisation' narrative presently articulates.

Some Christian interviewees were concerned that too vociferous a movement against the perceived sidelining of Christianity could, paradoxically, decrease the effectiveness of efforts to uphold the rights of Christians in specific instances. These interviewees expressed particular concern about the excessive use of litigation; the Christian Legal Centre was singled out for criticism for having pursued some cases that were weak on the facts and/or badly argued.

Allied to concern that there has been excessive litigation concerning religion or belief is a view that the law is limited in its capacity to address complex questions of multiculturalism and social identity in modern Britain. Interviewees situated in both the religion and belief and other equality strands argued that equality law has produced unintended consequences. In particular, it was seen as having sometimes encouraged an undue insistence on the assertion of competing identities and set different groups on an 'intellectual collision course'.

Interviewees proposed principles or 'rules of thumb' as a basis for pre-empting or resolving disputes in the workplace or community. These were congruent with principles in human rights law, though they were commonly expressed in non-legal terms. Proportionality (or the 'least restrictive' approach) was commonly invoked, as was the principle of 'do no harm'. Some interviewees situated in the religion strand proposed, as a general principle, respect for the intrinsic value of religions or beliefs to their adherents; however, it was acknowledged that this does not necessarily entail protection from offence. The principles of personal and institutional autonomy were also endorsed by several interviewees, though it was recognised that these might sometimes conflict. Several interviewees also commented that diversity is an inherent social good; this added ballast to the argument that institutions should bear

a degree of cost or inconvenience in order to accommodate religion or belief within reasonable limits.

Many interviewees were concerned to address the intemperate and divisive nature of much public discussion of religion or belief. Among the ground rules proposed was the requirement to respect the integrity and legitimacy of the position of each party to a dispute. This might sometimes require a process of mediation and the creation of 'safe spaces' for the negotiation of differences.

Several interviewees were critical of what they knew of the EHRC's track record on religion or belief. Some (especially Christian) interviewees perceived the EHRC to be lacking in competence in relation to religion or belief and/or more supportive of LGBT rights. Interviewees suggested three broad areas in which the Commission could play a constructive role: myth-busting about particular cases and issues; developing guidance; and developing its 'good relations' mandate. These roles were viewed as inter-linked as a means of avoiding litigation through improved decision-making and greater use of mediation and conciliation.

8. Implementing equality and human rights in relation to religion or belief in the workplace

8.1 Introduction

This chapter examines problems faced and solutions reached by decision-makers in the workplace in relation to equality and human rights and religion or belief.

Preceding chapters discussed evidence relating to discrimination in the workplace (section 3.5); the state of the law affecting the workplace (especially section 5.5 on the concept of reasonable accommodation); and the principles or 'rules of thumb' that decision-makers (including workplace managers) might adopt (section 7.7). The emphasis in this chapter is on evidence relating to practical experience of implementation.

8.2 Evidence about management handling of religion or belief

Few research studies have focused on management experience of handling religion or belief. Studies have focused either on the experience and grievances of employees (Denvir et al., 2007; Savage, 2007) or cases that have reached Employment Tribunals (Fitzpatrick, 2007).

A key study into management experience of handling religion or belief in the workplace was conducted on behalf of Acas and the Chartered Institute of Personnel and Development (CIPD) (Dickens et al., 2009). It indicates a prevailing uncertainty and lack of knowledge among employers (Dickens et al., 2009: 7-8).²¹⁴ This study also examined management handling of sexual orientation; managers' uncertainty related to the handling of each equality strand separately; and potential tensions between them. Managers were unclear about 'the priority employers should give to accommodating religious beliefs versus other employee needs that are not as clearly protected by law' (Dickens et al., 2009: 52). They were also unsure about 'how to draw a line between allowing people to express their faith versus disallowing proselytising, or hostility towards LGB [lesbian, gay and bisexual] people' (Dickens et al., 2009: 52-53). There was a view that managers are generally reluctant to address issues arising from employees' religion or belief and/or sexual orientation compared to other strands such as race, disability or gender (Dickens et al., 2009: 7).

The research suggested that, whilst religion or belief and sexual orientation presented some common management dilemmas, on the whole they were found to

²¹⁴ The aim of this study was to 'reappraise' the experience and knowledge of employers five years after the employment equality regulations on religion or belief and sexual orientation came into force, hence the focus on these two equality strands. The research comprised a one-day deliberative event involving a sample of 48 managers of different levels of seniority from organisations of different sizes in the private, public and voluntary sectors.

be 'distinct entities, requiring different approaches and solutions'. Effective handling of religion or belief was perceived to require proactive administrative responses from employers - in particular around the accommodation of practical requests such as attendance at services, space for worship and dress requirements (Dickens et al., 2009: 52). This was based on an assumption that employees were likely to be open about their religion or belief. By contrast, managers perceived that employees are not generally open about their sexual orientation; management handling was necessarily more 'low key' and the onus on employers was to maintain a tolerant and respectful culture in a climate of 'changing moral values' (see also Bond et al., 2009: 55-56).

The research identifies examples of effective practice in the handling of religion or belief and/or sexual orientation (Dickens et al., 2009: 53-54). Some apply to generic management practice; for example, consistent practice around flexible working to accommodate religious needs as well as other reasonable employee requests; and educating managers in the use of discipline and grievance procedures, together with informal dispute resolution and use of mediation. Others are specific to religion or belief and sexual orientation; for example, demonstrating that an organisation has a tolerant culture by supporting events and employee networks concerned with each equality strand; and building consideration of religion or belief and sexual orientation into Equality Impact Assessments.²¹⁵

Barriers to effective practice included engrained workplace cultures of harassment and bullying and a perception, especially among small organisations, that measures were too costly or onerous. Some managers expressed concern that perceived tensions between the two strands could inhibit effective practice - for example, where it was felt that open discussion of sexual orientation might offend religious employees.

A further study into management handling of conflict between religion or belief and sexual orientation was conducted by Stonewall (Hunt, 2009). This formed the basis for guidance aimed at employers. Interviews with equality and diversity specialists from a range of sectors suggested low levels of confidence about tackling negative attitudes towards lesbian, gay and bisexual people when these were 'justified and motivated by religion and belief' (Hunt, 2009: 1). However, such incidents were found to be 'very rare'. This study suggested that organisations that were most confident about responding to, and preventing, perceived conflicts were those that had developed - and communicated to all staff - explicit policies about equality and

²¹⁵ For a summary of good workplace practice in relation to religion or belief (as well as age and sexual orientation) collated from diverse sources of guidance, see Bond et al. (2009: 79-83).

diversity. Successful organisations had thought in advance about how they might respond to issues of conflict and had 'established where they would draw the line between acceptable expression of faith and unacceptable discrimination in employment and service delivery'. They had worked proactively with lesbian and gay staff and staff who belonged to religious networks to seek common ground. When incidents did occur, successful organisations had used third party mediators to try to resolve issues, but had robust disciplinary procedures to help resolve more complex issues.

Similar findings are presented in a study of 'managing the interface' between sexual orientation and religion in the further and higher education sectors in England (Lifelong Learning UK, 2010). It found that where equality and diversity was embedded in the ethos of learning providers, relations between the two equality groups tended to be mutually respectful. In other circumstances, there was the potential for 'significant tension and difficulty' (Lifelong Learning UK, 2010: 6). The study recommends an 'anticipatory approach' to managing the inter-relationship between the two equality strands rather than simply responding to incidents as they arise.

A study of integration in the workplace in relation to religion or belief, age and sexual orientation similarly emphasised the importance of having formal equality-related structures and, in particular, dedicated diversity and equality specialists (Bond et al., 2009: 71). This was a common factor across a range of organisations considered by the study to be successful in their handling of equality, regardless of the precise form that their equality policies took.

8.3 Survey on 'managing equality, human rights and religion or belief in the workplace'

The online survey conducted for this research presents a different picture to that in the Acas/CIPD study (see Appendix 7). The 47 respondents generally appraised their workplace and their own knowledge very positively in relation to the handling of religion or belief. As in the Acas/CIPD study, respondents were a mixture of middle managers, diversity and equality officers and human resources managers, as well as a small number of senior executives. However, it is important to note that the respondents were self-selecting and their responses do not constitute a statistically significant sample; for example, it was not possible to sample between different sizes of employer or different sectors. Around 70 per cent of respondents were from the public sector (with 23 per cent from the private sector and 7 per cent from the voluntary sector). Almost 90 per cent of respondents were from large organisations with 500 or more staff. Nearly all had their headquarters in the UK (89 per cent), with

just over a third of the total based in Wales. Only one respondent was from an organisation with a religious affiliation (Islam).

Summary of responses

The results of the workplace survey are presented in Appendix 7. This section presents a summary of responses.²¹⁶ Overall, the survey indicates high levels of confidence among respondents about their own knowledge and understanding and their ability to access appropriate guidance and support to handle religion or belief.

- Three-quarters of respondents view religion or belief as central to a person's identity and support the concept of reasonable accommodation; one noted that they had 'a general starting point that reasonable accommodation is the desired aim'.
- Most said that their workplace made active provision for religion or belief; for example, 80 per cent had a multi-faith, prayer, reflection or quiet room in their workplace.
- More than two-thirds said their workplaces had policies or procedures in place to enable them to respond systematically to requests for flexible working to permit observance of religion or belief (both time off work and flexibility during the working day).²¹⁷ Less than half had policies or procedures in place to respond to requests to wear clothing, jewellery or symbols in observance of religion or belief.
- 58 per cent said that their workplace had a group or network concerned with religion or belief. This was less than for LGB employees (71 per cent) and those with a disability (68 per cent). However, it was more than for groups covering gender or race (each 55 per cent); transgender (38 per cent); or age (36 per cent).
- Around three-quarters of respondents said that their workplace provided adequate training for employees on avoiding discrimination on grounds of religion or belief.

²¹⁶ In each case, the figure given is the proportion of respondents who answered the relevant question. The figures for response rates are shown in Appendix 3.

²¹⁷ This did not necessarily indicate that requests **would** be accommodated, but that there was a mechanism for considering requests consistently.

- Around three-quarters considered that their workplace had adequate policies and procedures in place to deal with the day-to-day accommodation of religion or belief.
- Eight in ten respondents considered that their workplace deals effectively with bullying and harassment based on religion or belief.
- Around two-thirds of respondents said that their workplace provides adequate advice and support about how to resolve disputes that might arise between claims based on religion or belief and claims based on another equality strand.
- Almost all respondents knew where to go for guidance on the law regarding equality, human rights and religion or belief or advice on policies or procedures in their own workplace.
- Knowledge of specific cases was generally high. The cases that were most familiar to respondents were (in order of familiarity) *Eweida v British Airways*, *Hall and Preddy v Bull and Bull*, *Ladele v London Borough of Islington*, *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust*, *McFarlane v Relate Avon Ltd* and *Azmi v Kirklees Metropolitan Borough Council*. Generally, the more familiar a case, the more it was considered to have wide applicability. For example, *Eweida* was not only the most familiar case (92 per cent had some or detailed knowledge of it), but was also rated highest for significance.

It is not possible to generalise from these results given that respondents were self-selecting and disproportionately situated in large, public sector organisations. However, the results indicate that the prevailing lack of confidence suggested in the Acas/CIPD research - and the impression created by specific legal cases of poor management handling of disputes concerning religion or belief - are not necessarily representative of all employers.

8.4 Problems and solutions related by interviewees

This section examines the practical experience of employers, practitioners and trade union representatives interviewed for this research.

Areas of difficulty

Competing claims

In keeping with findings from the literature (section 8.2), interviewees generally indicated that management confidence tends to be lowest when dealing with conflicting equality claims, almost invariably between religion or belief and sexual

orientation. One large private sector employer had established an inter-faith staff network and a group for lesbian, gay, bisexual and transgender (LGBT) employees. Fissures had emerged both between religious faiths and between religious and LGBT employees. The employer noted that:

Whilst we have a code of conduct and ethics and policies, [you can't regulate] what goes on between two individuals in the restroom.

Carola Towle of Unison commented that the perception of the problem of competing religious and sexual orientation claims was greater than the actual problem; she added, however, that:

There's still an idea that both of these are tricky and highly personal characteristics, and in combination even more so. We say that while there may be personal issues caught up in them, in terms of managing staff ... you treat these issues as you would ... other aspects of discrimination or misunderstandings between colleagues. But managers go into startled rabbit mode and think that they can't follow normal management practice.

One employer noted that such tensions were rare but tended to flare up quickly when they occurred; managers could be caught unawares and be unsure of the proper response in contrast to their handling of more 'routine' issues.

Fear of litigation

Employers (or those familiar with workplace issues) suggested that managers were often fearful of possible litigation and consequent reputational damage. This fear is likely to be especially prevalent among larger employers with prominent brands and can lead to 'knee jerk' decision-making. As one large private sector employer observed:

It's often when the media are involved that companies tend to panic and think we had better back down ... because of the reputational risk ... That's the biggest challenge for us - to educate our line managers so when these issues occur, at recruitment, training or further down the line, that they're equipped to deal with it and make the right decisions ... You're always on the back foot as a bigger company.

Larger companies had also experienced problems ascertaining the profile of religions or beliefs among their employees, since the provision of such information was

voluntary and staff were sometimes reluctant to provide it. This hampered efforts to be proactive in accommodating religion or belief.

Assessing proportionality

A fear of litigation was compounded by uncertainty created by a heavy reliance in case law on the principle of proportionality. Interviewees did not suggest that proportionality was an inappropriate guide to action; however, they noted that apparently contradictory judgments based on different facts created uncertainty for managers as to the parameters of what they have to accommodate (see section 4.4). Practitioners at the Cardiff roundtable had noted that ‘lazy’ managers were often tempted to ‘hide behind policies’ as a way of evading consideration of dilemmas relating to religion or belief. There was a temptation to interpret policy as providing ‘blanket’ rules in order to provide certainty; however, indiscriminate rules had actually created ‘hassle and problems because they leave no room for dialogue and compromise’.

Uncertainty about what practices are protected by law

Several interviewees commented that managers were uncertain about the legal definition of belief (see section 5.2). They also struggled to differentiate ‘religious’ from ‘cultural’ or purely personal practices in considering requests from employees to diverge from corporate dress codes. For example, one employer had received requests to consider henna skin decorations, tattooed crosses and thread bracelets as manifestations of religion or belief. Difficulties also emerged when co-religionists had different preferences for dress. For example, one employer had received a request from younger Sikh men to wear a *patka* (a simple cloth head covering commonly worn by Sikh boys or during sport) in preference to a turban; however, older Sikh employees considered this disrespectful.

Alan Beazley of the Employers Forum on Belief (now part of the Employers’ Network on Equality and Inclusion), had received numerous queries from employers concerning the distinction between ‘religion’ and ‘culture’ and between obligatory and non-obligatory practices; for example, employers were unsure how much leave staff should reasonably be allowed to mourn or to attend the *Hajj*. The forum also had a large post bag on requirements for the provision of ablution facilities for Muslim staff.

Effective practice

Human rights as the ‘bedrock’

Health and social care practitioners at the Cardiff roundtable advocated using human rights alongside equality law as a ‘lens’ for considering staff requests for

accommodation of their religion or belief. This enabled managers to move beyond considerations of whether (say) a dress code request related to 'religion' or 'culture' or was an obligatory or discretionary aspect of a belief. While the Equality Act 'lens' dictated a focus on legal compliance, human rights encouraged an approach focused on individual flourishing. As one participant commented, 'Is it 'faith' or 'culture'? Does it **matter** if we are looking for effective practice?' (emphasis in original). It was also noted that a human rights perspective discourages the unhelpful tendency created by equality law to 'put people in boxes' rather than explore the multiple identities and discrimination that individuals may experience.²¹⁸ Indeed, this research suggests that an approach based on human rights may be more satisfactory in the long term than one based principally on equality, notwithstanding the problems which some interviewees perceive with the domestic courts' approach to protecting freedom of religion or belief.

Organisational approach to equality and diversity

Interviewees reinforced the recommendations in the literature (section 8.2) for a workplace ethos that expressly endorses equality, diversity and human rights and is underpinned by clear and well-communicated policies (see, e.g., Foster, 2009). Amanda Ariss commented that:

It is important for employers to have an active equality and diversity policy, which is a living part of the workplace culture ... [This increases] the likelihood that people understand that there are ground rules at work about how to behave with their colleagues. It provides a foundation statement and [makes it] ... more possible to have the difficult conversations that people sometimes need to have.

Steve Williams similarly argued that employers need to have a clear and consistent policy for dealing with the accommodation of religion or belief requests since it is inconsistency that commonly gives rise to discrimination claims. He suggested that policies be based on the principles arising from case law; for example, the *Azmi* case had established that discrimination was justified if it was for a compelling reason connected to a person's ability to do their job.

²¹⁸ The coalition government's Equality Strategy published in December 2010 refers to a 'new approach to tackling inequality: one that moves away from treating people as groups or 'equality strands' and instead recognises that we are a nation of 62 million individuals' (HM Government, 2010: 9). It adds that 'new legislation and increased regulation have produced diminishing returns' and that equality 'has come to mean political correctness, social engineering, form filling and box ticking' (HM Government, 2010: 5).

Communicating this principle could 'introduce a confidence factor' across organisations where confidence was presently lacking. Decisions predicated on moral or value judgments alone were not a sound basis for resolving dilemmas or disputes. Such an approach also made it more likely that line managers would respond appropriately to issues that flared up without the need for the intervention of senior staff. Steve Williams noted that inept handling by line managers who lacked a clear decision-making framework could 'corrupt' a dispute at the outset and make it harder for experienced staff to resolve it further up the line.

Wendy Irwin, Head of Diversity at the Royal College of Nursing (RCN), observed that institutions benefitted from having charters or codes of conduct that set out expectations of desirable behaviour and not merely measures to penalise 'bad' behaviour. The RCN's 'Dignity Charter' for members and staff was an example of this approach.²¹⁹

The benefits of engraining equality and diversity in workplace culture were demonstrated by National Grid. Simon Langley, UK Lead Manager for Inclusion and Diversity, observed that 'Faith@Work' and 'Pride@Work' staff networks had jointly addressed a situation in which an evangelical Christian employee had discriminated against another employee on grounds of their sexual orientation. National Grid's 'Islam@Work' group had worked successfully with the director of security to address myths around Islam.

Creativity and negotiation

Interviewees gave examples of how compromises had been found to permit accommodation of religion or belief even when to do so appeared to contradict general policies or practices:

- West Midlands Police had a corporate policy of photographing each member of staff, but after negotiation agreed that Muslim women could be photographed wearing face coverings.
- Sodexo, which provides services in hospitals among other settings, worked with the National Health Service to organise a consultation among staff about the 'bare below the elbow' policy which is designed to minimise the spread of infection. The policy required the wearing of short sleeves and permitted only the wearing of a wedding ring. As a result of the consultation, it was agreed that

²¹⁹ See http://www.rcn.org.uk/__data/assets/pdf_file/0006/318633/003587.pdf.

Sikh staff could continue to wear a *kara* (religious bangle) and would follow additional disinfecting routines.²²⁰

- Female Muslim health care staff had also experienced problems with the 'bare below the elbows' policy due to concerns about modesty. Initially, Department of Health guidance permitted no exceptions (Department of Health, 2009: 16). However, interviewees observed that creative local solutions were found and these have resulted in amended national guidance. For example, staff are now permitted to wear three-quarter length sleeves and disposable plastic over-sleeves.²²¹
- Female Muslim staff had found creative ways round the need to 'scrub up' alongside male colleagues and the low cut of gowns worn in operating theatres. They 'scrubbed up' several minutes before their male colleagues and wore two gowns, one back and one front, and a surgeon's hood rather than a smaller cap to cover their head.

8.5 Guidance on religion or belief in the workplace

As noted in section 7.6, several interviewees proposed that the Equality and Human Rights Commission (EHRC) produce accessible, practice-based guidance that 'brings legislation to life' and reflects developing case law. The Acas/CIPD research quotes managers as saying there is a shortage of practical and evidence-based guidance about religion or belief and sexual orientation relative to other equality strands (Dickens et al., 2009: 52).

Existing guidance

Acas (2010) has produced guidance on putting the Equality Act 2010 into practice in relation to religion or belief, with good practice examples. It provides an overview of the law and guidance on commonly raised issues. It covers how employers might respond if an employee manifests their religion or belief 'in a way that breaches your Equality Policy or other workplace policies'. For example, 'Employers are entitled to expect that employees will not discriminate against or harass colleagues and that they will deliver services to customers in a non-discriminatory manner' (Acas, 2010: 18).

²²⁰ For a full account of the consultation procedure, see Godwin (2011).

²²¹ See 'Fresh guidance on bare below the elbow', *Nursing Times*, 30 March 2010.

Some large employers have produced guidance for decision-makers; for example, NHS Employers has produced guidance on dress codes and discrimination which draws heavily on the *Azmi* case.²²² The Department of Health has also issued a practice guide on religion or belief (Department of Health, 2009). Other guides exist into the law in this area (for example, Chartered Institute of Personnel and Development, 2003) but are outdated and/or do not provide practical examples.

As noted in section 7.6, some religion or belief groups expressed a preference for guidance which addresses the needs of their adherents. Some have produced such guidance. For example, the Muslim Council of Britain has produced a good practice guide for employers and employees on 'Muslims in the workplace' (Muslim Council of Britain, 2005). It provides detailed guidance on, among other issues, how religion or belief intersects with other equality grounds; it notes, for example, that:

It is ... fundamental that Muslim employers and employees understand that they have an obligation to respect the rights of other minority groups protected by equality laws, such as women, people of different sexual orientations and people of other or no religious affiliations, as well as minorities within the Islamic faith.

(Muslim Council of Britain, 2005: 22)

Other religion or belief groups have produced more general guidance in collaboration with others; for example, St Ethelburga's Centre for Reconciliation and Peace (2008) has produced guidance on the provision of prayer rooms and quiet spaces in the workplace.

Groups concerned with other equality strands have produced guidance which covers religion or belief; for example, Stonewall (Hunt, 2009) and Lifelong Learning UK (2010). Voluntary sector organisations have also done so; for example, the Employers Network for Equality & Inclusion (of which the former Employers Forum on Belief is now part) offers bespoke guidance and thematic guides on a subscription basis.

Interviewees expressed different views on the adequacy of existing guidance. Some found the Acas (2010) guidance adequate to their needs, while others found it (and other sources) too general. These employers said that they researched issues in

²²²<http://www.nhsemployers.org/EmploymentPolicyAndPractice/EqualityAndDiversity/Pages/DressCodesAndDiscrimination.aspx>.

detail as they arose, seeking specific legal advice or general advice from religion or belief groups or organisations such as Stonewall.

Overall, our research suggests that existing sources of guidance are either not in a useful format or are not known about. A web-based source which gathered diverse sources in one place would be a useful first step that the EHRC could take (see also section 7.6). Further, existing sources tend to cover equality law alone; new guidance which integrated human rights and equality case law and principles might address the limitations of using the equality 'lens' in isolation.

8.6 Conclusion

Studies of management experience of handling religion or belief in the workplace indicate a prevailing uncertainty about how to respond to instances where an employee's religious belief appears to conflict with others' protection from discrimination on grounds of sexual orientation. However, evidence suggests that such instances are rare; they can be prevented or mitigated by the development of policies which integrate equality and human rights principles and are promoted as part of a tolerant and inclusive workplace culture. An anticipatory approach is preferable to a reactive one.

Some studies suggest that managers' uncertainty extends to the handling of religion or belief more generally, but this appears not to be uniform between different types and sizes of employer. Survey respondents from larger public sector employers expressed high levels of confidence about their knowledge and understanding and the policies and practices of their organisations.

A fear of litigation was viewed by interviewees as a barrier to principled decision-making; it tended to produce knee jerk decisions which may complicate the resolution of grievances. Managers also lamented the lack of certainty created by fact-specific and apparently contradictory legal judgments; however, interviewees and roundtable participants acknowledged that 'blanket' rules create only an illusion of certainty and militate against dialogue and negotiation.

Participants advocated the integration of human rights and equality principles in the handling of religion or belief (and indeed all equality strands). It was noted that, used in isolation, the equality 'lens' can produce a narrow focus on legal compliance based on single characteristics, while human rights principles encourage a more holistic focus on individual flourishing. Indeed, this research suggests that an approach based on freedom of religion or belief may be more satisfactory in the long term than one which is based principally on equality. This in turn creates a case for

(re)educating decision-makers about human rights as a basis for decision-making about religion or belief in the workplace.

Some interviewees expressed a need for more accessible practice-based guidance on the handling of religion or belief. Equality specialists suggest that this should be based on principles emerging from case law as to the limited circumstances in which indirect discrimination may be justified, combined with steps which extend beyond strict legal requirements to establish 'rules of thumb' for easily achievable, good practice. A web-based source which gathered existing sources in one place would be a valuable contribution to more confident and consistent management practice.

9. Implementing equality and human rights in relation to religion or belief in public services

9.1 Introduction

This chapter examines selected issues concerning equality, human rights and religion or belief that arise in the context of public services. Previous chapters discussed the dilemma posed by requests by public servants to abstain from certain tasks on conscientious grounds (for example, pharmacists; see section 6.5); and controversy surrounding the sexual orientation exceptions for organisations relating to a religion or belief that are contracted to deliver public services (section 6.7). Chapter 8 examined issues relating to employment in the public sector. The emphasis in this chapter is on the legal and practical concerns that arise in the design and delivery of public services. We examine (i) health and social care and (ii) education in view of their size and relevance to all communities in England and Wales. The chapter also discusses the public sector equality duty in relation to religion or belief and the different notions of equality that might guide its implementation.

9.2 Health and social care

This section examines practical concerns relating to the implementation of equality and human rights in relation to religion or belief in health and social care. It is not a comprehensive digest of matters relating to implementation, but highlights examples raised by our interviewees and the Cardiff roundtable of health and social care practitioners, as well as those that have arisen in case law.

The ethics of self-disclosure

A small number of cases have drawn attention to the ethical concerns that arise when health or social care practitioners discuss their religion or belief with a patient or service user. In one instance, a GP (Dr Richard Scott) who suggested to a vulnerable patient that he might benefit from a Christian faith above his own religion is being investigated by the General Medical Council (GMC) for having ‘crossed the line’.²²³ In another, a nurse (Caroline Petrie) was suspended, but later reinstated, after a patient complained that she had offered to pray for her.²²⁴

²²³ The patient complained, saying he was ‘very upset’ about the consultation and what he saw as the ‘belittling’ of his own religion. See ‘Christian GP “crossed the line” in discussing religion with patient’, *Pulse*, 22 September 2011.

²²⁴ “‘Praying nurse’ returns to work’, *The Guardian*, 6 February 2009.

The area is subject to two distinct sets of guidance; one addressed to doctors from the GMC and the other addressed to all practitioners from the Department of Health. The GMC guidance advises doctors that:

You must not express to your patients your personal beliefs, including political, religious or moral beliefs, in ways that exploit their vulnerability or that are likely to cause them distress.
(General Medical Council, 2006: 19)²²⁵

In addition, doctors are advised:

You must not unfairly discriminate against [patients] by allowing your personal views to affect adversely your professional relationship with them or the treatment you provide or arrange.
(General Medical Council, 2006: 10)²²⁶

The Department of Health guidance is more specific about the possible consequences of self-disclosure. It states that:

Members of some religions ... are expected to preach and to try to convert other people. In a workplace environment this can cause many problems, as non-religious people and those from other religions or beliefs could feel harassed and intimidated by this behaviour ... [S]uch behaviour, notwithstanding religious beliefs, could be construed as harassment under the disciplinary and grievance procedures.
(Department of Health, 2009: 22)

Debate about self-disclosure intensified in 2011 with the publication of a brief guidance note by the Medical Defence Union (MDU).²²⁷ This cited parts of the GMC

²²⁵ The GMC has issued supplementary guidance, which advises doctors that, 'You should not normally discuss your personal beliefs with patients unless those beliefs are directly relevant to the patient's care. You must not impose your beliefs on patients, or cause distress by the inappropriate or insensitive expression of religious, political or other beliefs or views. Equally, you must not put pressure on patients to discuss or justify their beliefs (or the absence of them)'. See General Medical Council (2008).

²²⁶ As of November 2011, a new draft of this guidance is under consultation (General Medical Council, 2011). This appears to tighten the wording of this section of the guidance by removing the word 'adversely', thereby requiring GPs to challenge their colleagues' behaviour if there is **any** effect to the professional relationship caused by their personal views (GMC, 2011: 17).

and Department of Health guidance. However, discussion focused on a reference to a letter published in the *Daily Telegraph* in 2009 from a senior GMC official which stated that:

Nothing in the GMC's guidance ... **precludes** doctors from praying with their patients ... Any offer to pray should follow on from a discussion which establishes that the patient might be receptive. It must be tactful, so that the patient can decline without embarrassment - because, while some may welcome the suggestion, others may regard it as inappropriate.
(emphasis added)

In keeping with this guidance, participants at the Cardiff roundtable suggested that the ethics of self-disclosure are entirely dependent on the particular context and the practitioner's relationship with the service user. Some had personal experience of praying with distressed patients who appeared to have found the experience 'hugely therapeutic'. Participants also considered it unrealistic and undesirable to place a practitioner's religion or belief entirely 'out of bounds' of caring relationships. However, they observed that if expressions of the practitioner's religion or belief are not expressly requested by the service user, or are a replacement for another course of action such as medication, then they are likely to be unethical and unprofessional. In assessing whether discussions of religious matters are consensual, the relative vulnerability of the service user is likely to be a factor; for example, a patient might consent to say prayers with their doctor for fear of causing offence or damaging a relationship on which they depend. A subsequent complaint by a patient or service user would normally indicate a lack of consent.

No participant at the Cardiff roundtable suggested that practitioners have a **right** to express their beliefs to patients or that this should be viewed as a matter of freedom of expression. The justification for self-disclosure rested wholly on the therapeutic value to the service user in the particular context in which it occurred.

A different view was expressed by Andrea Williams of Christian Concern, who suggested that to deny caring professionals the right to talk about their belief:

... makes us not human, not real - it's not natural for me not to talk about my faith. It's about the ability to be natural. [Dr Richard Scott] was being

²²⁷ See http://www.the-mdu.com/section_Hospital_doctors_and_specialists/topnav_news_3/hidden_Article.asp?articleID=2450&contentType=Advice+article&articleTitle=Religion+on+prescription?&EK=1060850.

genuinely loving and genuinely natural - giving all the best advice and extending love by opening up this conversation.

There is no evidence to suggest that caring professionals frequently come into conflict with guidelines on self-disclosure; for example, the MDU has received only seven queries about this area of practice in two years.²²⁸ However, participants in Cardiff suggested that it was crucial for practitioners to have the opportunity to explore their different stances and beliefs within their professional setting; 'otherwise it all becomes very covert and that is not helpful to anyone'. The revision of professional guidance, and the ongoing high-profile case concerning a GP, appear likely to keep this issue in the public eye.

Religion or belief of service users

Contextual evidence about religion or belief and health

A review of evidence for the EHRC's Triennial Review, *How Fair is Britain?*, reveals large differences in self-reported health between groups defined by their religion (Allmark et al., 2010: 48-49).²²⁹ Muslims are the most likely to report 'not good' health and also have the highest prevalence of limiting long-term illness and disability.²³⁰ Available evidence does not suggest significant differences in indicators of common mental disorder between religious groups (Allmark et al., 2010: 49). Several qualitative studies highlight the way in which certain religious identities - notably a Muslim identity - may result in negative experiences in healthcare settings (Allmark et al., 2010: 49). Common themes include feelings of exclusion, dismissiveness and lack of engagement with professionals. Some particular religiously-based health needs or choices are not at present routinely accommodated by the NHS, such as the desire to avoid porcine- or alcohol-derived drugs or a preference for same-sex services (Allmark et al., 2010: 49). In terms of the causes of health inequalities between religious groups, factors include socio-economic status and deprivation;

²²⁸ See http://www.the-mdu.com/section_Hospital_doctors_and_specialists/topnav_news_3/hidden_Article.asp?articleID=2450&contentType=Advice+article&articleTitle=Religion+on+prescription?&EK=1060850.

²²⁹ This finding is based on the 2001 Census data for Great Britain and the Health Survey for England 2004.

²³⁰ For example, age standardised rates of limiting long-term illness (LLTI) for all people for Great Britain were highest among Muslims for both males (21.4 per cent) and females (24.3 per cent), though males and females reporting 'any other religion' and also Sikh females, had high rates. Jewish males (12.6 per cent) and females (12.8 per cent) were the least likely to report an LLTI when age standardised rates were compared (Allmark et al., 2010: 48).

discrimination at societal level; unresponsive and inappropriate health service provision; religiously informed patterns of behaviour and life-style choices; and networks of association and support that shape access to information and resources (as well as norms and expectations of behaviour) (Allmark et al., 2010: 51). However, the interplay between these factors requires further explication. The interplay of discrimination and low social status, operating both within the healthcare sector and in wider society, seems to account for much of the excess health burden experienced by Pakistani and Bangladeshi Muslims (Allmark et al., 2010: 51).

Department of Health guidance identifies numerous ways in which the religion or belief of patients or service users might impinge upon their care and treatment. These include: reproductive medicine, abortion, contraception and neonatal care; 'end of life' concerns such as brain death, organ donations and care for the corpse; palliative care, including religious communities' interpretations of the relationship of body/mind/soul/spirit; the types of treatment and drugs used, such as avoidance of porcine-, bovine- or alcohol-based substances; gender issues, such as same-sex wards and respect for modesty; and spiritual interpretations of diseases, for example in mental health (Department of Health, 2009). It is beyond our scope to examine all of these; this section presents our participants' experience of implementation and, in particular, the relevance of equality and human rights standards and mechanisms.

Equality and human rights impact assessments

Participants at the Cardiff roundtable emphasised the value of Equality Impact Assessments (EIAs) as a means of bringing about 'very positive changes to policy in relation to religion or belief'. In one instance, a hospital chaplaincy team had recruited a Welsh-speaking Christian minister because an EIA revealed that Welsh-speaking patients didn't feel their needs were being fully met. In another, an EIA had revealed a gap in staff training about the sensitive handling of patients' sacred artefacts while in hospital.

EIAs were viewed as particularly valuable in the context of expenditure cuts since they enabled decision-makers to make informed and principled decisions about the allocation of resources. They had also been used to improve the uptake of services. For example, an EIA had highlighted barriers that some religious communities perceived to becoming blood donors. Discussion groups with different religious communities had clarified the nature of their misgivings, which ranged from theological understandings to concerns among Muslim women about lying uncovered on a bed while blood was taken. This had led to some women-only sessions and the provision of blankets to cover donors during the procedure. Faith-based focus groups had also been used to seek to improve the uptake of cancer services among some

minority religious communities. One equality specialist in an NHS Trust commented that wards for cancer patients had religious guides to support staff decision-making about, for example, end of life care. The Trust had also recruited lay chaplains and developed a contact sheet to ensure patients' religious needs were met in an emergency.

These examples from Wales indicate the utility of proactive equality mechanisms to identify and address needs arising from patients' religion or belief. Participants in Cardiff also emphasised the value of human rights principles and the Human Rights Act (HRA) as a vehicle for enabling practitioners who design services 'to think about them in the context of dignity and respect'. Participants suggested that integrated equality and human rights assessments were a useful way of carrying out a holistic appraisal of an individual's needs, whether related to their religion or belief or any other aspect of their identity. Human rights 'created the space for conversations to be had around difficult issues within organisations', including religion or belief. Participants noted that voluntary sector organisations and institutions, such as the Children's Commissioner for Wales, had 'driven discussions about dignity and respect in public services', underpinned by a focus on both national and international human rights obligations.²³¹

However, the Cardiff roundtable provided evidence that implementation may fall short of human rights standards, particularly in relation to groups that lack a powerful voice. One participant familiar with children's services noted that children's religious identity was frequently overlooked by practitioners; for example, children were not always able to access chaplaincy services. Thus 'the most voiceless sector of the community gets the least focus on how services ought to be provided in terms of any sort of faith identity'.

Religion or belief and mental health

Department of Health guidance notes that some religious interpretations of mental health conditions are different from medical interpretations. For example, it states that some religious communities might interpret mental illnesses as a spiritual reality caused by, for instance, a demonic attack to which the appropriate response is religious, not medical, intervention (Department of Health, 2009: 33). Practitioners in Cardiff noted that, while mental health may be subject to different understandings, it

²³¹ The mandate of the Children's Commissioner for Wales is expressly based on the UN Convention on the Rights of the Child (CRC). See <http://www.childcom.org.uk/en/about-us/>. Children's rights have been especially prominent in the policy landscape in Wales. Under the Rights of Children and Young Persons (Wales) Measure 2011, Welsh Ministers have a general duty to have regard to the CRC with respect to new laws or policies from May 2012 and in the exercise of any of their functions from May 2014.

was important not to create an 'urban mythology' about the attitudes of certain religious communities. Well-intentioned efforts to provide culturally- and religiously-sensitive services could have the unintended consequence of attributing to communities or individuals beliefs that they may not, in fact, hold. One mental health specialist commented that:

If a group does see things differently to how I would see mental illness and psychiatric services, our role is purely to uphold that person's right to quality services, dignity and respect; access to information, advocacy and so on, rather than to seek to influence how any individual or group might see their mental health.

This participant added that people with mental health problems (and especially those in hospital) were commonly unable to exercise their right to practice their religion or belief. This could sometimes be complicated by the fact that people in a psychotic state commonly display florid symptoms focused on religion, even if they have no religious belief before becoming unwell. This had sometimes become a barrier to giving serious consideration to the needs of mental health patients in relation to religion or belief.

Supporting confident decision-making

Participants at the Cardiff roundtable and some interviewees commented on the need for greater religious and cultural 'competence' among practitioners. Participants noted that even relatively experienced staff could be tentative and lack confidence when discussing religion or belief and fearful of exposing gaps in their knowledge or understanding. As one noted:

We need to develop ... the positive skills of cultural competence - to say, 'that is different - tell me about it', rather than 'that is different - let's not go there'.

Another noted that religion and sexuality were issues where people start to shut down:

The starting point is fear ... The vocabulary and the milieu in which you can share these concepts and ideas - it's almost prohibited.

These comments again underline the benefit of using equality and human rights mechanisms to create a space in which sensitive issues can be addressed and competing interests balanced. Nevertheless, participants in Cardiff suggested that

there was considerable scepticism amongst ‘decision-making establishments’ in the health and social care sector about the need for proactive equality or human rights approaches. Such approaches were viewed as requiring a ‘business case’ and as secondary to clinical safety. The result was often a ‘tick box’ approach. The roundtable emphasised the importance of leadership - from, among other actors, the Equality and Human Rights Commission (EHRC) - to champion equality and human rights standards and principles as policy tools at a time of shrinking resources.

9.3 Education

This section examines issues of equality and human rights that arise in relation to religion or belief in schools.²³² Sandberg (2011a: 166) notes that laws concerning religious education and worship in schools, and the legal status of schools designated as having a religious character, are complex and contradictory.²³³ Moreover, it is questionable whether they are sustainable in the light of changing social norms; increased protection for the rights of the child; and the development of equality and human rights law (Hepple, 2011: 119; Sandberg, 2011a: 150).

This section considers five broad areas in relation to equality and human rights:

- admissions;
- employment of teaching staff;
- religious education;
- religious worship; and
- reasonable accommodation of religion or belief.

²³² For comprehensive accounts of the law relating to religion or belief in education, see Knights (2007, Chapter 4); Rivers (2010, Chapter 8); and Sandberg (2011a, Chapter 8). Dinham and Jackson (2012) examine religion in relation to educational provision since the Second World War, focusing on policy initiatives.

²³³ Schools with a religious character are colloquially known as ‘faith schools’; however, this term is misleading as schools without a religious character cannot be viewed as secular in view of the law on religious education and collective worship (Rivers, 2010: 234; Sandberg, 2011a: 160-61).

Admissions criteria based on religion or belief

State-maintained schools may be designated as having a religious character when they are established by a religious body or for religious purposes.²³⁴ The Equality Act 2010 contains an exception applying to such schools which permits them to give preference to members of their own religion or belief when they are oversubscribed.²³⁵ The exception only applies to religion or belief discrimination; schools with a religious character cannot discriminate on other grounds such as race.

The JFS case

The distinction between religion or belief and race is not watertight. In *R (E) v JFS Governing Body*, the Supreme Court ruled by a narrow margin that a state-funded school for Orthodox Jews which tested applicants for matrilineal descent was acting on the basis of ethnic origin, meaning that their admission requirement constituted direct racial discrimination (Barber, 2010: Cranmer 2010a; Graham, 2012: 95-97). The judgment was welcomed by some for preserving the same protection against racial discrimination for Jews as for other groups.²³⁶

²³⁴ These may be 'foundation' or 'voluntary' schools. Foundation schools are run by their own governing body, which employs the staff and sets the admissions criteria. Voluntary schools are those established by voluntary bodies (as opposed to 'community' schools which are established by the state). Voluntary schools are divided into 'voluntary-aided' and 'voluntary-controlled' schools. Voluntary-aided schools are virtually all religious in character. As with foundation schools, the governing body employs the staff and sets the admissions criteria. Voluntary-controlled schools are run by the local authority and, as with community schools, the local authority employs the staff and sets the admissions criteria; however, this may include allowing the school to discriminate on grounds of religion or belief. Independent schools, which are funded by fees mainly paid by parents, may also be designated as having a religious character. Another type of school is supplementary schools that operate (largely unregulated) outside the mainstream education system, such as Muslim madrassas (Cherti and Bradley, 2011). Discussion in this chapter focuses on state-maintained schools. For more information on the different types of school, see: http://www.direct.gov.uk/en/Parents/Schoolslearninganddevelopment/ChoosingASchool/DG_4016312.

²³⁵ Equality Act 2010, Schedule 11, para. 5. As explained above, voluntary-aided schools with a religious character control their own admissions policy and therefore have wide discretion to discriminate on grounds of religion or belief. Some voluntary-controlled schools also discriminate on grounds of religion in their admissions. Research by the Accord coalition found that around one third of local authorities that have one or more voluntary-controlled schools with a religious character in their jurisdiction permit those schools to discriminate on grounds of religion or belief in some way when they are oversubscribed. Changes to admissions procedures for voluntary-controlled schools are subject to local consultation. See <http://accordcoalition.org.uk/campaigning-for-inclusive-admissions-in-local-voluntary-controlled-faith-schools/>.

²³⁶ For example, the Equality and Human Rights Commission intervened in the case in support of the claimant; see <http://www.equalityhumanrights.com/hafan/canolfan-cyfryngau/2009/december/commission-welcomes-supreme-court-ruling/>.

However, it caused considerable controversy among communities adhering to the Orthodox Jewish tradition. According to David Frei of the United Synagogue, the judgment ‘fundamentally misunderstands the nature of our religion’. Frei commented that the ‘artificial’ religious practice test set out in the *JFS* judgment (based on, for example, dietary laws, observance of the Sabbath and regular attendance at a synagogue) ‘flies in the face’ of the Orthodox religious law of matrilineal descent:

We’ve had to invent forms of religious practice which are sufficient to satisfy the Supreme Court’s new definition of [who is Jewish], whilst not at the same time deterring Jewish children coming to these schools, who may come from homes which are not [religiously observant].

McCrudden (2011: 30) comments that the case highlights the potential conflict between the individualistic and associational aspects of freedom of religion. Moreover, it raises difficult questions about how far courts can ‘truly understand a normative system other than the legal system’ (see also section 5.4). The claimant in the *JFS* case considered himself Jewish while the Office of the Chief Rabbi did not. The court was thus faced with considering evidence as to who was regarded as Jewish by different traditions of Judaism. Jon Benjamin of the Board of Deputies of British Jews noted that the *JFS* case had created the possibility of legal challenge to other faith-based welfare services; for example, Jewish youth groups or homes for the elderly:

The concern is that Jewish people should have access to the services they need ... and if equality laws force [services] to throw open their gates, that could have a significant impact on the provision of scarce resources tailored to the specific needs of one community.

The principles at stake in the *JFS* case are likely to continue to reverberate. The case illustrates the uncertainty surrounding the interface between racial and religious discrimination (Rivers, 2010: 257). More broadly, it highlights the distinction between the private sphere of a religious community and how state-funded bodies with a religious character may act in the public arena.

Other equality and human rights concerns relating to faith-based admissions

According to Hepple (2011: 119), an unresolved issue is whether the fact that the law allows publicly funded schools to use faith-based admissions criteria is compatible with Article 2 of Protocol 1 of the European Convention on Human Rights (ECHR) (the right to education) and Article 14 ECHR (prohibition of discrimination). Sooner or later, Hepple argues, the government is likely to be called upon to provide evidence

to support a defence that this discrimination because of religion or belief is necessary and proportionate in a democratic society for the protection of the rights and freedoms of others under Article 9(2) ECHR. Such concerns have become more acute, he argues, 'in the context of the envisaged growth of academy or "free" schools which are not accountable to local authorities'.²³⁷

The Joint Committee on Human Rights (JCHR) expressed concern about faith-based admissions in its scrutiny of the Equality Bill (JCHR, 2010). It noted that the government's principal justification for permitting schools with a religious character to discriminate on religious grounds in their admissions policies is that it is necessary in order to protect the right of parents (under Article 2 Protocol 1 ECHR) to access education for their children in accordance with their religious convictions (JCHR, 2010: 7-8). The JCHR was not persuaded by this justification because Article 2 Protocol 1 does not, in fact, impose a duty on the state to establish schools with a religious character; for example, it cannot be relied upon by Muslim parents to require the state to establish Muslim schools in areas where only schools of other faiths exist.

The JCHR (2010: 8) was also unconvinced by the argument that schools with a religious character must be able to have faith-based admissions criteria in order to maintain their distinctiveness and a 'plurality of provision'. Evidence adduced in relation to Church of England schools suggested that plurality of provision had been preserved even where those schools did not have faith-based admissions criteria.²³⁸ The JCHR noted that the argument about preserving plurality may carry more weight in relation to other schools with a religious character such as Jewish, Muslim, Hindu or Catholic schools since there are far fewer of these schools for families to choose

²³⁷ Academies that are designated as having a religious character are allowed by law to give priority to faith applicants if they are oversubscribed; see <http://www.education.gov.uk/schools/leadership/typesofschools/b0066996/faith-schools/faith>. 'Free' schools (new academies that do not replace predecessor schools) must allow for 50 per cent of places to be allocated to children without reference to faith if the school is oversubscribed; see <http://www.education.gov.uk/schools/leadership/typesofschools/freeschools/freeschoolsfaqs/a0075643/free-schools-faqs-admissions#faq1>.

²³⁸ See, for example, evidence presented to the JCHR by the Church of England which states that 'our schools continue to be for those of no faith, those of other faiths and those of the Christian faith' (JCHR, 2009: Ev 190).

from.²³⁹ Overall, the JCHR (2010: 9) concluded that ‘the exemption permitting faith schools to discriminate in their admissions on grounds of religion or belief may be overdrawn’.

The social impact of religious discrimination in school admissions is a matter of contention. There is evidence that schools with faith-based admissions criteria may favour those from higher socio-economic backgrounds (Tough and Brooks, 2007: 16). For example, a study of schools in London with faith-based admissions criteria showed that they have higher ability and lower free school meal intakes compared to the neighbourhoods in which they are located (Allen and West, 2009).²⁴⁰ In relation to school admissions, controversy has also surrounded the practice of some schools with a religious character of interviewing pupils and parents, ostensibly to assess the commitment of the family to the religious faith, and whether such practices are a form of covert selection and therefore unfair (Meredith, 2006).²⁴¹ Concerns are also expressed about the effect of faith-based admissions criteria on community cohesion, particularly in areas where there is a high degree of residential segregation (Berkeley, 2008; Cattle et al., 2009; Oldham Independent Review, 2001).²⁴² More generally, ‘the genuineness of faith schools is routinely undermined by frequent media reports of parents becoming “religious” so that their children can attend what they perceive to be better schools’ (Sandberg, 2011a: 160).

The Church of England (Church of England Board of Education and National Society for Promoting Religious Education, 2011: 2) acknowledges that in relation to primary

²³⁹ As of January 2011, there were almost 7,000 schools with a religious character, or roughly one-third of the total number of state-funded schools. Around two-thirds of these were Church of England schools and a third Catholic. All but 58 state-funded schools with a religious character were associated with the major Christian denominations. Around 60 per cent of schools with a religious character are voluntary-aided schools. See <http://education.gov.uk/rsgateway/DB/SFR/s001012/sfr12-2011.pdf>.

²⁴⁰ The study noted, however, that these differences between voluntary-aided and community schools vary geographically; they are very marked in London and quite marked in the north-west, but the differences are less pronounced in other regions.

²⁴¹ The Church of England’s advice to its schools is that when deciding membership or commitment to the Church, ‘the only criterion to be taken into account is attendance at worship’ (Church of England Board of Education and National Society for Promoting Religious Education, 2011: 7).

²⁴² Teaching unions and others have criticised a provision in the Education Bill 2011 to remove from Ofsted the duty to assess the contribution that schools make to community cohesion; see <http://accordcoalition.org.uk/2011/10/26/government-rejection-of-community-cohesion-inspection-in-schools-%E2%80%98risks-empowering-those-who-would-mitigate-against-social-cohesion%E2%80%99/>.

school admissions, 'where there is a very heavy demand for places ... the relationship between admissions based on church affiliation and on local residence can be a cause of contention'. However, it says that in the 'vast majority of primary schools this is not an issue'. The Church notes that its secondary schools have a wide variety of patterns in admissions: most offer places on a neighbourhood basis, while a minority stipulate a percentage of faith-based places (typically 50 to 80 per cent of places). Recently revised advice to Diocesan Boards of Education on admissions notes that:

Church of England schools should be able to show how their Admissions Policy and practice demonstrates the school's commitment both to distinctiveness and inclusivity, to church families and the wider community. (Church of England Board of Education and National Society for Promoting Religious Education, 2011: 5)

The Bishop of Oxford, the Right Reverend John Pritchard, who heads the Church of England's Board of Education, had previously said that a maximum of 10 to 15 per cent of foundation places 'feels right' to keep the ethos of a Christian school while serving the community.²⁴³ However, the revised advice to diocesan boards does not specify an optimum percentage of 'open' and 'foundation' places, noting that in individual schools, the balance between them will depend on ethos, history and tradition, and local circumstances.²⁴⁴ The advice document notes that the Church of England national office will regularly review the national picture of admissions arrangements in Church of England schools and will report biennially to the Church and to government starting in September 2012.

Faith-based admissions policies are likely to become more rather than less widespread with changes contained in the Education Act 2011 which make it easier to establish voluntary-aided schools.²⁴⁵ In November 2011, the Accord Coalition²⁴⁶

²⁴³ See 'Bishop: Open school access even if standards fall', BBC News website, 22 April 2011.

²⁴⁴ Foundation places are those offered to 'children whose parent(s) or carers are faithful and regular worshippers in an Anglican or other Christian Church'. Open places are those available for children from the local neighbourhood, irrespective of religious affiliation.

²⁴⁵ Schedule 11 of the Act removes the requirement for those wishing to establish a voluntary-aided school to get prior consent from the Secretary of State.

²⁴⁶ Among other issues, Accord campaigns 'to make admissions and recruitment policies in all state-funded schools free from discrimination on grounds of religion or belief'. It includes religious groups, humanists, trade unions and human rights campaigners. See www.accordcoalition.org.uk.

launched a campaign to prevent voluntary-controlled schools with a religious character from being able to discriminate on grounds of religion in their admissions.

Alison Ryan, Policy Adviser of the Association of Teachers and Lecturers (ATL), called for more nuanced equality and diversity arguments to be developed in relation to school admissions; for example, minority religion or belief groups might argue on egalitarian grounds for more schools based on their faith in order to redress the present balance. However:

What concerns ATL is where people interpret diversity as ‘if you have one of those, we want one too and we’ll all be separate enclaves’. We don’t think that’s a worthy aim.

Paul Pettinger of the Accord Coalition argued that the impact of faith-based admissions policies requires further research, since it is not known how many children lose out on a place at their local or preferred school because they have the ‘wrong’ religion or no religion.

Employment of teaching staff

Under the School Standards and Framework Act (SSFA) 1998, in foundation or voluntary-controlled schools with a religious character, ‘reserve’ teachers can be appointed who are selected for their fitness to give the required religious education and are specifically appointed to do so.²⁴⁷ In the case of ‘reserved’ teachers, preference can be given in the appointment, pay and promotion of people holding those posts to persons whose religious opinions accord with those of the school or who attend religious worship or who give (or are willing to give) religious education.²⁴⁸ The holders of reserved posts can be dismissed by reference to any conduct incompatible with the religion of the school; this might include conduct in the teacher’s private life.²⁴⁹ In a voluntary-controlled school with a religious character, the number of such reserved teachers may not exceed one-fifth of the total number of teachers.²⁵⁰ In a voluntary-aided school, all teachers may be treated as reserve teachers.²⁵¹

²⁴⁷ Schools Standards and Framework Act 1998, Section 58(2).

²⁴⁸ Section 60(3), (5)(a).

²⁴⁹ Section 60(3), (5)(b).

²⁵⁰ Section 58(3).

²⁵¹ Section 60(5).

The JCHR (2010: 6-7) argued that these provisions may be in breach of the 2000 European Union Framework Employment Directive, on the basis that 'the reservation of such posts is not restricted to circumstances where it can be shown that a genuine, legitimate and justified occupational requirement to adhere to a particular religious belief can be said to exist' (see also Vickers, 2009b). Formal complaints to this effect have been made to the European Commission by the British Humanist Association and the National Secular Society (British Humanist Association, 2011b: National Secular Society, 2011: 2).

Several interviewees for this project expressed concern about the practical impact of these provisions in the SSFA. Paul Pettinger noted that it is difficult to gather evidence beyond the anecdotal as to their impact since information about employment practice is often confidential and is highly variable between schools. Alison Ryan commented that such evidence as does exist suggests that the provisions:

... create real problems for someone who is not religious, or has a different religion, or simply chooses not to use their religion and wants to get a job on their own merits. People will self-select and not think of applying to certain schools with prescriptive practices ... Gay teachers especially feel more vulnerable.

These interviewees expressed further concern about a clause in the Education Bill which introduces a new power for the Secretary of State to permit voluntary-controlled schools that transfer to Academy status to apply preference in the appointment, promotion or remuneration of all teachers in accordance with the religious tenets of the school; that is, to give them the same freedom to discriminate as that enjoyed by voluntary-aided schools.²⁵² The BHA (2011a: 2) notes that this measure could potentially extend discrimination on religious grounds to many posts where such restrictions had never previously applied.²⁵³

²⁵² Clause 58 of the Education Bill introduced on 27 January 2011; Clause 62 in the version of the Bill as amended at 2 November 2011.

²⁵³ The BHA (2011a: 2) quotes Minister of State for Schools Nick Gibb as stating that 'the Secretary of State would only allow this change when a strong proposal was made and a thorough consultation was carried out'. However, the BHA notes that there is no statutory guarantee that future Secretaries of State will not simply allow all schools to make this change.

Religious education

Religious education (RE) is compulsory in all state-funded schools. It is not part of the national curriculum but is determined locally.

RE in schools without a religious character

In schools without a religious character, RE must be ‘in the main Christian, whilst taking account of the teaching and practices of the other principal religions represented in Great Britain’.²⁵⁴ As Sandberg (2011a: 155) notes, the law appears to walk a tightrope. For example, it is forbidden for RE to be taught by means of ‘any catechism or formulary which is distinctive of a particular religious denomination (but this is not to be taken as prohibiting provision in such a syllabus for the study of such catechisms or formularies)’.²⁵⁵ Thus, the law embodies an assumption that Christianity is the norm, whilst also recognising religious plurality and requiring religious neutrality.²⁵⁶

The precise balance is determined by local regulatory bodies known as Standing Advisory Councils for Religious Education (SACREs), which advise local authorities on matters of RE and collective worship (see Department for Children, Schools and Families, 2010, Chapter 4). Interviewees generally endorsed the SACRE model as a means of harnessing local knowledge and ensuring local accountability. However, there is some controversy around membership of SACREs, since there is no requirement for them to include representatives of non-religious belief groups such as humanists, as would be required if the law were to be read in compliance with the Human Rights Act (HRA). In practice, some SACREs address this anomaly by co-opting humanists as members.²⁵⁷

²⁵⁴ Education Act 1996, section 375(3).

²⁵⁵ Schools Standards and Framework Act 1998, schedule 19, para. 2(5).

²⁵⁶ The case of *Lautsi v Italy* No. 30814/06, 18.3.2011 illustrates the unsettled nature of debate about religion in schools at the European level. The Grand Chamber of the European Court of Human Rights (ECtHR) ruled that the compulsory display of crucifixes in Italian classrooms does not restrict the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. This overturned a previous unanimous Chamber judgment. The Grand Chamber held (at paras. 71-72) that the cross was a ‘passive symbol’ which did not ‘denote a process of indoctrination’ on the state’s part. The case placed great emphasis on the ‘margin of appreciation’ – that is, the discretion that the ECtHR grants states in fulfilling their obligations under the European Convention on Human Rights. It noted (at para. 70) that there is ‘no European consensus on the question of the presence of religious symbols in state schools’. For discussion of this case, see McGoldrick (2011).

²⁵⁷ See <http://www.humanism.org.uk/education/sacres-and-ascs/about-sacres>. See also Dinham and Jackson (2012: 294, note 4).

The law provides for the accommodation of the religion or belief of parents. In schools without a religious character, parents may request that a pupil be ‘wholly or partly excused’ from receiving RE and the pupil will be so excused until the request is withdrawn.²⁵⁸ Teachers’ religious freedom is also protected; for example, none can be required to teach RE.²⁵⁹ Several interviewees noted that the law is anomalous in not expressly protecting children’s right to religious freedom. As Sandberg (2011a: 157) argues, this appears out of step with the shift towards greater protection for the rights of the child and the fact that courts have entertained religious freedom claims from schoolchildren; for example, in the cases of *Begum*, *Watkins-Singh* and *Playfoot*.

RE in schools with a religious character

In foundation or voluntary-controlled schools with a religious character, the rules are broadly similar to those which apply in a school without a religious character. In both, RE must be in accordance with an agreed syllabus and must be non-denominational.²⁶⁰ A key difference relates to parental rights: whereas in schools without a religious character, parents have the right to opt out of RE, in foundation or voluntary-controlled schools, parents have a right to opt in; that is, to request that their children receive RE in accordance with the religion or religious denomination of the school.²⁶¹ As with admissions and employment, voluntary-aided schools with a religious character enjoy more freedom than foundation or voluntary-controlled schools (Petchey, 2008). In these schools, RE must be in accordance with the religion or religious denomination of the school.²⁶² There is a parental right to opt out of this denominational education and receive the kind of non-denominational RE that they would in schools without a religious character.²⁶³

Some commentators question the adequacy of the opt-out clause as a means of protecting the religious liberty of individuals who do not want to participate in the teaching of doctrinal religion where the pressure to conform may be great (Mawhinney, 2006; Mawhinney et al., 2012). Several interviewees noted that parents

²⁵⁸ Schools Standards and Framework Act 1998, section 71(1)

²⁵⁹ Schools Standards and Framework Act 1998, section 59(3)

²⁶⁰ Schools Standards and Framework Act 1998, Schedule 19, paras. 2(5) and 3

²⁶¹ Schedule 19, para. 3(3)

²⁶² Schedule 19, para. 4

²⁶³ Schedule 19, paras. 4(3)-(4); this applies if it is not reasonably convenient for parents to send their children to a school in which a non-denominational syllabus is in use.

and children do not always know about their right to opt out and may fear becoming isolated if they exercise it. Joyce Miller, Vice Chair of the Religious Education Council of England and Wales, argued for a broad and non-instructional approach to RE:

It's a fundamental principle that RE in community schools should never suggest that one religion is better than another or that having a religious interpretation of life is intrinsically better than having a non-religious interpretation of life. Everything should be open and 'up for grabs' ... the values of critical engagement and a wish to understand and learn from what others believe are what underpins it all.²⁶⁴

Several interviewees observed that where voluntary-aided schools present their religious tenets as objective truth, and do not include the perspectives of other religions or of those with no religion, children's right to freedom of religion or belief may be compromised, since it cannot be assumed that children share their parents' religion. Several interviewees expressed particular concern about the teaching of creationism and 'intelligent design' in 'free' schools and academies which control their own curriculum.²⁶⁵

Exemption of the curriculum and RE from the prohibition of discrimination

Some interviewees expressed concern about the fact that the Equality Act 2010 contains a broad exemption for the content of the curriculum and of RE from the prohibition of discrimination on any protected characteristic - including sexual orientation.²⁶⁶ In its scrutiny of the Equality Bill, the JCHR (2009: 72) was concerned by the risk that, if the prohibition on discrimination on grounds of sexual orientation

²⁶⁴ See also the practice code for RE teachers developed by the Religious Education Council of England and Wales (2009: 2), which urges teachers to 'strive for fair and accurate representation of religious and non-religious beliefs by drawing on sound scholarship and a range of voices'.

²⁶⁵ There are no definitive data on the number of UK schools which teach creationism. The Department for Education states that, 'We do not expect creationism, intelligent design and similar ideas to be taught as valid scientific theories in any state-funded school'. See <http://www.education.gov.uk/schools/leadership/typesofschools/freeschools/freeschoolsfaqs/a0075656/free-schools-faqs-curriculum/#faq4>. However, in August 2011, an evangelical church's bid to open a free school passed the first round of the selection process, despite announcing that it planned to teach creationism in science lessons; see 'Free school with creationism on the agenda is on the eve of bearing fruit', *Times Educational Supplement*, 12 August 2011.

²⁶⁶ Equality Act 2010, section 89(2). The Equality Act 2006 exempted the content of the curriculum and the teaching of RE from the prohibition on discrimination on grounds of religion or belief alone. The exemption contained in the 2010 Act is thus significantly broader.

did not apply to the curriculum, 'homosexual pupils would be subjected to teaching, as part of the religious education or other curriculum, that their sexual orientation is sinful or morally wrong'.

The 2010 Act does include in the prohibition of discrimination the delivery of the curriculum, i.e. the way in which education is provided.²⁶⁷ The government had sought to reassure the JCHR that this provision would ensure that schools which teach the tenets of their faith, including the views of that faith on sexual orientation and same-sex relationships, could not 'present these views in a hectoring or harassing or bullying way which may be offensive to individual pupils or single out individual pupils for criticism' (JCHR, 2009: 73). The JCHR was not persuaded by this argument. It argued that the broad exemption covering the curriculum and RE was 'likely to lead to unjustifiable discrimination against gay pupils'. It noted that there was an important distinction between a curriculum which imparts to pupils in a descriptive way the fact that certain religions view homosexuality as sinful and morally wrong, and a curriculum which teaches a particular religion's doctrinal beliefs as if they were objectively true. In the latter case:

It is the **content** of the curriculum (the teaching that homosexuality is wrong), not its **presentation**, that is discriminatory.
(emphasis in original)

Non-statutory advice for schools issued by the Department for Education (2011a) on the 2010 Act does not directly address this issue. It is not possible to quantify the extent to which the JCHR's concerns are borne out in practice. By way of context, there is evidence that young people who attend secondary schools with a religious character in Britain are more likely to report homophobic bullying than their peers in schools without a religious character (Hunt and Jensen, 2007: 3). The JCHR (2009: 72-73) notes that the breadth of the exemption covering the curriculum and RE makes it difficult to see 'how a gay pupil ... who felt that they were being taught that they are of less moral worth because of an inherent characteristic', could invoke any protections under equality law. This creates at the minimum a requirement to monitor the impact of the newly-broadened exemption, in particular on lesbian, gay, bisexual and transgender pupils.

²⁶⁷ Equality Act 2010, Section 85(2)(a).

Religious worship

It is compulsory for all state-funded schools to hold a daily act of collective worship.²⁶⁸ In schools without a religious character, this must be ‘wholly or mainly of a broadly Christian character’.²⁶⁹ In schools with a religious character, worship must be in accordance with that character.²⁷⁰ Parents have a right to withdraw children and children over the age of 16 have a right to withdraw themselves from daily worship.²⁷¹

Several interviewees and participants in the London roundtable argued that the law on collective worship is unsatisfactory and unworkable. Some questioned why pupils’ right to opt out is limited to those over the age of 16. Joyce Miller noted that the law and government guidance on it are ‘a mess’ and may appear to provide protection for proselytising groups to carry out their activities in schools. The BHA (2011a) argues that the law ‘impedes schools’ ability to provide good inclusive assemblies, is prescriptive and in practice is widely flouted’. Knights (2007: 113) suggests that the law ‘seems out of kilter with the notion of a multicultural society and may not reflect the religious beliefs of the majority in any event’ (see also Mawhinney, 2006). As with RE, there is concern that parents and pupils may not know about their right to opt out; moreover, as Paul Pettinger noted, pupils who do so may feel isolated and risk missing out on other aspects of the assembly, including ethical and moral discussion.

The law does permit flexibility. In the case of schools without a religious character, the requirements do not apply to every act of worship, but to ‘most such acts’ in a given school term, with the precise balance to be determined by SACREs at a local level.²⁷² In some cases, SACREs have agreed determinations for schools to have worship that is multi-faith rather than of a broadly Christian character (see, for example, Brent SACRE, 2006: 4, 26-30). Such determinations are made upon application by the school, not by parents or pupils, although the school may choose to consult them (Department for Education, 1994: 22-23). Moreover, the flexibility in the law allows schools that so choose to make all their acts of worship wholly Christian and instructional. The law thus affords relatively little power in relation to collective worship to parents or pupils, and no direct recourse save that of opting out if, for example, a school decides to change from one arrangement to another.

²⁶⁸ Schools Standards and Framework Act 1998, Section 70.

²⁶⁹ Schools Standards and Framework Act 1998, Schedule 20, para. 3(2).

²⁷⁰ Schools Standards and Framework Act 1998, Schedule 20, para. 5.

²⁷¹ Schools Standards and Framework Act 1998, Sections 71, 71A.

²⁷² Schools Standards and Framework Act 1998, Schedule 20, para. 4.

Reasonable accommodation of religion or belief in schools

Several high-profile cases have concerned pupils' right to wear clothes or jewellery in observance of their religion or belief; for example, *Begum*, *Watkins-Singh* and *Playfoot*. As noted in section 6.2, schools may find themselves on the 'front line' of decision-making about the complex social and political challenges posed by multiculturalism and questions of identity - decisions which may need to withstand considerable scrutiny as claims make their way into legal process. Kathryn James, Director of Policy of the National Association of Head Teachers, noted that schools needed clear guidance, for example in relation to uniform and access to prayer rooms:

The law is not clear for schools. It feels as if it is a minefield for many school leaders ... Such issues can disrupt schools for days while there is discussion about what can be allowed and what is discriminatory.

Some guidance has been produced by government (Department for Education, 2011b), as well as by religion or belief groups (for example, Muslim Council of Britain, 2007) and other agencies (Coles, 2008). There may be value in the EHRC making such guidance available in a single place. It is also important that guidance goes beyond minimum compliance to establish easily achievable good practice in relation to the accommodation of religion or belief in schools.

Interviewees offered several instances of such practice; for example, Reverend Alan Green of Tower Hamlets Inter Faith Forum noted that it was part of the 'hospitable culture' of Church of England schools to serve *halal* food for Muslim pupils. Interviewees also related how tensions relating to religious dress had been resolved through negotiation; for example, in relation to pupils who wished to wear a *niqab* veil (the solution being for them to wear the full veil while outside the school gates but to make arrangements such that these could be taken off during the school day). Joyce Miller argued that such accommodations:

... depend on the school being a respectful place where people are not going to be subjected to any sort of inappropriate behaviour ...
Accommodation is the only sensible way of dealing with these issues, otherwise it becomes confrontational and it always emphasises 'the other', whereas what we should be talking about is a community that feels safe and secure for everyone that's in it.

The principle of personal autonomy equally extends to the right to opt-out of blanket policies that insist upon the wearing of religious dress (Kazi, 2010) (see also section 7.7).

Several interviewees expressed concern that the proliferation of schools that are accountable to central rather than local government may risk depriving them of the experience that local authorities have developed in managing issues relating to religion or belief in schools, especially in areas with high religious diversity.

Summary of issues relating to religion or belief in schools

Sandberg (2011a: 168) argues that the law concerning religion in schools appears 'outmoded' and in tension with the 'new religion law' based on human rights and equality. Concerns identified in this section include the necessity and proportionality of faith-based admissions policies. They also include the wide discretion given to voluntary-aided schools to discriminate on grounds of religion or belief in the employment of all teachers, without there being any requirement to demonstrate that a genuine, legitimate and justified occupational requirement exists. The law also appears out of step in not expressly protecting the rights of the child; for example, in relation to RE and collective worship. The entry into the education system of new religious providers setting up 'free' schools and academies, and the likely expansion in the number of voluntary-aided schools, is likely to heighten concerns. There is a need to monitor the practical impact of discrimination that is permitted within the education system, in relation to admissions; employment; and the broad exemption for the content of the curriculum and RE from the prohibition of discrimination, particularly in relation to sexual orientation. This role might be taken on by the EHRC or the JCHR, as well as by civil society organisations.

9.4 Public sector equality duty

As explained in section 4.3, the Equality Act 2010 extends and strengthens the public sector equality duties which previously applied only to race, sex and disability (Vickers, 2011: 136-38). The new single general public sector equality duty applies to all protected characteristics, including religion or belief. The duty has three elements. Public authorities must have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Act;
- advance equality of opportunity between persons who share a relevant characteristic and persons who do not share it; and

- foster good relations between persons who share a relevant characteristic and persons who do not share it).²⁷³

As the duty only came into force in April 2011, assessment of its practical impact is premature.²⁷⁴ This section discusses the problems and opportunities presented by the implementation of the duty in relation to religion or belief.

Concerns about the public sector equality duty in relation to religion or belief

Some commentators and participants in this research are opposed in principle to the inclusion of religion or belief in the new single duty and/or express strongly negative views about its likely impact - but for different reasons and from different perspectives.

At the level of principle, the concern is that the duty will 'lead to a greater visibility for religion in the public sphere, and, if only as a product of its higher visibility, that will involve some level of acceptance or normalising of religion in public life' (Vickers, 2011: 146). The suggestion is that, even though the duty also covers lack of religion or belief, its inevitable consequence will be to imply an endorsement of religious belief on the part of public authorities.

In some cases, the reservations expressed echo concerns about the general anti-discrimination protection for religion and belief; for example, concerns that religion or belief is essentially different from other characteristics and liable to be in tension with some of them (see section 6.3; see also Vickers, 2011: 138-42) and that it is sometimes hard to define (section 5.2).

The National Secular Society and some humanist participants also had misgivings about transposing a duty conceived in the context of race, gender and disability into the more contested realm of religion and belief. David Pollock noted that religions and beliefs, unlike all the other protected characteristics, make potentially

²⁷³ Equality Act 2010, Part 11, Section 149

²⁷⁴ In addition, the specific duties that are designed help public bodies perform the general equality duty better only came into force in England in September 2011. These duties, contained in the Equality Act 2010 (Specific Duties) Regulations 2011, require public bodies to be transparent about how they are responding to the equality duty; for example, by requiring them to publish relevant, proportionate information showing compliance with the equality duty and to set equality objectives. Lessons may be learned from the experience of implementing Section 75 of the Northern Ireland Act 1998. Section 75 places a duty on public authorities to have due regard to the need to promote equality of opportunity on nine grounds, including 'religious belief', and regard to the desirability of promoting good relations on three grounds, also including 'religious belief'.

controversial claims about the world and how one should behave; he feared that some more vocal religion or belief groups might use the duty to ‘stir up a hornets’ nest’. The interests of those with no religious belief, he suggested, were likely to be neglected or overridden (see also Vickers, 2011: 142-43). Pollock commented that public authorities would have to rely on ‘unreliable’ Census data to estimate the size of religion or belief communities (see also section 2.2) or else undertake their own ‘intrusive’ data-gathering exercises.

The End Violence Against Women coalition (EVAW) opposed the inclusion of religion or belief in the second and third limbs of the equality duty (‘advancing equality of opportunity’ and ‘fostering good relations’). This was because, among other reasons, EVAW was concerned that the duty ‘may increase pressure on public bodies to accept culturally relativist arguments that women from certain religious backgrounds can be treated differently from other women experiencing abuse’ (EVAW, 2009: 2). EVAW also noted that ‘it is often the more traditional and sometimes reactionary groups that are most effective at mobilization and engaging in debate’. Even interviewees who were more positive about the duty expressed concern that some religious groups might (as one equality specialist observed) use it to ‘browbeat’ public authorities to promote religion (or a particular religion) and that public bodies might ‘panic and cave in even if the point made has no legal validity’.

EVAW and other groups concerned with gender equality expressed concern about the increased contracting out of core public functions to religious organisations (see also British Humanist Association, 2007b). They were particularly troubled about moves to increase the involvement of religious providers in abortion and sexual health services (see section 1.3) and services relating to violence against women. Rose Doran of the Local Government Group noted that commissioning and procurement processes needed to build in prescriptions on the promotion of particular religious views by providers. She added that religious providers could themselves be more pro-active in providing such reassurances (see also section 6.6 in relation to the employment practices of religious organisations).

From a different perspective, some interviewees from religious organisations also expressed reservations about the inclusion of religion or belief in the new single duty. For some (mainly Christian) interviewees, this was based on a lack of confidence that public authorities were well-equipped to implement it. One commented that public authorities had become increasingly ‘secularised’ and were thus ill-suited to taking on a more pro-active role with regard to religion. Generally, Christian interviewees who were concerned about the ‘trumping’ of religious claims by those based on gender or sexual orientation felt that this would also happen in relation to the public sector

equality duty. Several Christian interviewees referred to what they saw as the general 'religious illiteracy' of public authorities (see also section 2.5); these interviewees noted that public bodies sometimes restricted funding to inter-faith initiatives, rather than those of particular religious groups, or denied funding to religious groups out of a misplaced fear that they would use it as an opportunity to evangelise.

Interviewees of all types acknowledged the difficulty that public authorities face in identifying authoritative representatives of religious communities (see also section 2.6). Vickers (2011: 144) notes that determining who represents a religion, and thus whose equality needs to be advanced, or whose good relations need fostering:

... may involve deciding whose is the authentic voice of the religion or belief, a decision no one is in a position to make, least of all workers in public authorities upon whom such decisions are likely to fall.

Julian Rivers of the University of Bristol added that a particular risk for decision-makers is they might 'slip into thinking about religion as [they do] about race, which doesn't work as an overall strategy because it treats religions as immutable, monolithic blocks'.

Opportunities presented by the public sector equality duty

Several interviewees and roundtable participants were positive about the potential for using the new single duty to address disadvantage associated with religion or belief and consider the needs of communities holistically. They commonly shared some of the concerns expressed above about the challenges of implementation but felt that these could be overcome. These included interviewees concerned with sexual orientation; for example, Sam Dick of Stonewall argued that:

We must not forget that many lesbian, gay and bisexual people also have a religion or belief. The [public sector equality duty] provides a real opportunity to actively consider different groups beyond [single] identities and to see them in the round as having different identities. It goes beyond [preventing] discrimination to a more active consideration of people's needs.

Amanda Ariss of the Equality and Diversity Forum argued that the duty could be:

... a very good way of dealing with the persistent inequality of life chances affecting, for example, Muslim women ... There is clearly an argument that public action is needed to address that persistent inequality. Cohesive

communities are not possible when particular groups, whether defined by race, religion or any other characteristic, are falling way behind.

Ariss commented that the duty embodies a ‘reasonable expectation’ that all public authorities will make some effort to discover who lives in their area and what their needs are. Participants in Cardiff added that this might involve using qualitative as well as quantitative methods; collecting reliable quantitative data about religion or belief was a ‘huge problem’ for public bodies since people often declined to provide this information and did not understand why it was being requested.

Reverend Aled Edwards of Cytûn noted that the devolved authorities in Wales have taken a ‘strong and distinctive line’ in promoting the equality duty.²⁷⁵ He commented that the practicalities of the duty for faith communities were being ‘worked out almost on a daily basis’ in diverse areas of policy and practice; for example, it had come into play in discussions about whether care home residents were entitled to transport to take them to a place of worship. The duty had also influenced discussions around the procedures for emergency planning in relation to the timely release of bodies to families in accordance with religious requirements.

Respondents to the workplace survey to whom the public sector equality duty was applicable showed high levels of awareness of the extension of the public sector equality duty to religion or belief (see Appendix 7). More than three-quarters knew where to go for guidance about the duty and said they understood what it requires in relation to religion or belief. However, only 1 in 5 respondents agreed that the duty ‘will make a significant difference to the way their organisation approaches equality in relation to religion or belief’.

Different conceptions of equality

Vickers (2011: 147) argues that in assessing the wisdom of extending the public sector equality duty, it is important to have regard to the overarching aims of discrimination law in promoting equality between different groups; however, ‘determining what “promoting equality” might require is both complex and contested’.

The traditional conception of equality is ‘formal’ or ‘symmetrical’ equality, which requires that like cases be treated alike. This is widely viewed as too narrow: it can lead to equally bad treatment, is limited to achieving parity for individuals rather than groups and provides little basis for positive action. Vickers (2011: 147-48) outlines three more substantive concepts of equality. The first is a model which focuses on

²⁷⁵ In one indication of this, the Wales specific duties were not delayed (as in England) and came into force on 6 April 2011.

the link between equality and individual dignity and identity. Vickers (2011: 150-51) suggests that this conception is problematic in relation to religion or belief; for the reasons discussed above, it is doubtful that religion and belief can be identified as clear categories with a single identity capable of being recognised and ‘given value’ or ‘celebrated’ for their own sake. Moreover, to do so may be divisive and cause resentment among those with different religions or beliefs and those with none. By the same token, there is no requirement on public authorities to, for example, avoid using the word ‘Christmas’ in a misguided attempt to treat all religions equally.

The second model focuses on disadvantage and redistribution (Vickers 2011: 152-53). This understanding of equality is focused on ‘identifying where religion is causally linked to disadvantage, and then trying to reorder or implement public policy to address this issue’. Thus, for example, if health promotion messages are not reaching particular religious communities, leading to lower health outcomes for those groups, then using some resources to reach them would be an appropriate action in response to the duty (see section 3.3 for discussion of the causal link between religion or belief and socio-economic disadvantage).

The third model is based on equality as a means of addressing social exclusion and promoting participation (Vickers, 2011: 153-55). Vickers suggests that this approach provides the strongest basis for developing the religion and belief duty. The model starts from the premise that equality is best achieved by ensuring greater participation in decision-making by marginalised groups. It involves both **recognition** of marginalised groups to permit their involvement in civic life and **redistribution** of resources to break cycles of disadvantage. Thus, it combines the focus (in model two) on economic disadvantage with an emphasis on full participation in society for excluded groups, including where those groups are defined by religion.

Equality specialists who participated in this project generally endorsed substantive notions of equality which were broadly congruent with the second and third models proposed by Vickers. Participants in the London roundtable suggested that the public sector equality duty provided a vehicle for public bodies to address persistent disadvantage and to focus on the exclusionary effects of certain policies or practices. For example, in a *Begum*-type situation, a substantive equality ‘lens’ would lead decision-makers to the conclusion that:

... a ‘no-headscarf’ rule operates as an exclusionary rule for large numbers of women for whom the knock on effect will be to deny them access to [education or] employment.

Some religion or belief groups embraced a similar notion. For example, Shaykh Faiz Siddiqi, speaking from a Muslim perspective, observed that women and ethnic minorities had ‘hammered on the door to break down the institutionality of discrimination’ against them. Religion or belief groups might do the same; however, religion or belief was a ‘more sensitive and emotive area’ and it remained to be seen whether entrenched discrimination associated with this characteristic would succeed in the same way.

Challenges of implementation

The discussion in this section suggests that public authorities will need to develop nuanced understandings of equality in order to identify the approach best suited to each of the different protected equality grounds in their locality. As Vickers (2011: 158) argues, a ‘one size fits all’ approach is ‘likely to be dangerous, as treating religion and belief equality in the same way as other grounds is likely to lead to the realisation of exactly the concerns voiced by those opposing the extension of the duty’. For example, an approach which emphasises individual identity may be well suited to addressing discrimination based on sexual orientation, but potentially divisive when applied to religion or belief. However, a view of equality based on promoting social inclusion may help public bodies target their activities as they develop the religion and belief duty, since ‘only where religion or belief is standing in the way of achieving such an aim should action be targeted on grounds of religion and belief’ (Vickers, 2011: 157).

Practitioners at the Cardiff roundtable emphasised that substantively addressing discrimination also requires a focus on outcomes and not just on minimum legal compliance. This in turn required ‘smarter’ approaches by public authorities across sectors and organisations; for example, the setting of coordinated equality outcomes across the health, social care and welfare systems. Several interviewees added a note of caution that public austerity risks stifling creative approaches to implementing the public sector equality duty, as well as exacerbating structural inequalities.

9.5 Conclusion

This chapter has examined a range of ethical and practical concerns relating to religion or belief in the context of public services.

A key ethical concern arises when practitioners discuss their personal beliefs with a service user. Participants in this research suggested that the justification for self-disclosure rests entirely on the therapeutic value to the service user in the particular context in which it occurs; they did not view it as a matter of the practitioner’s right to freedom of expression. Incidents where practitioners are considered to have

transgressed professional guidelines are rare, though intensely controversial when they do occur.

Participants emphasised the value of using equality and human rights proactively to shape policy and practice and to carry out a holistic appraisal of individuals' needs, whether related to their religion or belief or any other characteristic. Equality and human rights impact assessments were viewed as particularly valuable in the context of expenditure cuts since they enable decision-makers to make informed, principled and transparent decisions about the allocation of resources.

In relation to education, concerns include the necessity and proportionality of faith-based admissions policies and the wide discretion given to voluntary-aided schools to discriminate on grounds of religion or belief in the employment of teachers. The entry into the education system of new religious providers setting up 'free' schools and academies, and the expansion in the number of voluntary-aided schools, has heightened these concerns.

There is a need to monitor the practical impact of discrimination that is permitted within the education system, in relation to admissions; employment; and the broad exemption for the content of the curriculum and RE from the prohibition of discrimination, particularly in relation to sexual orientation. This role might be taken on by the EHRC or the JCHR, as well as by civil society organisations.

Participants expressed strongly divergent views about the extension of the public sector equality duty to include religion or belief. Some were opposed in principle and/or felt that the duty in relation to religion or belief would in practice be divisive and unworkable. Concerns included the potential for vociferous religion or belief groups to 'browbeat' public authorities and the difficulty of identifying authentic representatives of religious communities. Other participants were more positive about the potential for using the new single duty to address persistent disadvantage associated with religion or belief and focus on the exclusionary effects of certain policies or practices. This perception rests on a substantive understanding of equality as a vehicle to address social exclusion and promote participation among marginalised groups defined by religion or belief, rather than one which emphasises the recognition and celebration of different religious identities.

10. Conclusions: advancing debate and practice

10.1 Introduction

This chapter draws on evidence and insights from this research in order to propose ways of advancing debate and practice in relation to equality, human rights and religion or belief in England and Wales.

The chapter does not address recommendations to specific actors since the points it raises are potentially relevant to a wide range of bodies. Among these are public authorities; employers and employers' organisations; trade unions; religion or belief groups; equality and human rights bodies and civil society groups, as well as the Equality and Human Rights Commission (EHRC) and the parliamentary Joint Committee on Human Rights (JCHR).

10.2 Areas of broad consensus

A persistent theme of this research has been the intemperate nature of much public debate about equality, human rights and religion or belief. In particular, there is palpable anxiety about specific cases which are viewed by some groups as both demonstrating and perpetuating an anti-religious (or, more commonly, a specifically anti-Christian) bias. Among our participants, the most contentious of these were cases in which individuals or agencies wished to abstain on grounds of religious conscience from providing services to others on the grounds of their sexual orientation. These cases have gained an exceptionally high public profile. However, it is important that this divisive current of debate does not obscure the areas where there is (or is potential for) consensus. Debate is likely to be advanced if these areas can be identified and, as far as possible, insulated from the more rancorous tone which has characterised the 'public conversation' about equality, human rights and religion or belief in recent years.

The role of religion or belief groups in the formation of law and policy

Our interviews suggested a degree of consensus among groups situated in both the 'religion' and 'belief' strands (as well as groups concerned with other equality strands) that religion or belief groups are legitimate interest groups like any other but should have no **privileged** role in the formation of law and policy. In particular, most interviewees - including a majority of those situated in the 'religion' strand - suggested that there is no room for 'truth claims' or claims of moral superiority based upon a particular religion or belief in matters of law and policy. There were differences of emphasis within this broadly articulated position. However, it is notable that interviewees from both religious and non-religious perspectives considered that

views based upon religious doctrine should not influence the formation of law and policy.

Reasonable accommodation of religion or belief

We found a high degree of consensus about the desirability of making reasonable accommodation for religion or belief in the workplace, particularly in matters of dress codes and flexible working patterns. Virtually all participants agreed that individuals whose religion or belief is important to them have a responsibility to make sensible career choices and may have to make personal sacrifices to avoid conflict with the law or professional guidelines. We also found broad consensus about the **type** of criteria which might reasonably restrict the manifestation of religion or belief in particular instances, such as health or safety concerns; business efficiency; and detrimental impact on colleagues.

We found an equally strong presumption **towards** the accommodation of religion or belief where these criteria do not apply or are not compelling. This was sometimes expressed in terms of the principle of personal autonomy and the inherent value of diversity in social settings. It was also viewed as making good business sense. Views differed (including between co-religionists) as to what was 'reasonable' in particular instances. Such disagreements are inevitable in view of decision-makers' reliance on the principle of proportionality which, being context-specific, precludes hard and fast rules or predictable outcomes. Nevertheless, our findings indicate a high degree of acceptance of what might be termed 'routine' accommodation of religion or belief, in stark contrast to approaches elsewhere in Europe.

The role of litigation

Another matter on which the majority of interviewees and roundtable participants agreed was the undesirability of pursuing litigation except as a 'weapon of last resort'. Litigation may be necessary in some circumstances to challenge individual injustice or to clarify an area of law. However, the suggestion is that wherever possible, claims based on religion or belief should be pursued through forms of social action such as mediation, negotiation, guidance and public argument, with legal action reserved for cases of real strategic importance. Interviewees overwhelmingly viewed litigation as symptomatic of failure, whoever instigated it.

Allied to concern that there has been excessive and/or misguided litigation concerning religion or belief is a view that the law is limited in its capacity to address complex questions of multiculturalism and social identity in modern Britain. As one roundtable participant put it, 'courts may simply not be the right place to have this conversation'. In addition, participants spoke of the need to lower the emotional

temperature of public discussion about religion or belief since ‘copy-cat’ claims for legal recognition and protection were divisive and suppressive of debate. Some participants suggested that excessive or misguided pursuit of litigation could, paradoxically, **decrease** the effectiveness of efforts to uphold the rights of individuals to manifest their religion or belief by appearing to ‘pick a fight’ with the equality and human rights framework. Further, a litigious environment was broadly viewed by participants as inimical to proportionate and balanced decision-making: a fear of litigation was likely to produce knee-jerk responses which tended to escalate and harden divisions rather than diminish them.

The value of proactive equality and human rights approaches

Participants concerned with employment and service delivery emphasised the value of using equality and human rights standards and tools proactively to shape policy and practice. Equality and human rights impact assessments were viewed as particularly valuable in the context of expenditure cuts, since they enable decision-makers to make informed and transparent decisions about the allocation of resources. In relation to religion or belief, these tools had been used both to increase the uptake of services and to improve them. A clear lesson to emerge from this experience was the imperative to use human rights alongside equality mechanisms as a ‘lens’ for examining policy and practice: for example, a human rights perspective enabled managers to move beyond considerations of whether (say) a dress code request related to ‘religion’ or ‘culture’ or was an obligatory or discretionary aspect of a belief. While the Equality Act ‘lens’ dictated a focus on legal compliance and distinct characteristics, human rights permitted an approach focused on individual flourishing.

This focus on equality and human rights as a framework for decision-making reminds us that the most productive level of engagement for those who wish to advance debate and practice on religion or belief is with policy-makers, practitioners and managers in the workplace, and not solely with legal process.

Principles for resolving disputes outside the courtroom

If litigation is to be used selectively, there is a requirement to pre-empt or resolve disputes relating to religion or belief by other means. There was a significant degree of overlap between the principles or ‘rules of thumb’ proposed by interviewees and roundtable participants as a basis for doing so.

The most commonly invoked principle was ‘do no harm’. At a general level, the principle suggests a position of mutual restraint, according to which individuals or groups refrain from asserting claims if to do so entails harm to others. In the context

of the workplace, the principle was considered a useful means of distinguishing situations in which claims for reasonable accommodation are refused for compelling reasons as opposed to merely a disinclination to embrace religious or cultural difference. The principle was also invoked in favour of allowing religious believers conscientiously to object to certain tasks if no material harm was caused to colleagues or to people using a service. However, the application of the principle was controversial in this context, with disagreement as to who - or what - was harmed (or not) in specific instances. These differences remind us that perceptions of harm are context dependent and therefore form part of the assessment of proportionality in each case.

The principle of proportionality (or the 'least restrictive' approach) was also commonly invoked by participants. Interviewees situated in the religion strand proposed, as a general principle, respect for the intrinsic value of religions or beliefs to their adherents; however, it was generally acknowledged that this does not guarantee protection from offence. The principles of personal and institutional autonomy were also broadly endorsed, though it was recognised that these might sometimes conflict. The application of these 'rules of thumb' in specific instances may be a matter of contention. Nevertheless, the articulation of a set of broad principles provides a starting point for the negotiation of differences.

10.3 The conduct of public debate

Also critical is the process by which decisions are made, differences are identified and resolutions (however contingent or partial) are achieved. Where consensus does **not** exist, it is all the more important that public debate is conducted in a manner which encourages rather than closes down possibilities for resolution.

Ethical 'rules of engagement'

Participants in this research identified 'ground rules' for approaching public discussion or negotiation of differences in particular settings. It is suggested that acceptance of these 'rules of engagement' is a minimum requirement for groups or individuals who seek to negotiate a particular outcome in a context where competing interests are at stake. The ethical reference points proposed by participants include the requirement to respect the integrity and legitimacy of the perspective of others. Also important are good faith and openness to those whose viewpoints are incomprehensible to oneself. This approach is premised on the assumption that the balancing of competing interests is not a 'zero-sum' game. Nor is it one that is suited to abstract determinations. Rather, the imperative is to conduct nuanced analysis of the context in each case through dialogue and, where necessary, with the support of mediators who are able to respect the integrity of each party's position.

Creating spaces for the negotiation of differences

Many participants observed that ‘good faith’ solutions are more easily achieved in a safe environment. This was especially important in relation to minority religious communities. Participants perceived the need to create localised spaces where groups can work out what equality and human rights mean in relation to religion or belief in particular localities, free from the pressure created by adversarial, media-driven debate. Participants also advocated the creation of safe spaces for discussion within workplaces and public institutions, noting that decision-makers are frequently fearful and lack confidence about resolving dilemmas or disputes about religion or belief. Examples of successful mediation or negotiation of differences in communities and workplaces underline the value of this approach.

Debate about legal cases

A number of contentious legal cases have, to a large extent, set the contours of public and media debate about equality, human rights and religion or belief. Legal judgments may raise important matters of principle and it is healthy for these principles to be debated in public. However, legal cases are by their very nature an unreliable indicator of common experience or the place of religion or belief (or particular religions or beliefs) in society. Each case is highly fact- and context-specific and there are invariably contingent reasons why some claimants make it to court while other potential claimants do not. Thus, considerable caution is required when seeking to generalise from specific cases or to assess their social, as well as legal, significance. Public commentators are not always sufficiently circumspect. As a result, responses to high-profile cases may make conflicts between religion or belief and other interests appear more intractable or prevalent than they actually are. This is especially so when understanding is reliant upon media reports or the views of lobby groups and is not also informed about the detailed circumstances and legal reasoning in each case. If public debate is to advance, it requires a sound evidence base, a minimum requirement of which is an accurate and balanced account of the legal contestation.

‘Religious’ versus ‘secular’ perspectives

Discussion about religion or belief can involve different perspectives which appear to be mutually unintelligible; for example, one participant argued that ‘secularists’ concerned about the representativeness of religious community leaders do not understand ‘how religions work’. This may explain why debate has at times become so acrimonious, as specific legal cases or policy matters act as a ‘lightning rod’ for a broader perceived gulf between the ‘religious’ and the ‘secular’. Indeed, some (but not all) participants situated in the ‘religion’ strand were vehement in their criticism of

what they perceived as a combative ‘secular’ agenda to constrain the significance of religion in public life.

However, our research suggests that when specific issues are probed in detail, the lines are not always so clearly drawn. For example, members of religion or belief groups (including co-religionists) argued both for and against extending protection for conscientious objection where an individual feels that their religious beliefs compel them to abstain from providing services to same-sex couples. This is not surprising since legal cases often reflect ideological and theological disputes that are also taking place **within** religious organisations. It is important to remember that the rights of lesbian, gay, bisexual or transgender believers are centrally at stake in this debate - a perspective that is overlooked in debates framed as religious versus secular.

Further, recognition of the foundational differences between religious and non-religious perspectives on human rights should not mask their shared concern about social injustice and commitment to a set of human rights standards and principles enshrined in law. There is much scope for dialogue between these two perspectives, for example, about the meaning of human dignity and what it means to live an authentic and flourishing life.

The Christian ‘marginalisation’ narrative

Much political and media debate about religion or belief is shaped or influenced by the insistent narrative articulated by some strands of Christian opinion which sees equality law as a means by which Christianity is being marginalised and penalised in Britain. However, this view is not universally shared by Christians, some of whom view the ‘marginalisation’ narrative as a response by a particular Christian tradition to a loss of privilege. The evidence base concerning discrimination against Christians is incomplete; however, the evidence that does exist suggests the need for a more nuanced analysis of the incidence and seriousness of discrimination against Christians than the generalised ‘marginalisation’ narrative presently articulates. It is important also to contextualise claims of discrimination against particular religious communities: one clear trend from existing evidence is the greater prevalence of discrimination against Muslims compared to other groups defined by their religion.

10.4 Legal ‘pressure points’

This report has examined areas where the law is perceived to be unclear, under strain and/or vulnerable to future challenge. This section summarises these areas as an indication of future ‘pressure points’ in legal debate and practice.

- The definition of 'belief' is widely perceived to be unclear as a result of case law and managers are uncertain about which beliefs warrant legal protection and which do not.
- The requirement to show group (rather than solitary) disadvantage in discrimination cases is viewed by the EHRC and other legal specialists as failing to provide sufficient protection for individual believers. More broadly, there is concern that courts and tribunals have been too ready to dismiss religion or belief claims on the grounds that there has been no interference with the right, rather than consider in detail the justification for interference. This has created a perception among some religion or belief groups and legal specialists that Article 9 does not 'deliver the goods' in the domestic context.
- A related concern is that justification for restrictions on the manifestation of religion or belief should be assessed using sociological arguments rooted in the context of the case, rather than (as has sometimes happened) arguments about whether particular beliefs or practices are prescribed by a religion or belief. This does not preclude scrutiny of the nature of beliefs and practices, but recognises the inherent difficulty that secular courts face in adjudicating doctrinal or theological matters.
- Legal concepts have been stretched uncomfortably by the inclusion in the Equality Act 2010 of equality grounds which are qualitatively different from each other and which sometimes conflict. One effect has been to magnify conflicts - especially between the religion and sexual orientation strands - which might not otherwise have become so visible or so fraught.
- In particular, there are proliferating calls (especially by some Christian voices) for the extension of the right of conscientious objection to new and diverse situations. No participant advocated a *carte blanche* for would-be conscientious objectors or a blanket rejection of conscientious action. Arguments coalesce around the criteria by which to decide which exercises of conscientious objection should be accommodated in laws or procedures, and which not. This is an area of unresolved difficulty which requires further public debate.
- There is a lack of clarity in the domestic context about the relationship between, on the one hand, protection for the manifestation of religion or belief under Article 9 and, on the other, protection against direct and indirect discrimination under the Equality Act 2010. The two concepts do not map neatly onto one another. This is thrown into sharp relief by claims by religious believers to be

able to discriminate against others on another protected ground. Overall, there is a need to differentiate more clearly those situations that are most appropriately addressed on the basis of freedom of religion or belief and those that are best addressed on the basis of non-discrimination.

- The religion or belief exceptions in the Equality Act 2010 relating to employment are shrouded in legal uncertainty due to ambiguities in their wording and discrepancies between the text of the Act and the Explanatory Notes. The fact that they do not expressly require proportionality to be applied makes them vulnerable to challenge under European Union law. The lack of clarity surrounding the exceptions means that they could potentially be misunderstood and misapplied.
- Concerns arise in relation to religion or belief in schools. In relation to schools designated as having a religious character, these include the necessity and proportionality of faith-based admissions policies and the wide discretion given to voluntary-aided schools to discriminate on grounds of religion or belief in the employment of all teachers. There is a need to monitor the practical impact of discrimination that is permitted within the education system in relation to admissions; employment; and the broad exemption for the content of the curriculum and religious education from the prohibition of discrimination, particularly in relation to sexual orientation.
- There is a need to strengthen the protections presently offered by the Arbitration Act 1996 to users of religious tribunals, particularly users from vulnerable groups who may be unwilling or unable to challenge tribunal decisions. This may be achieved through a system of monitoring through statutory agencies which can offer active support to users of religious tribunals.
- There is concern that the extension of the public sector equality duty to include religion or belief may, if poorly implemented, be divisive or counter-productive. However, the new single duty has the potential to address persistent disadvantage associated with religion or belief and the exclusionary effects of certain policies or practices. To fulfil this potential, public authorities will need to develop substantive understandings of equality as a vehicle to foster social inclusion and promote participation among marginalised groups defined by religion or belief.

10.5 Guidance for decision-makers

Some interviewees expressed a need for more accessible, practice-based guidance on the handling of religion or belief in the workplace. Equality specialists suggest that this should include principles emerging from case law as to the limited circumstances in which indirect discrimination on grounds of religion or belief may be justified. Such guidance would specifically include advice for managers and practitioners as to how to make proportionate decisions in specific instances.

A striking feature of our interviews was the variety of considerations that go to assessing proportionality. There may be utilitarian arguments (e.g. ‘what is the harm in letting X do what he or she wishes to do?’); arguments based on general principles (e.g. ‘people delivering public services should not be allowed to pick and choose who they deliver them to’) and/or empirical arguments (e.g. evidence as to the suitability of prospective adoptive parents or foster carers). Each may be a valid contributor to decision-making in a given case. However, the relative weight to be accorded to each will vary in each case and decision-makers may welcome advice as to the extent and limits of their professional discretion in performing this balancing act.

Guidance which integrates human rights and equality standards and principles would address the limitations of using the equality ‘lens’ in isolation. Such guidance should also extend beyond strict legal requirements to establish ‘rules of thumb’ for easily achievable and effective practice. Future guidance should also address the uncertainty expressed by workplace managers about how to determine which beliefs warrant protection and which do not

A web-based source which gathered existing sources of guidance in one place would be a valuable means of supporting more confident and consistent management practice.

10.6 Future research

The evidence base relating to the incidence and nature of discrimination on grounds of religion or belief is incomplete and a number of suggestions on how to improve the evidence base have been made in other recent EHRC research (Weller, 2011: ix-x).

Specific options for research suggested by this study include:

- Further research to explore the views of a larger number and wider range of employers about the management of issues associated with religion or belief in the workplace. This might consist of an online or telephone survey aimed specifically at smaller, as well as larger, employers and private sector, as well

as public sector, organisations asking broadly similar questions to those examined in this study. It might also involve a more detailed case study analysis of how selected employers have sought to tackle religion or belief issues in practice and the response of employees and trade unions to these initiatives. Such research could include a focus on the use of negotiation and mediation to resolve disputes, as well as on procedures for deciding upon and facilitating the reasonable accommodation of religion or belief.

- Research on the implementation of the public sector equality duty in relation to religion or belief (as well as other characteristics). This might include case studies in Wales, where implementation is more advanced due to the earlier adoption of the specific duties that are designed to help public bodies perform the general equality duty better. In particular, research might address the development of substantive approaches to equality as a vehicle to foster social inclusion and promote participation among marginalised groups, including groups defined by religion or belief. Such research might usefully focus on particular sectors (e.g. the implementation of the duty in relation to health services) as well as on cross-sectoral approaches.
- Research designed to examine the perception of **some** Christian groups that Christians experience greater discrimination than is generally acknowledged or measured. As Weller (2011: 55) notes, such research might explore the continuum of ‘visibility’ and ‘invisibility’ in relation to how religious discrimination occurs. The notion of invisibility is also relevant to future research on discrimination against Pagans and people from new religious movements in which, generally speaking, ethnicity does not play a part.
- Research about the impact of minority legal orders based in religious communities on those that use them or are affected by them, particularly vulnerable groups such as women and children. Such research might establish the degree to which women are able to exercise autonomy, agency and choice within religious arbitration or mediation.
- Research about children’s views and experiences with regard to their right to freedom of religion or belief. Such research might have both a legal and policy focus; for example, it might examine options for more explicit protection for children’s right to freedom of religion or belief (as distinct from that of their parents) in schools and other public services.

- Research about the application and impact ‘on the ground’ of some of the religion or belief exceptions in the Equality Act 2010 and the Schools Standards and Framework Act 1998. This includes the exceptions which permit (i) discrimination on grounds of sex, transsexual status, marriage and sexual orientation in the context of employment for the purposes of organised religion; (ii) discrimination on the grounds of religion or belief by employers with an ethos based on religion or belief; and (iii) discrimination on grounds of religion or belief in the employment of teachers in voluntary-aided schools.
- Research about the impact of the exemption for the content of the national curriculum and of religious education from the prohibition of discrimination on any protected characteristic - including sexual orientation; in particular, the impact on lesbian, gay, bisexual and transgender pupils.
- This research bears out Weller’s observation (2011: viii) that at present there is little distinctive evidence to suggest a substantially different position in Wales as compared to that in England. However, as the majority of the evidence that refers to England and Wales relates primarily to England, it is unclear whether such distinctiveness does not exist or whether insufficient specific research has been conducted (as suggested by Winckler, 2009: 125). Future studies might address this issue, as well the nature and extent of discrimination on grounds of religion or belief in Scotland.

Appendix 1 Interviewees

1	Anonymous			British Airways	16 May 2011
2	Anonymous			Department for Communities and Local Government	19 May 2011
3	Anonymous			Interfaith Network for the UK	22 June 2011
4	Anonymous			NHS Employers	3 May 2011
5	Ahmad	Husna	Chief Executive	Faith Regen Foundation	20 May 2011
6	Ariss	Amanda	Chief Executive	Equality and Diversity Forum	24 May 2011
7	Barrow	Simon	Co-director	Ekklesia	20 July 2011
8	Bartley	Jonathan	Co-director	Ekklesia	20 July 2011
9	Beazley	Alan	Advice, policy and research specialist	Employers Forum on Belief (now Employers Network for Equality & Inclusion)	19 May 2011
10	Benjamin	Jon	Chief Executive	Board of Deputies of British Jews	18 May 2011
11	Brett	Sally	Senior Equality Policy Officer	Trades Union Congress	5 April 2011
12	Brown	Malcolm	Director of Mission and Public Affairs	Church of England	20 May 2011
13	Combs	Ryan	Research Associate	University of Manchester	24 June 2011
14	Copson	Andrew	Chief Executive	British Humanist Association	17 June 2011
15	Crowley	Chris	President	Pagan Federation	10 May 2011
16	Day	Jeremy	Head of Diversity and Employee Engagement	Sodexo	24 May 2011
17	Dick	Sam	Head of Policy	Stonewall	2 June 2011
18	Doran	Rose	Community Cohesion Advisor	LG Improvement and Development	14 July 2011
19	Edwards	Rev Aled	Chief Executive	Cytûn (Churches Together in Wales)	20 April 2011

20	Eliadis	Pearl	Human rights lawyer	Montreal, Canada	16 June 2011
21	Faiz Siddiqi	Shaykh	Chairman	Muslim Arbitration Tribunal	13 July 2011
22	Ferguson	Sharon	Chief Executive	Lesbian and Gay Christian Movement	4 April 2011
23	Finneron	Doreen	Executive Director	Faith-based Regeneration Network	26 May 2011
24	Frei	David	External and Legal Services Director	United Synagogue and Registrar, London Beth Din	20 May 2011
25	Gohir	Shaista	Executive Director	Muslim Women's Network UK	27 May 2011
26	Green	Alan	Chair	Tower Hamlets Inter-Faith Forum	15 June 2011
27	Hayden	Jennifer	Diversity Officer	West Midlands Police	12 May 2011
28	Horrocks	Don	Head of Public Affairs	Evangelical Alliance	18 May 2011
29	Irwin	Wendy	Head of Diversity	Royal College of Nursing	9 June 2011
30	James	Kathryn	Director of Policy	National Association of Head Teachers	26 April 2011
31	Jethwa	Jit	President (East Region)	Hindu Forum of Britain	20 May 2011
32	Kantor	Frank	Secretary	United Reformed Church	26 May 2011
33	Kazi	Tehmina	Director	British Muslims for Secular Democracy	6 April 2011
34	Kelly	Liz	Co-Chair	End Violence Against Women	27 May 2011
35	Kidwai	Saleem	Secretary General	Muslim Council of Wales	29 June 2011
36	Kornicki	Richard	Associate	Catholic Bishops' Conference for England and Wales	3 June 2011
37	Langley	Simon	UK Lead Manager for Inclusion & Diversity	National Grid	31 May 2011
38	Leith OBE	Barney		Bahá'í community of the UK	25 May 2011
39	Livesey	Tim	Secretary for International Affairs	Archbishop of Canterbury's personal staff, Lambeth Palace	17 June 2011

40	Lobl	Toni	Media Representative	Christian Science Movement	31 May 2011
41	Lovelock	Yann	Representative	Network of Buddhist Organisations and West Midlands Buddhist Council	23 May 2011
42	Madeiras	Joy	Chief Executive	Faithworks	18 May 2011
43	Mahmood	Fazal	Community Development Officer	Positive East	9 June 2011
44	Miller	Joyce	Vice Chair	Religious Education Council of England and Wales	5 July 2011
45	Minogue	Roddie	Chief Executive	Catholic Care	11 April 2011
46	Patel	Pragna	Director	Southall Black Sisters	16 May 2011
47	Pettinger	Paul	Coalition Co-ordinator	Accord Coalition	10 May 2011
48	Pollock	David	President	European Humanist Federation	6 April 2011
49	Porteous-Wood	Keith	Executive Director	National Secular Society	6 June 2011
50	Rivers	Julian	Professor of Jurisprudence	University of Bristol	31 May 2011
51	Rowson	Richard		Working Ethics	5 April 2011
52	Ryan	Alison	Policy Advisor	Association of Teachers and Lecturers	3 June 2011
53	Sandberg	Russell	Lecturer at Cardiff Law School	Cardiff University	8 April 2011
54	Shaffi	Wahida	Director	Bradford Muslim Women's Council (and specialist for women's strand of the Christian Muslim Forum)	20 June 2011
55	Shahid Raza	Moulana	Founder/Trustee	British Muslim Forum	30 May 2011
56	Singh	Kashmir	General Secretary	British Sikh Federation	3 June 2011
57	Singh Rai	Jasdev	General Secretary	British Sikh Consultative Forum	17 June 2011
58	Sofi	Khalid	Legal Officer	Muslim Council of Britain	23 May 2011
59	Sparkes	Graham	Head of Faith and Unity Department	Baptist Union of Great Britain	1 June 2011

60	Terlouw	Ashley	Professor in Sociology of Law	Radboud University, Nijmegen, Netherlands	30 June 2011
61	Towle	Carola	National Officer for Lesbian, Gay, Bisexual and Transgender Equality	Unison	10 May 2011
62	Vickers	Lucky	Professor of Law	Oxford Brookes University	27 April 2011
63	Williams	Andrea	Chief Executive Officer	Christian Concern	2 December 2011
64	Williams	Steve	Head of Equality	ACAS	10 June 2011
65	Wookey	Charles	Assistant General Secretary	Catholic Bishops' Conference of England and Wales	2 June 2011
66	Young-Somers	Debbie	Rabbi	West London Synagogue	9 May 2011

One other interview was conducted with a representative of a Christian organisation who did not want the organisation named.

Appendix 2 Cardiff roundtable participants

Roundtable with health and social care sector in Cardiff, 28 June 2011

1	Amira Bakhiet	Project Co-ordinator, Minds at Ease	Islamic Social Services Association Wales
2	Helen Birtwhistle	Director	Welsh NHS Confederation
3	Janice Boland	Member, Citizens Advice Cymru Committee and Wales Equalities and Diversity Working Group	Citizens Advice Cymru
4	Jill Evans	Senior Education & Development Manager	Aneurin Bevan Health Board
5	Lynne Hackett	Regional Equalities Organiser	Unison Cymru
6	Ceri Harris	Diversity and Equality Manager	Velindre NHS Trust
7	Yvonne Jardine	Chief Executive	Minority Ethnic Women's Network Swansea
8	Martyn Jones	Equalities Policy Advisor	Age Cymru
9	Voirrey Manson	Senior Equality Manager	NHS Wales Centre for Equality and Human Rights
10	Heather Payne	Consultant Paediatrician and Associate Dean	Wales Deanery, Cardiff University
11	Ginny Scarlett	Social Justice and Research Participation Officer	Mind Cymru
12	Jim Stewart	National Assembly Liaison Office	Evangelical Alliance Wales
13	Paula Walters	Director	NHS Wales Centre for Equality and Human Rights
14	Keithley Wilkinson	Equality Advisor	Cardiff & Vale University Health Board
15	Jen Williams	Equality and Diversity Advisor	Acas Wales

Appendix 3 London roundtable participants

Roundtable with academics and legal and policy experts, Matrix Chambers, 10 June 2011

1	Malcolm Evans	Deputy Director of the Human Rights Implementation Centre, Professor of Public International Law	University of Bristol
2	Mark Hill QC	Barrister	Pump Court Chambers
3	Samantha Knights	Barrister	Matrix Chambers
4	Maleiha Malik	Professor in Law, Barrister	King's College London
5	Voirrey Manson	Senior Equality Manager	NHS Wales Centre for Equality and Human Rights
6	Aileen McColgan	Professor of Human Rights Law	King's College London
7	Mohammad Nafissi	Research Advisory Member	Associate, SOAS and Associate, Human Rights and Social Justice Research Institute
8	Prakash Shah	Senior Lecturer in School of Law	Queen Mary University

Appendix 4 Questionnaire

Understanding equality and human rights in relation to religion or belief

This questionnaire covers the broad areas of interest to this research project. We recognise that not all interviewees will be able to answer all questions given the diversity of their experience and expertise. We are keen to explore with you those areas that you or your organisation are familiar with and feel confident to discuss.

Please note that the term 'religion or belief' is used here to include a lack of religion and any religious or philosophical belief, as in the Human Rights Act 1998 and the Equality Act 2010. Religion or belief is a 'protected characteristic' under the Equality Act, along with age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation.

Religion or belief in public life

1. What do you think the relationship between religion or belief and the state should be in Britain?
2. What should the role of religion or belief groups be in the formation of law and public policy?
3. Do you have personal experience of engaging with government or public authorities from a religion or belief perspective?

The law regarding equality and human rights and religion or belief

4. Are there any areas of the law concerning equality and human rights and religion or belief - or the way that courts interpret and apply it - that concern you?
5. Is the law concerning equality and human rights and religion or belief clear to you? Is adequate guidance available about how to implement it?
6. In your view, are there competing interests in the area of equality and human rights and religion or belief? If so, what are they? Do you think the law strikes the right balance between these interests?
7. Which legal cases or issues are most significant in your view?

8. Are you aware of the extension of the public sector equality duty to religion or belief in the Equality Act 2010? If this duty is relevant to you, do you have any views about it?

Achieving equality and human rights in relation to religion or belief

9. Have you ever experienced, managed or resolved dilemmas or disputes that have arisen in relation to equality or human rights and religion or belief (for example, in a workplace, while delivering or receiving a public service, or in a community setting)?
10. Can you provide any examples of what you consider to be effective (or ineffective) practice in preventing or resolving dilemmas or disputes involving religion or belief?
11. How often do such dilemmas or disputes arise in your organisation or community and are there any common causes? In your view, how prevalent and how serious are such dilemmas or disputes in your organisation or community?
12. If such a dilemma or dispute concerning religion or belief was to occur, would you feel confident in managing or resolving it? If not, why not?
13. What do you regard as the role of the Equality and Human Rights Commission in the area of equality and human rights and religion or belief?

Addressing dilemmas or disputes in relation to religion or belief

14. Can you identify any values or principles that you think could be used to address dilemmas or disputes relating to religion or belief? For example, these might be legal, religious, moral or 'common sense' values or principles.
15. In your view, what criteria should be used to decide whether exceptions to general rules or practices should - or should not - be made on the basis of a person's religion or belief (for example, if a person wants to be excused from performing certain tasks; wear certain clothing or symbols; or distribute literature relating to their religion or belief)?
16. Are there any aspects of equality and human rights and religion or belief that you perceive as being incompatible with each other?

Additional concerns and follow up

17. Is there anything that we haven't discussed during this interview that you feel is of importance to this research?
18. Is there any literature that will give us further information or insights about what we have discussed (e.g. published or unpublished documents, guidance, surveys etc).
19. Can we follow up with you if any further questions arise during the course of our research?
20. Would you prefer to remain anonymous or would you agree to your comments being attributed by name (please see the information sheet for an explanation of our approach to confidentiality and consent)?

Appendix 5 General survey

About this survey

Dear colleague

This survey is part of a research project on 'understanding equality and human rights in relation to religion or belief'. The research has been commissioned by the Equality and Human Rights Commission and is being conducted by the Human Rights and Social Justice Research Institute at London Metropolitan University.

The research is exploring participants' understanding of, and concerns about, equality, human rights and religion or belief in England and Wales. We are interested in participants' views and experience of the law, policy and practice in the workplace and in the wider public sphere.

Issues of interest include the 'reasonable accommodation' of religion or belief (for example, in relation to clothing and symbols); conscientious objection in the workplace and when delivering public services, and potential or perceived clashes between religion or belief and other 'protected characteristics' (such as gender or sexual orientation).

We are keen to hear from: religion or belief groups; groups representing other equality 'strands'; academics and legal practitioners, and individuals with knowledge and experience of the themes of the research.

Your comments may be cited in the research but will not be attributed to you. Please submit your views by July 15th 2011.

Thank you.

Advice about filling in this survey

Please note that you do not have to answer every question.

You can move backwards and forwards between survey questions by clicking the 'Prev' and 'Next' buttons.

There is no facility to save a partly completed survey and return to it later. This means that you will need to complete the survey and submit it in the same sitting. If you wish to complete the survey in stages, we advise that you write your comments outside the survey (e.g. in a Word document) and then copy and paste

them into the survey when you are ready to submit it. We apologise for the inconvenience this is likely to cause.

Please note that the term 'religion or belief' is used in this survey to include a lack of religion and any religious or philosophical belief, as in the Human Rights Act 1998 and the Equality Act 2010. Religion or belief is a 'protected characteristic' under the Equality Act, along with age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation.

About you

1. If you wish to state your name, please do so here. This is optional and any comments you make will not be attributed to you in the final report.
2. It will help us to evaluate your response if we know the type of organisation to which you are affiliated, if any. This might be a professional position that you hold or another type of involvement or affiliation. You may choose more than one option.
 - Religion or belief group
 - Group concerned with another protected characteristic (e.g. age, disability, gender reassignment, marriage and civil partnership, race, sex, sexual orientation)
 - Other (please specify)
3. It may help us to evaluate your response if you name the organisation(s) to which you are affiliated. If you wish to do so, please do so here. You may name more than one organisation.

The law

4. Are there any areas of the law concerning equality and human rights and religion or belief - or the way that courts have interpreted and applied it - that concern you?
5. Which legal cases or issues concerning equality and human rights and religion or belief are most significant, in your view? (If you prefer, you do not need to specify the names of particular legal cases; generic descriptions will suffice).
6. In your view, are there competing interests in the area of equality and human rights and religion or belief? if so, what are they and do you think the law strikes the right balance between these interests?

Addressing dilemmas or disputes

7. Can you identify any values or principles that you think could be used to address dilemmas or disputes relating to religion or belief? For example, these might be legal, religious, moral or 'common sense' values or principles.

We are interested to find out whether you think there are criteria that could be used to decide whether or not religion or belief should be accommodated in specific instances in the workplace or when delivering a public service.

8. Can you suggest any criteria that could be used to decide whether or not religion or belief should be accommodated in the case of employees who wish to wear certain clothing, jewellery or symbols?
9. Can you suggest any criteria that could be used to decide whether or not religion or belief should be accommodated in the case of employees who wish to be excused from performing certain tasks on grounds of their religion or belief (also known as 'conscientious objection')?
10. Can you suggest any criteria that could be used to decide whether or not religion or belief should be accommodated in the case of employees who wish to work flexibly to permit religious observance?
11. Can you suggest any criteria that could be used to decide whether or not religion or belief should be accommodated in the case of employees who wish to have prayer, meditation or quiet rooms provided; have washing or changing facilities provided or have certain dietary requirements met?
12. Can you suggest any criteria that could be used to decide whether or not religion or belief should be accommodated in the case of employees who wish to post or distribute literature relating to their religion or belief?
13. Please use this box to add any further comments that you consider to be important for this research.

Thank you. The survey is now complete.

Once you click 'done', your responses will go directly to the Human Rights and Social Justice Research Institute where they will be securely stored. Your responses will not be shared with any third parties and will not be attributed to you.

This research will be completed in October 2011 and is likely to be published by the Equality and Human Rights Commission after that date.

Appendix 6 Workplace survey

About this survey

Dear colleague

This survey is part of a research project on 'understanding equality and human rights in relation to religion or belief'. The research has been commissioned by the Equality and Human Rights Commission and is being conducted by the Human Rights and Social Justice Research Institute at London Metropolitan University.

The research is exploring participants' understanding of, and concerns about, equality, human rights and religion or belief in England and Wales.

In this survey, we are keen to hear from people who have responsibility for managing issues associated with religion or belief in the workplace. We are interested in your views and experience of the law, policy and practice in this area. The survey will take only a few minutes to complete.

Issues of interest include the 'reasonable accommodation' of religion or belief in the workplace; 'conscientious objection' in the workplace or when delivering a public service, and potential or perceived tensions between religion or belief and other characteristics protected under equality legislation (such as gender or sexual orientation).

Please submit your views by July 15th 2011.

Thank you.

Advice about completing this survey

Please note that you do not have to answer every question.

You can move backwards and forwards between survey questions by clicking the 'Prev' and 'Next' buttons.

There is no facility to save a partly completed survey and return to it later. This means that you will need to complete the survey and submit it in the same sitting.

The term 'religion or belief' is used in this survey to include a lack of religion and any religious or philosophical belief, as in the Human Rights Act 1998 and the Equality

Act 2010. Religion or belief is a 'protected characteristic' under the Equality Act, along with age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation.

About you

1. Which one of the following best describes your area of work in your workplace?

- Senior executive or director
- Operational or middle management
- Human resources
- Equality and/or diversity

Other (please specify)

2. What is your personal opinion about religion or belief in the workplace? You may only choose one option per row.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
A person's faith is central to their identity and therefore it is important to take full account of the religion or belief requirements of staff.					
It is not always possible to take full account of the religious or belief requirements of staff in the workplace, but reasonable accommodations should be made.					
A person's religion or belief is their private affair and should be kept out of the workplace.					
I do not have an opinion about religion or belief in the workplace.					

About your workplace

3. Which one of the following best describes your organisation?

- Public sector
- Private sector
- Charity or voluntary sector
- Association or network

Other (please specify)

4. Which one of the following best describes the number of employees working in your organisation?

- 1-10
- 11-50
- 51-250
- 251-500
- 501+

5. Which of the following best describes where most of the employees of your organisation are based?

- England
- Wales
- Both England and Wales
- International

6. Is your workplace associated with a particular religion or belief?

- Yes
- No

7. If you answered yes to question 5, please choose from one of the following options.

- Christianity
- Islam
- Judaism
- Sikhism
- Hinduism
- Buddhism
- Humanism
- A multi- or inter-faith perspective

Other (please specify)

8. Does your workplace provide any of the following in order to accommodate employees' religions or beliefs? You may only choose one option per row.

	Yes	No	Don't know	Not applicable
Multi-faith, prayer, reflection or quiet room(s)				
Washing or changing facilities				
Provision for special dietary requirements				

9. Does your workplace have policies or procedures in place to respond systematically to the following types of request for accommodation of religion or belief? You may only choose one option per row.

	Yes	No	Don't know	Not applicable
Requests for flexibility during the working day to permit observance of religion or belief				
Requests for flexibility around time off work to permit observance of religion or belief				
Requests to wear clothing, jewellery or symbols in observance of religion or belief that are exceptions to general dress codes				
Requests to display symbols associated with religion or belief in the workplace (for example, on a wall or in a vehicle)				
Requests to abstain from certain tasks or duties on the grounds of religion or belief				
Requests to post or distribute literature or leaflets relating to a religion or belief				

10. Does your workplace make provision for any other type of flexibility, adaptations or exceptions to accommodate the religion or belief of staff? Please use this box to tell us about it.

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11. Does your workplace provide support or networking groups covering any of the following equality strands? Please choose all that apply.

- age
- disability
- gender
- LGB (lesbian, gay, bisexual)
- race
- religion or belief
- transgender

Other (please specify)

12. Please respond to the following statements. You may choose only one option per row.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Not applicable
My workplace provides adequate training for employees on avoiding discrimination on grounds of religion or belief						
My workplace does not provide advice or guidance on law, policy and practice in relation to religion or belief that is tailored to the work that we do						
My workplace relies on external sources of advice or guidance on law, policy and practice in relation to religion or belief						
My workplace does not have adequate policies and procedures in place to deal with the day-to-day accommodation of religion or belief						

My workplace effectively communicates the outcomes of any complaints, grievances or disputes in the area of religion or belief to all those that need to know						
If complaints, grievances or disputes relating to religion or belief arise in my workplace, managers are poorly-equipped to resolve them before they escalate						
My workplace provides adequate advice and support about how to resolve disputes that might arise between claims based on religion or belief and claims based on another equality strand						
My workplace provides mediation to resolve disputes that might arise in the workplace between claims based on religion or belief and claims based on another equality strand						
My workplace fails to deal effectively with prejudice, harassment and bullying in relation to religion or belief						
My workplace regularly reviews service delivery to ensure equality of treatment on grounds of religion						
It is difficult to discuss religion or belief openly and with respect in my workplace						

13. If you are a public body or an organisation carrying out public functions, please respond to the following statements. You may choose only one option per row.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Not applicable
I am aware of the extension of the Public Sector Equality Duty to include religion or belief						
I do not know where to go for guidance about the Public Sector Equality Duty in relation to religion or belief						
I do not understand what the Public Sector Equality Duty requires in relation to religion or belief						
The Public Sector Equality Duty will make a significant difference to the way my organisation approaches equality in relation to religion or belief						

You and your workplace

14. Please respond to the following statements. You may only choose one option per row.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Not applicable
I know where to go for guidance on the law regarding equality and human rights and religion or belief						
I know where to go for advice on policies or procedures in my workplace regarding equality and human rights and religion or belief						
I am not confident in my ability to determine what is reasonable accommodation of religion or belief in the workplace						
I am confident in my understanding of the legal definition of religion or belief						
I am not confident in my understanding about the core practices and beliefs of different religions and beliefs						
I am unsure if I could effectively handle a situation where a claim based on religion or belief appears to conflict with another equality strand						

Legal cases

15. We list below several legal cases in which domestic courts have considered matters of equality and human rights and religion or belief. Please indicate your level of knowledge of each case. You may choose one option per row.

	Detailed knowledge	Some knowledge	No knowledge
LB Islington v Ladele (concerning the right of a Christian registrar to refuse to have civil partnership duties assigned to her)			
McFarlane v Relate Avon Ltd (concerning the right of a Christian counsellor to refuse to offer psycho-sexual therapy to homosexual partners)			
Hall and Preddy v Bull and Bull (concerning Christian hoteliers who wished to let rooms only to heterosexual married couples)			
Eweida v British Airways (concerning the right of an employee to wear a visible cross)			
Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust (concerning the right of a nurse to wear a crucifix)			
Azmi v Kirklees Metropolitan Borough Council (concerning the right of a school support worker to wear a <i>niqab</i> veil covering her face)			
Noah v Desrosiers (concerning the rejection of an applicant for a job in a hairdressing salon because she was a Muslim who habitually wore a headscarf)			
Reaney v Hereford Diocesan Board of Finance (concerning an unsuccessful homosexual applicant for a post of Diocesan Youth Officer)			
Grainger plc v Nicholson (concerning whether a belief in man-made climate change is a philosophical belief protected by equality law)			

16. Please indicate the degree to which you consider these cases to have broad significance for the handling of religion or belief in the workplace, where 5 equals very significant with wide applicability and 1 equals no significance.

	1	2	3	4	5	Don't know
LB Islington v Ladele (concerning the right of a Christian registrar to refuse to have civil partnership duties assigned to her)						
McFarlane v Relate Avon Ltd (concerning the right of a Christian counsellor to refuse to offer psycho-sexual therapy to homosexual partners)						
Hall and Preddy v Bull and Bull (concerning Christian hoteliers who wished to let rooms only to heterosexual married couples)						
Eweida v British Airways (concerning the right of an employee to wear a visible cross)						
Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust (concerning the right of a nurse to wear a crucifix)						
Azmi v Kirklees Metropolitan Borough Council (concerning the right of a school support worker to wear a <i>niqab</i> veil covering her face)						
Noah v Desrosiers (concerning the rejection of an applicant for a job in a hairdressing salon because she was a Muslim who habitually wore a headscarf)						
Reaney v Hereford Diocesan Board of Finance (concerning an unsuccessful homosexual applicant for a post of Diocesan Youth Officer)						
Grainger plc v Nicholson (concerning whether a belief in man-made climate change is a philosophical belief protected by equality law)						

Additional comments

17. Please use this box to add details of any example(s) of issues relating to religion or belief that have arisen in your workplace and how they were handled or resolved.

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18. Please use this box to add any further information which you think is important for this research.

Thank you. The survey is now complete.

Once you click 'done', your responses will go directly to the Human Rights and Social Justice Research Institute where they will be securely stored.

This research will be completed in October 2011 and is likely to be published by the Equality and Human Rights Commission after that date.

Appendix 7 Workplace survey: results

Survey

This survey was designed to elicit responses from those responsible for handling matters relating to religion or belief in the workplace. It consisted primarily of closed questions with a prescribed range of options. It was open for on-line responses from 20 June to 15 July 2011. Given the self-selecting nature of the respondents, it was not designed to yield statistically significant data. The survey had 47 respondents. Of those identifying their organisation, 70 per cent (28/47) were from the public sector, 22 per cent (9/47) from the private sector and eight per cent (3/47) from the charitable or voluntary sector. Most respondent organisations had 500+ staff (40/47), with most (39/47) based in England, Wales, or both, and 5/47 identified as internationally-based organisations. Only one respondent said their workplace was associated with a religion or belief (Islam).

Personal attitudes towards centrality of religion or belief and reasonable accommodation

Three quarters of the respondents who answered the question (33/45) felt that a person's faith is central to their identity and employers should take full account of religion or belief requirements of staff. Ninety-one per cent of respondents (41/45) said that it was not always possible to take full account of such requirements of staff, but reasonable accommodation should be made. Only 16 per cent (7/44) agreed that 'a person's religion or belief is their private affair and should be kept out of the workplace'.

Provision for religion or belief in the workplace

The majority of respondents said their workplace made active provision for religion or belief: 80 per cent who answered the question (36/45) had a multi-faith, prayer, reflection or quiet room in their workplace; 56 per cent (25/45) had special washing or changing facilities; and 72 per cent (31/43) provided for special dietary requirements.

Policies or procedures relating to religion or belief

The survey asked a series of questions relating to whether employers had policies or procedures in place to enable them to respond systematically to requests to accommodate employees' religion or belief (this did not necessarily indicate that requests **would** be accommodated, but that there was a mechanism for considering requests consistently). The following figures show the proportion of respondents who answered the question stating that their workplace had policies or procedures in place to deal with these specific types of request:

- Flexibility around time off work to permit observance of religion or belief - 67 per cent (30/45).
- Flexibility during the working day to permit observance of religion or belief - 70 per cent (31/45).
- Wearing of clothing, jewellery or symbols in observance of religion or belief that are exceptions to general dress codes - 42 per cent (19/45).
- Display of symbols associated with religion or belief in the workplace (for example, on a wall or in a vehicle) - 16 per cent (7/45).
- Abstaining from certain tasks or duties on the grounds of religion or belief - 34 per cent (15/44).
- Posting or distributing literature relating to a religion or belief - 16 per cent (7/45).

Some respondents commented that reasonable decisions could be made in the absence of formal policies or procedures relating to religion or belief; one noted that the existence of specific policies might even cause resentment since requests relating to religion or belief should be considered in the same way as any requests for flexible working.

Support or networking groups for employees

Respondents were asked if their workplace provides support or networking groups covering different equality strands: 58 per cent who answered the question (18/31) said that their workplace had a group concerned with religion or belief. This was less than the number of lesbian, gay or bisexual network groups (71 per cent; 22/31) and groups for those with a disability (68 per cent; 21/31). However, it was more than for groups covering gender or race (each 55 per cent; 17/31); transgender (38 per cent; 12/31) or age (36 per cent; 11/31).

Training for employees

Around 76 per cent of respondents who answered the question (32/42) said that their workplace provided adequate training for employees on avoiding discrimination on grounds of religion or belief.

Support for decision-makers

The survey asked questions about how well managers were supported to make decisions and resolve disputes concerning religion or belief. Around six in 10 of respondents who answered the question (26/42) found that their workplace provided advice or guidance on law, policy and practice in relation to religion or belief that is tailored to the work they do. Almost three-quarters (31/42) considered their workplace to have adequate policies and procedures in place to deal with the day-to-day accommodation of religion or belief.

When asked whether managers were 'poorly-equipped' to resolve complaints, grievances or disputes relating to religion or belief before situations escalated, two-thirds of those who answered the question (26/40) disagreed. However, less than half of respondents (18/41) considered that their workplace effectively communicates the outcomes of any complaints, grievances or disputes in the area of religion or belief to all those that need to know.

Almost 60 per cent of respondents who answered the question (27/41) said their workplace provides adequate advice and support about how to resolve disputes that might arise between claims based on religion or belief and claims based on another equality strand; 56 per cent (23/41) said that their workplace provides mediation to resolve such disputes.

Workplace culture

When asked if their workplace 'fails to deal effectively with prejudice, harassment and bullying in relation to religion or belief', 81 per cent (33/41) who answered the question disagreed, and no respondent agreed with the statement. When asked if 'it is difficult to discuss religion or belief openly and with respect in my workplace', around 68 per cent (28/41) disagreed with this statement, and 12 per cent (5/41) agreed. Almost half of respondents who answered the question (20/41) reported that their workplace regularly reviews service delivery to ensure equality of treatment on grounds of religion.

Respondents' knowledge and understanding

Respondents indicated high levels of confidence in their ability to make decisions and access suitable guidance about the handling of religion or belief. Around 96 per cent of those who answered the relevant question (37/39) knew where to go for guidance on the law regarding equality and human rights and religion or belief. A similar percentage knew where to go for advice on policies or procedures in their own workplace. Around three-quarters of those who answered the question (28/39) were confident in their ability to determine what constitutes reasonable accommodation of

religion or belief in the workplace. When asked whether they were 'unsure' if they could effectively handle a situation where a claim based on religion or belief appeared to conflict with another equality strand, 62 per cent (24/39) disagreed. Twenty-one per cent (8/39) expressed a lack of confidence.

Most respondents (31/39) were confident in their understanding of the legal definition of religion or belief (this contrasted with some interviewees' uncertainty surrounding the definition of 'belief' arising from cases such as *Grainger plc v Nicholson*, which established that belief in man-made climate change warrants protection from discrimination (see section 5.2). As noted below, this case was unfamiliar to respondents.

Respondents were slightly less confident in their understanding about the core practices and beliefs of different religions and beliefs: around half (20/39) expressed confidence but a third (12/39) expressed a lack of confidence.

Respondents' knowledge of case law

The survey asked about respondents' knowledge of particular legal cases and their view of how applicable the cases were to their own work. The cases that were most familiar to the 39 respondents who answered the question were (in order of familiarity) *Eweida v British Airways*, *Hall and Preddy v Bull and Bull*, *Ladele v London Borough of Islington* and *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust*, *McFarlane v Relate Avon Ltd* and *Azmi v Kirklees Metropolitan Borough Council*. In each of these cases, those expressing some or detailed knowledge of the case exceeded those with no knowledge; for example, 92 per cent (36/39) had some or detailed knowledge of *Eweida*.

Cases where the reverse was true include *Reaney v Hereford Diocesan Board of Finance*, *Noah v Desrosiers* and *Grainger plc v Nicholson*: between five and seven in 10 respondents who answered the question had no knowledge of these cases. This result may be partly attributable to the greater media coverage of the first set of cases.

Perceived significance of case law

The survey also asked about the broad significance of these cases for the handling of religion or belief in the workplace. Generally, the more familiar a case, the more it was considered to have wide applicability. For example, *Eweida* was not only the most familiar case but was also rated highest for significance.

Public sector equality duty

The majority of respondents who answered the question (34/37) were aware of the extension of the public sector equality duty to include religion or belief, and most (31/37) knew where to go for guidance about the duty. Most respondents conveyed an understanding of what the duty requires in relation to religion or belief (30/37). Very few (8/37) agreed that the duty will make a significant difference to the way their organisation approaches equality in relation to religion or belief. See section 9.4 for a discussion of the public sector equality duty.

Appendix 8 Summary of selected legal cases

For an analysis of a range of legal cases and issues relating to religion or belief, see Addison (2007); Howard (2011b); Knights (2007); Rivers (2010); Sandberg (2011a); and Vickers (2008). Selected sources which focus on a specific case or cases are referred to after each case summary.

***Azmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07/MAA, 30 March 2007**

The claimant, a junior classroom assistant, argued that a school's action in refusing her request to wear a face veil amounted to direct discrimination on grounds of religion or belief. Her claim failed as the reason for her treatment was because she wanted to cover her face and any teacher wanting to cover their face would have been similarly treated; therefore it was not less favourable treatment on the ground of religion and belief. Azmi also claimed indirect discrimination and the Employment Appeal Tribunal (EAT) held that although Muslim women would be put at a particular disadvantage by such a rule, the rule was nevertheless justified: the school had conducted a trial with her teaching with and without the veil and found that she was more effective in teaching the children when she did not wear her veil. The school had made the decision based upon these classroom observations. An exacerbating factor was that the claimant had not covered her face when she attended the job interview or signalled that her religious beliefs placed any limitation on her working. The case established the principle that indirect discrimination may be justified if it is for a compelling reason connected to a person's ability to do their job.

Judgment available at:

http://www.bailii.org/uk/cases/UKEAT/2007/0009_07_3003.html.

Further reading: Hill and Sandberg (2007); Howard (2011a); McColgan (2009); Vickers (2010).

***Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007, 26 April 2011**

A Leeds-based adoption agency, Catholic Care, sought - unsuccessfully - to amend its charitable objects so as to permit it to restrict its service to mixed-sex couples. The agency argued that restricting its service in this way (and thereby continuing to raise donations and prevent its closure) was a proportionate means of achieving a legitimate aim within the meaning of Article 14 of the European Convention on Human Rights (ECHR), which prohibits discrimination. It argued that the service denied to same-sex couples would be available via other voluntary adoption

agencies and local authorities. The Charity Tribunal rejected these arguments. It held that the agency's aim of maximising placements for children was legitimate, but would not be achieved by its proposed method. Moreover, the possible closure of the service did not outweigh the detriment to same sex couples and the detriment to society generally of permitting the discrimination.

Judgment available at:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/catholic-care-judgment-26042011.pdf>.

Further reading: Stychin (2008).

***Chaplin v Royal Devon and Exeter NHS Foundation Trust* ET Case No. 1702886/2009, 6 April 2010**

Chaplin, a nurse, had for many years worn a crucifix on a chain over her uniform as a manifestation of her religious conviction. The NHS Trust asked her to remove it, stating that it contravened a newly introduced policy restricting the wearing of jewellery. This policy was based on national guidance aimed at minimising the risk of cross-infection, as well as the risk that dangling jewellery might snag, be grabbed by a patient or come into contact with a wound. A proposal that the chain be attached with a magnetic clip only partially met the hospital's concerns. Chaplin rejected alternative suggestions; for example, that she wear the crucifix under a high-necked T-shirt or pinned inside a pocket. As a consequence she was removed from her nursing duties and redeployed to a post that did not have the same uniform restrictions. A minister of Chaplin's church, the Free Church of England, gave evidence to the effect that it was not part of the church's doctrine that its adherents should wear crucifixes. The Employment Tribunal (ET) held that Chaplin had not been subjected either to direct or indirect religious discrimination. A majority held that she had not shown that the uniform policy put Christians **as a group** at a particular disadvantage. This was enough to dispose of the claim. A minority held that Chaplin and another nurse **had** been placed at a disadvantage but that this was justified. The case is currently (2011) being taken to the European Court of Human Rights (ECtHR).

Judgment available at:

<http://employment.practicallaw.com/2-506-0380?q=chaplin%20nhs>.

Further reading: Pitt (2011).

Copsey v WWB Devon Clays Ltd [2005] EWCA Civ 932

Copsey, a Christian, refused a contractual variation in his working hours which included regular Sunday working. After rejecting various compromises, he was dismissed. The ET decided - and the EAT upheld - that the dismissal had been for business, not religious, reasons. The issue before the Court of Appeal was whether Article 9 was engaged and if so whether the interference had been justified. In dismissing Copsey's appeal, the Court found that Article 9 was not engaged because Strasbourg case law had established that where religious beliefs were incompatible with working hours, the applicant was free to resign (the 'specific situation' rule; see section 5.4). However, notably, the Court criticised the specific situation rule, saying that Strasbourg jurisprudence 'did not represent a body of consistent decisions' in cases where the employer, rather than the employee, sought to vary the employee's working hours. LJ Rix stated that the ultimate guarantee of employees' right to freedom of religion is self-abnegation: 'It is, however, to forestall the need for such ultimates that a concern for human rights exists'.

Judgment available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2005/932.html>.

Further reading: Hambler (2008); Leader (2007).

Eweida v British Airways [2010] EWCA Civ 80

Eweida, a member of check-in staff at British Airways (BA), attended work wearing a visible silver cross on a chain. BA asked her to conceal the cross as part of its uniform policy. She refused to do so and was sent home on unpaid leave. BA then took steps to amend its uniform policy to allow staff to display a faith or charity symbol while wearing the uniform. Eweida returned to work and began procedures claiming direct and indirect discrimination and harassment. None of those claims were upheld either at the initial ET or the EAT. At the Court of Appeal, Eweida pursued a single ground of appeal: that the EAT had been wrong to find that in order for her indirect discrimination claim to succeed, she was required to show that the uniform policy put or would put Christians at a particular disadvantage. Eweida argued that it should be enough to show that she alone suffered that disadvantage on the grounds of her religion. The Court rejected this argument. It held that her complaint arose from a personal objection neither arising from any doctrine of faith, nor interfering with her observance of it and never raised by any other BA employee. The case is currently (February 2012) being taken to the ECtHR.

Judgment available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2010/80.html>.

Further reading: Vickers (2009a; 2010).

***Grainger Plc v Nicholson* EAT Case No. 0219/09/ZT, 3 November 2009**

Nicholson was the head of sustainability at Grainger plc until he was dismissed in July 2008. He argued that his dismissal was due to his belief in man-made climate change and amounted to discrimination. The ET held that a belief in man-made climate change and the alleged resulting moral imperatives was capable, if genuinely held, of being a philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations 2003. The employer appealed to the EAT, which followed ECtHR jurisprudence on the definition of philosophical belief. Accordingly, to warrant protection, a belief must: be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; relate to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion, and importance; be worthy of respect in a democratic society; not be incompatible with human dignity; and not conflict with the fundamental rights of others. The EAT also held that beliefs in a political philosophy or based in science can be qualified as 'philosophical beliefs' as long as they are not objectionable (based on racist or homophobic ideas).

Judgment available at:

http://www.bailii.org/uk/cases/UK/EAT/2009/0219_09_0311.html.

Further reading: Pitt (2011); Vickers (2010).

***Bull and Bull v Hall and Preddy* [2012] EWCA Civ 83**

Hall and Preddy, civil partners, booked a double bedroom at a private hotel owned and operated by Mr and Mrs Bull. Upon arrival, the couple was informed that the hotel did not allow unmarried persons to share a double room and the couple had to seek accommodation elsewhere. The Bulls stated that their policy did not have to do with sexual orientation, but with extramarital sex, based on their Christian convictions. For this reason, they also denied accommodation in double bedrooms to unmarried heterosexual couples. The County Court had held that Hall and Preddy had suffered both direct and indirect discrimination. Under the Equality Act (Sexual Orientation) Regulations 2007, there was no material difference between marriage and a civil partnership. The Bulls' refusal to allow Hall and Preddy to occupy the double room which they had booked was because of their sexual orientation: this was direct discrimination. The County Court went on to consider the indirect discrimination claim and upheld that as well. The Bulls appealed. The Court of Appeal agreed with the County Court that the hotel's rule directly discriminated against Mr Preddy and Mr Hall. It noted the owners' right to manifest their religion and protection from religious discrimination. However, the judges ruled that religious

belief does not offer an exemption from laws that everyone running a business has to follow.

Judgment available at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2012/83.html&query=Preddy&method=all>.

Further reading: Sandberg (2011b).

***Ladele v London Borough of Islington* [2009] EWCA Civ 1357**

Ladele was a registrar employed by the London Borough of Islington, who refused on grounds of religious conscience to perform civil partnership ceremonies. Islington insisted that she should undertake at least some of these duties, disciplined her and threatened her with dismissal. The ET found that Islington had discriminated directly and indirectly against Ladele on the ground of religion or belief; its policy of requiring all registrars to perform civil partnership duties put individuals who held an orthodox Christian belief (that marriage was a union between one man and one woman for life) at a disadvantage when compared with others who did not hold that belief. The EAT overturned this ruling. The case went up to the Court of Appeal. Islington argued that Ladele was in breach of its published 'Dignity for All' equality and diversity policy. The Court held that Islington's policy of designating all registrars as civil partnership registrars had a legitimate aim of fighting discrimination. Moreover, Ladele was employed in a public role by a public authority; she was being required to perform a 'purely secular task' as part of her job and her refusal to perform that task 'involved discriminating against gay people in the course of that job'. The fact that other local authorities had decided **not** to designate registrars who shared Ladele's beliefs as civil partnership registrars did not undermine the Court's finding that she was neither directly nor indirectly discriminated against, nor harassed. The case is currently (February 2012) being taken to the ECtHR.

Judgment available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html>.

Further reading: Hambler (2010); Sandberg (2010b; 2011b); Stychin (2009); Vickers (2010).

***McClintock v Department of Constitutional Affairs* EAT Case No. 0223/07/CEA, 31 October 2007**

McClintock was a Justice of the Peace serving on the family panel. As part of his duties he had to decide whether children should be placed in care, fostered or adopted. He objected to the possibility that he might be required to place a child with a same-sex couple. The reason he gave was that he considered that there was

insufficient evidence that such a placement was in a child's best interest and he felt that children were being treated as guinea pigs in the name of 'politically correct' legislation. His request was refused and he resigned from the family panel. He complained that he had been subject to direct and indirect discrimination and harassment on the grounds of religion or belief. Both the ET and the EAT held that there had not been any direct discrimination, since McClintock had not made it plain that his objection arose from a religious or similar philosophical belief as distinct from his concern that placing children with same sex couples was a social experiment. The EAT held that even if it had been found that McClintock had suffered indirect discrimination, 'the Department was fully justified in insisting that magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws to which they have a moral or other principled objection'.

Judgment available at:

http://www.bailii.org/uk/cases/UKCAT/2007/0223_07_3110.html.

Further reading: Hambler (2010).

***McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880**

McFarlane was employed as a counsellor by a firm that provides relationship counselling services. He is a Christian who believes homosexuality to be sinful. He petitioned not to work with same-sex couples undergoing psychosexual therapy, but an exemption could not be made. McFarlane then agreed to undertake psychosexual therapy with same-sex couples if asked, but his employer found him reluctant to do so. The ET dismissed his claim of direct discrimination and found that the indirect discrimination had been proportionate to the aim of 'ensuring that no person received less favourable treatment on the basis of personal or group characteristics'. The EAT upheld this decision. The Court of Appeal, relying on *Ladele*, refused a petition for leave to appeal. It found that indirect discrimination was established according to outcomes rather than to the actor's motives. More generally, in response to a witness statement by a former Archbishop of Canterbury, Lord Carey, Laws LJ concluded that to give legal protection or preference to a particular moral position because it was faith-based would be 'deeply unprincipled', since to do so would give effect to subjective opinion; instead, 'the State, if its people are to be free, has the burdensome duty of thinking for itself'. The case is currently (2011) being taken to the ECtHR.

Judgment available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2010/880.html>.

Further reading: Sandberg (2010a; 2011b).

Noah v Sarah Desrosiers ET Case No. 2201867/2007, 29 May 2008

The claimant applied for employment at a hair salon. She was told that if she were to work there she would have to remove her headscarf, as employees were to display contemporary hairstyles. She was not offered employment and the position was not filled. The ET found that there had been no direct discrimination but that there had been indirect discrimination. Although the job was not given to an alternative candidate, the Employment Equality (Religion or Belief) Regulations also applied to job applicants. The tribunal found that the requirement for hairdressers to have their own hair visible was not a proportionate means of achieving a legitimate aim. The employer had placed too much weight on the need to display modern hairstyles and not wearing a headscarf did not constitute a requirement for the job.

Judgment available at: <http://employment.practicallaw.com/3-382-6228>.

Further reading: Woodhead with Catto (2009)

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

This case concerned the Employment Equality (Sexual Orientation) Regulations 2003. These contain exceptions allowing employers to discriminate on grounds of sexual orientation where this amounts to a genuine occupational requirement, and a further specific exception where the employment is for the purposes of an organised religion or as regards access to a benefit where this is by reference to marital status. The central issue in the case was whether the balance struck by the Regulations was so broad as to go outside the scope of exceptions permitted by the EU Framework Employment Directive - as trade unions argued in their application that it did. The High Court found the Regulations to be compatible with the Directive and with the ECHR. However, the judgment emphasised the very narrow scope of the exceptions. For example, it was clear from parliamentary material that the employment exception was intended to be very narrow, and, as a derogation from the principle of equal treatment, it had to be construed strictly. It established that there will be very few jobs in which it will be permissible to discriminate on grounds of sexual orientation. It also established that the basis for the discrimination for the purposes of an organised religion - for example, that it is required so as to comply with the doctrine of the religion or to avoid conflicting with the strongly-held convictions of a significant number of its followers - must meet an objective test and not be determined by the subjective motivation of the employer.

Judgment available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2004/860.html>.

Further reading: Rubenstein (2004); Sandberg (2011b).

***R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15**

Begum, a Muslim high school student had for two years worn as her school uniform the *shalwar kameeze* (loose tunic and trousers). Later, she attended school wearing a *jilbab*, which conceals the shape of arms and legs. The school refused to allow her to wear the *jilbab* as her uniform. Begum did not return to school and applied for judicial review of the decision, claiming breach of her right to manifest her religion or belief under Article 9 and her right to education under Article 2 of Protocol 1 ECHR. The High Court dismissed her application but the Court of Appeal found that there had been a violation of Article 9. The school appealed and the case went to the House of Lords. The majority of Lords held that there was no interference with Article 9 in a situation where a girl voluntarily accepted a place at a school with knowledge of its uniform policy which did not permit the wearing of a *jilbab* and in a situation where she could have chosen to attend a school where the *jilbab* was permitted. The minority held that Article 9 **was** engaged but that the interference was justified. The school had taken immense pains to devise a uniform policy that respected Muslim beliefs, was demonstrably acceptable to Muslim opinion and had the legitimate aim of protecting the rights and freedoms of others.

Judgment available at: <http://www.bailii.org/uk/cases/UKHL/2006/15.html>.

Further reading: Hill and Sandberg (2007); Howard (2011a); Leader (2007); Malik (2008b).

***R (E) v JFS Governing Body* [2009] UKSC 15, 19 December 2009**

This case concerned the admissions policy of a state-funded school for Orthodox Jews which gave preference when oversubscribed to applicants who were recognised as Jewish by the Office of the Chief Rabbi (OCR) on the basis of matrilineal descent. The mother of the child involved had converted to Judaism under the auspices of a non-orthodox synagogue and her conversion was not recognised by the OCR. The Supreme Court was asked to determine whether this was a test of ethnicity (which is unlawful) or a religious test (which, for schools with a religious character, is not). The Supreme Court ruled by a narrow margin that the school was acting on the basis of ethnic origin. Five Justices held that there had been direct racial discrimination for which there exists no defence; two concluded that there had been indirect racial discrimination which could not be justified. The minority held that there had been no racial discrimination and that the school had made a legitimate selection on the grounds of religion.

Judgment available at: <http://www.bailii.org/uk/cases/UKSC/2009/15.html>.

Further reading: Barber (2010); Cranmer (2010a); Graham (2012)

R (Ghai) v Newcastle City Council & Ors [2010] EWCA Civ 59

Ghai, a Hindu, asked Newcastle City Council to dedicate land for the construction of open air funeral pyres. The council stated that it was not possible to do so since current legislation on cremation (Cremation Act 1902 and the Cremation Regulations 2008) requires that cremations are carried out in a properly-equipped building that is far from roads and homes. The High Court held that there had been an interference with Ghai's right to manifest his religion under Article 9(1) but that this was justified under Article 9(2). It was within the remit of the secretary of state to conclude, as he had, that a significant number of people would find both the principle and the reality of open air cremation to be a matter of offence. Before the Court of Appeal, Ghai claimed that his religious beliefs would be satisfied if he was cremated within a building, provided that the cremation was by fire rather than electricity and that sunlight could shine directly on his body. The Court focused on the technical issue of what a 'building' was for the purposes of the Cremation Act 1902. It concluded that Ghai's wishes could be accommodated without necessarily infringing the legislation on cremation. Unlike the High Court, the Court of Appeal did not engage with the question of whether Ghai had a fundamental right under Article 9 for his body to be disposed of in a particular way or whether, if he did, a restriction on this right could be justified by reference to some broader interest.

Judgment available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2010/59.html>.

R (Johns) v Derby City Council [2011] EWHC Admin 375

The case concerned a Pentacostalist Christian couple, previous foster carers, who wished to become short-term foster carers with Derby City Council, but whose application was deferred because their negative views about same-sex relationships were not in line with the National Standards for Fostering Services. The Johns applied for a judicial review of the decision to defer and as part of that case the court considered direct discrimination on grounds of religion or belief. A declaration and application for permission to apply for judicial review were refused. The High Court ruled that the local authority was entitled to explore the extent to which prospective foster carers' beliefs might affect their behaviour and their treatment of a child being fostered by them. The Court further concluded that if the local authority did not have regard to such matters, it could found itself in breach of both its own guidance and the national minimum standards.

Judgment available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2011/375.html>.

R (Playfoot) (A Child) v Millais School Governing Body [2007] EWHC (Admin) 1698

Playfoot, a school pupil, wished to wear a ‘purity’ ring as a symbol of her religiously-motivated commitment to celibacy before marriage. This contravened her school’s uniform policy and she was refused permission to wear it. Her application for judicial review was refused because the wearing of the ring was not considered to be a manifestation of her belief. There was no interference with Article 9 because the claimant had voluntarily accepted the school’s uniform policy. She was not obliged by her religious faith to wear the ring and the school offered her other means by which she could express her belief without undue hardship or inconvenience, such as attaching the ring to her bag. The court also rejected the claimant’s complaint that she had been treated less favourably than Muslim girls who were allowed to wear headscarves and Sikh girls who were allowed to wear *kara* bangles. The school had reached carefully considered decisions on each occasion it had been called upon to permit exceptions to the uniform policy.

Judgment available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2007/1698.html>.

Further reading: Howard (2011a).

R (Watkins-Singh) v The Governing Body of Abedare Girls’ High School [2008] EWHC (Admin) 1865

Watkins-Singh, a 14-year-old Sikh pupil, was asked to remove her *kara* bangle at school because it contravened the school’s uniform policy. She continued to wear the *kara* and was given a series of fixed-term exclusions. In challenging this decision, her legal team relied on race and religious discrimination rather than on Article 9. This distinction allowed the court to distinguish the claim from Article 9 case law. The judgment sidestepped the question of whether the wearing of the *kara* was obligatory to the claimant; disadvantage would also occur where a pupil was forbidden from wearing an item that was exceptionally important to his or her religion or race, even if it was not an actual requirement of that person’s religion or race. Having established that Watkins-Singh had suffered disadvantage, the judgment turned to the issue of justification. The disadvantage was found not to be justified; the *kara* was a small and unostentatious symbol and it could not be argued that wearing it might undermine the aim of the uniform policy of fostering community spirit. Again, the judgment distinguished the claim from Article 9 case law such as *Begum* and *Playfoot*.

Judgment available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html>.

Further reading: Howard (2011a).

***R v Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15**

This case was brought by head teachers, teachers and parents of children at four independent Christian schools where disciplinary measures included the use of mild corporal punishment. Claiming to speak on behalf of a 'large body of the Christian community', they contended that the ban on corporal punishment in schools (contained in the Education Act 1996, section 548) was incompatible with their belief that it was part of the duty of education in a Christian context. They argued that the ban breached their right to freedom of religion under Article 9 and the right of parents to ensure that their children's education conforms to their religious and philosophical convictions (under Article 2 or Protocol 1 ECHR). The lower courts dismissed their claim, largely by reference to the Article 9(1) question of interference. The House of Lords held that there had been interference with the appellants' right to freedom of religion. It held that to limit protection only to beliefs which are respectable or of which the court approves is inappropriate: 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals'. However, the interference was justified under Article 9(2). The ban was prescribed by law, was necessary in a democratic society to protect the rights and freedoms of others and had the legitimate aim of protecting children and promoting their well-being.

Judgment available at:

<http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050224/will-1.htm>.

Further reading: McColgan (2009).

***Reaney v Hereford Diocesan Board of Finance* ET Case No. 1602844/2006, 17 July 2007**

Mr Reaney, an applicant for the position of Youth Officer for the Diocese of Hereford, was recommended by an interviewing panel for the position, pending the approval of the Bishop. During the interview he discussed his sexuality. After meeting Mr Reaney, the Bishop informed him that he was not being appointed for the position, as the Bishop was concerned about the solidity of the claimant's expressed commitment to celibacy. The ET found that the Bishop could not rely on the exception from the rules prohibiting discrimination against a job applicant on grounds of sexual orientation if the job is for purposes of an organised religion. In the circumstances of the case, it was unreasonable for the Bishop not to trust an assurance from the claimant (and other evidence relating to character) that he would meet a requirement not to enter into a sexual relationship with another person during the period of the proposed employment. The failure to offer the candidate a job was direct discrimination.

Judgment available at:

<http://thinkinganglicans.org.uk/uploads/herefordtribunaljudgment.html>.

Further reading: Sandberg (2011b).

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Useful websites and cases in domestic courts and tribunals

Law and Religion Scholars Network (LARSN) Case Database

This LARSN Case Database, produced in collaboration with *Law and Justice*, summarises and provides links to judgments delivered by UK courts, the European Court of Justice and the European Court of Human Rights concerning law and religion.

<http://www.law.cf.ac.uk/clr/networks/lrsncd.html>.

Religion Law Website and Blog

The Religion Law UK website, run by Neil Addison, monitors case law concerning religion with personal commentary in his Blog.

<http://www.religionlaw.co.uk> .

<http://religionlaw.blogspot.com>.

<http://www.neiladdison.pwp.blueyonder.co.uk/religionlaw.co.uk/>.

Strasbourg Consortium: Freedom of Conscience and Religion at the European Court of Human Rights

An electronic forum covering issues pending before the European Court of Human Rights and other international institutions.

<http://www.strasbourgconsortium.org/>.

Cases in domestic courts and tribunals

Amachree v Wandsworth Borough Council ET Case No. 2328606/2009, 9 August 2010.

Azmi v Kirklees Metropolitan Borough Council UKEAT/0009/07/MAA, 30 March 2007.

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Contacts

England

Equality and Human Rights Commission Helpline

FREEPOST RRLG-GHUX-CTR

Arndale House, The Arndale Centre, Manchester M4 3AQ

Main number: 0845 604 6610

Textphone: 0845 604 6620

Fax: 0845 604 6630

Scotland

Equality and Human Rights Commission Helpline

FREEPOST RSAB-YJEJ-EXUJ

The Optima Building, 58 Robertson Street, Glasgow G2 8DU

Main number: 0845 604 5510

Textphone: 0845 604 5520

Fax: 0845 604 5530

Wales

Equality and Human Rights Commission Helpline

FREEPOST RRLR-UEYB-UYZL

3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT

Main number: 0845 604 8810

Textphone: 0845 604 8820

Fax: 0845 604 8830

Helpline opening times:

Monday to Friday 8am–6pm.

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This report examines the law in relation to equality, human rights and religion or belief and how it is understood and applied in the workplace and in public services. Through interviews with religion or belief groups and other stakeholders, the research shows that the law is contested. Tensions exist between some 'religious' and 'secular' perspectives and between the religion and sexual orientation equality strands. Nevertheless, there is some consensus, for example concerning the need both to avoid unnecessary litigation and to develop principles to avoid disputes. Ground rules to ensure more temperate public debate are also required