

University of Newcastle - Australia

From the Selected Works of Neil J Foster

July 15, 2011

Freedom of Religion in Practice: Exemptions under AntiDiscrimination Laws on the Basis of Religion.

Neil J Foster



Available at: https://works.bepress.com/neil_foster/46/

**LAW AND RELIGION: LEGAL REGULATION OF RELIGIOUS GROUPS,
ORGANISATIONS AND COMMUNITIES**

MELBOURNE LAW SCHOOL, UNIVERSITY OF MELBOURNE, 15-16 JULY 2011

**"Freedom of Religion in Practice: Exemptions under Anti-Discrimination Laws
on the Basis of Religion."**

Neil Foster¹

Abstract Recognition of "human rights" often involves the need to balance one set of rights against another. While anti-discrimination laws generally are designed to outlaw decision-making on irrelevant grounds, recognition of "freedom of religion" (a clear human right acknowledged in the international covenants on the area) requires acknowledging that decision-making in many areas on religious grounds is not irrelevant, and hence requires careful crafting of appropriate exemptions to otherwise blanket prohibitions against discrimination. But in many ways there has been a subtle shift in recent decades away from a fully-orbed recognition of human rights, towards an absolutist prohibition of discrimination alone. This trend raises serious concerns for recognition of the right to free exercise of religion. Should a Christian marriage registrar be obliged to register same-sex partnerships? May a Christian worker in a secular organisation be required not to wear an openly visible cross? Can a Christian foster-care agency be obliged to place children in a same-sex partnership? Must a Christian camping organization accept a booking from a same-sex advocacy group? This paper considers examples from the UK and Australia to further discussion of how religion is protected in practice as opposed to merely on paper.

1. Introduction – Freedom of Religion as a protected right

Why should "freedom of religion" should be protected and promoted? One obvious answer is that this is a freedom clearly mentioned in all major international human rights instruments. But there is more that can be said.

The notion of "rights" that are enjoyed by all persons *qua* members of the human race can arguably be traced back in its origins to insights from the major religious movements of the world. In the Judeo-Christian tradition human beings are intrinsically valuable because they are created "in the image of God".² In the New Testament we are told that God made all people from the "one man" and hence they share rights and responsibilities.³ Early movements for recognition of "freedom of speech" were strongly connected with the issue of freedom of religion, and the opportunity to differ from the majority religion.

Justice Michael Kirby, in an address to graduates shortly before his retirement from the High Court, commented in a lecture, the title of which was taken from the words of Paul in *1 Corinthians 13:13*, "But the Greatest of These is Love", that

¹ BA/LLB (UNSW); BTh (ACT); DipATh (Moore); LLM (Newc)- Senior Lecturer, Newcastle Law School, NSW.

² *Genesis* 1:26-27. In *Gen* 9:6 the fact of humanity's creation in the image of God is offered as a reason to protect human life: "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man (NIV)."

³ *Acts* 17:26.

I have always thought that the essential foundation of fundamental human rights is love.⁴

In another comment, Julian Rivers, Professor of Jurisprudence at the University of Bristol, notes that the Universal Declaration of Human Rights itself was a product of thinking informed by Biblical values.

[T]his combination of universal goods, freedom of thought and conscience, autonomy of family and church, and limited state authority is a genuine and attractive expression of the Christian political tradition.⁵

But more than the fact that the historical origin of human rights lies in religious perspectives, the modern reality in Australia, as all over the world, is that religion plays a key role in the lives of many people. Whatever definition is adopted of the term (and this is an area that always presents important issues), all recognise that religion is a matter of “ultimate concern”, something which shapes a person’s values, their understanding of the meaning of life, and how they ought to behave. So if values such as liberty and rights to be free from interference in other areas of life are to be recognised, the law must extend its protection to some extent to an aspect of life that is fundamentally important to many people. Of course it is true that in the past “religious” commitments have been used as a reason, or offered as a cloak, for acts of oppression and violence. But the same can be said of other rights such as the right to freedom of movement, the right to property, or the right to freedom of speech. The response should be to provide protection for these rights, while ensuring that they are appropriately balanced with other rights.

There are other reasons for protection of freedom of religion, which relate to benefits to society at large. It seems an observable fact that religious adherents often engage in voluntary social activity for the good of others, which, to put it at the lowest, provide an important supplement to Government-provided social services.

International Human Rights Instruments

Recognising these and other factors, international human rights instruments require protection of the right to have and to exercise (within reasonable limits) a religion.

Article 18 of the *Universal Declaration of Human Rights* provides that

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

Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) is in identical terms in its first sub-clause, and goes on to provide further:

⁴ Address to Griffith University Graduation Ceremony, 16 Dec 2008, p 4.

⁵ “Three principles for Christian citizens”, *Cambridge Papers* (vol 18, No 1, March 2009), <http://www.jubilee-centre.org/document.php?id=297>.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

It is also worth noting, because of Australia's historic links with the UK and Europe, Article 9 of the *European Convention on Human Rights* (ECHR):

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.⁶

General Issues Raised by Freedom of Religion

There are some very important principles that emerge from these statements. Some of the more obvious are

- A right to “freedom of religion” must include as a minimum the right to hold a particular religion or to change one's religion;
- But it must go beyond a mere “mental assent” to propositions, to the right to “manifest” religion in public gatherings, and also in “observance”- presumably, that is, in acting in certain ways even in everyday life which reflects a person's commitments about what their religion requires them to do;
- However, it is equally clear that the right to freedom of religion may be subject to “limitations” the nature of which are described in art 18(3)- set out in law, “necessary” to protect certain other important values, including the “fundamental rights and freedom of others”.

The fact that must be faced is that any “freedom” given to a person to do something, will usually involve a “duty” on another person's part to allow them to do it, even if it interferes with some other freedom of that person. And no modern “freedom of religion” right is only concerned with what goes on inside someone's head. Any religion worth the name will have an impact on behaviour, and it is in the area of behaviour that the balancing of people's “freedoms” becomes important.

Effectively “freedom of religion” laws involve a number of interlocking questions:

⁶ See <http://www.hri.org/docs/ECHR50.html#C.Art9>.

1. Are people free to join together with other believers in a traditional “church meeting” without being shut down by the Government or angry mobs? We might call this “freedom of religious assembly”, and it is presumably one of the most basic rights we would expect to be granted (still denied, of course, in some countries of the world to some groups of believers- eg in Saudi Arabia to non-Muslims; in China to those not part of the “officially recognised” churches; in some parts of India in recent years, such as Orissa, where violent Hindu mobs have burned Christian churches and questions have been raised about government inaction.)
2. If someone chooses to proclaim their religious affiliation, is it acceptable for others on that basis to discriminate against them- not to allow them to rent property, or not to give them a job? If there is a general prohibition on discrimination, at what point does religion become “relevant” so that decisions may be based on it? These are questions of “religious anti-discrimination laws”.
3. Is someone free, in their religious meetings, to proclaim that their religion is correct, and that other religions are not correct? This could be called “freedom of speech on religious topics in religious meetings”. We might call this issue 3A, and add here 3B, the right to make such proclamations in a “non-religious” public forum. Here the question arises of laws dealing with “religious vilification” and other laws impacting on what can be “published” in the community (such as defamation laws.)⁷
4. Is someone free, in a religious meeting, to proclaim the teaching of their religion on “moral” (what we may call “non-religious”) issues? That is, can a person proclaim in church that greed is wrong? That abortion is wrong? That certain types of sexual activity are wrong? If this can be described as right 4A, “freedom of speech on non-religious topics in religious meetings”, we might call right 4B the same right but in the public sphere- does someone have the right to publish a newspaper article arguing on the basis of their religious beliefs that certain behaviour engaged in by members of society is wrong? (There may be some debate among believers as to whether this is a *helpful* strategy or not, but the issue is whether society protects the right to do so.)
5. Is a person free to *do* things their religious beliefs lead them to think they are either obliged, or allowed, to do? (As opposed to speaking.) Again perhaps we can categorise this into 5A (behaviour in church meetings), and 5B (behaviour in the general community.) Of course

⁷ On this topic see a conference paper, N Foster “Defamation and Vilification: Rights to Reputation, Free Speech and Freedom of Religion at Common Law and under Human Rights laws”, presented at the “Cultural and Religious Freedom Under a Bill of Rights Conference”, Canberra, 13-15 August 2009; available online at: http://works.bepress.com/neil_foster/18. This paper will also be available as a chapter in the forthcoming conference proceedings.

here we will run into the laws the community has set up regulating behaviour generally, and there will be an issue as to whether the justification for behaviour on the basis of religion is sufficient to allow or require the community to exempt a person from the general law. Most people would agree that the fact that human sacrifice was to be carried out in a revival of traditional Aztec religion would not allow such an activity, even in the context of a “church service”. Trickier issues come when people claim the right not to serve in the armed forces (if conscription is in force) on the basis of religion, or the right not to have their sick child given a blood transfusion.

This final area, the right of believers to engage in some activities that are generally forbidden by the law, on the basis that they are exercising their freedom of religion, is the general topic of the recent cases noted below.

2. The need for Balancing Provisions in anti-discrimination laws to protect Freedom of Religion

As mentioned already, a fundamental feature of “rights” of any sort is that, where they are given to more than one person, there is the potential for conflict. One person’s rights will often constrain the liberty of another person. So all human rights instruments and legislation contain provisions designed to balance the exercise of rights by one, with the preservation of rights by others.

So, in the area of religion, there may be a requirement to attend a place of worship on a particular day. However, an employer may demand attendance to duties at that time. Usually there will be some accommodation in terms of rostering. This is the type of situation dealt with, for example, in the recent decision of the UK Employment Appeal Tribunal in *Cherfi v G4S Security Services Ltd* (UKEAT/0379/10/DM; 24 May 2011.) Mr Cherfi was a Muslim who worked as a security guard. For some years his employers had been happy for him to take time off on a Friday to attend his mosque, in the middle of a shift. But a new regime kept a closer watch on attendance, and the company took on a contract that required a minimum number of guards at all times. Mr Cherfi was offered a Monday-Thursday contract with work on either Saturday or Sunday, but he refused to work on Saturday and Sunday.

He took action on the basis of “indirect discrimination” on the basis of religion, under reg 3 of the *Employment Equality (Religion or Belief) Regulations* 2003 (UK). It was accepted that the otherwise non-discriminatory rule (that all employees be “on site” throughout the shift) did have the effect of imposing a disadvantage on Muslims who desired to attend prayers at a mosque. But in the end the Tribunal found that the actions that the employer had taken (including offering weekend work) were a “proportionate means” of achieving a legitimate aim (the aim of meeting contractual obligations to clients.) They commented that the Tribunal below that had ruled in favour of the employer had done “the necessary balancing”- see [45].

While “balancing” may sometimes involve over-ruling desires for action based on religion, it is important to keep in mind that human rights are not generally

arranged in a hierarchy. It is not the case that some rights will always “trump” others, no matter how minor the breach of one and how significant the breach of the other. Or at least, that is the theory. But the danger is that, in a secular Western society where religion is perceived sometimes as archaic and anachronistic, that the freedom of religion right will be ignored or reduced to a merely formal principle, and subordinated to other rights. Some of the cases discussed below reveal this dangerous trend.⁸

3. Examples of court decisions applying these principles

I want to start, however, with a case where a “religious” right was, in my view, appropriately subordinated to a very strong right, the right not to be subjected to racial discrimination.

a. The Case of the Jewish School

The case of *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15 (16 Dec 2009) (*JFS*) was a decision of the new UK Supreme Court, the importance of the decision can be seen by the fact that a 9-member panel was convened.⁹

The case raised the difficult issue as to whether it amounted to racial discrimination for JFS¹⁰ to adopt a policy where it would accept (when there were more applications than places available) only students who were Orthodox Jews according to the definition adopted by the Office of the Chief Rabbi.

Judaism in the UK (as in other parts of the world) is splintered into different groups. The definition of Jewishness adopted in what is called “Orthodox” Judaism is that someone is Jewish only if their mother, at the time of their birth, was themselves an Orthodox Jew, or if they themselves have converted in a way that is recognised by Orthodoxy. In this case the mother of M, who had applied for admission to the school, was Jewish by conversion at the time of his birth, but had converted into a group that was not recognised as Orthodox. Hence M was not an Orthodox Jew.

The school admission criteria allowed for the possibility that a prospective student may have been able to demonstrate his or her own Jewishness, but evidence showed that this was very rarely used as a criterion (students being admitted at a young age.) So effectively M was barred from admission on the basis of a fact about the circumstances of his birth. The question for the Supreme Court was whether the application of this criterion was an act of “racial discrimination” under the *Race Relations Act 1976* (UK).

⁸ For an overview of the area a few years ago in the UK, see R Sandberg & N Doe, “Religious Exemptions in Discrimination Law” (2007) 66 *Cambridge Law Jnl* 302-312. The cases I deal with have mostly arisen since then.

⁹ Many appeals are determined by a 5-member bench; this seems to have been the first 9-member panel that was convened in the new Court, and even when the Court was sitting as the House of Lords, it had been some time since 9 Law Lords all sat on a case.

¹⁰ The acronym originally stood for the “Jew’s Free School” but seems to be the official title these days: see Lady Hale at [54]; though Lord Hope at [163] refers to it as the “Jewish Free School”.

In the end a 5-4 majority of the Supreme Court held that it was directly discriminatory to apply such a criterion for admission, and hence unlawful. The definition of "racial grounds" in s 3 of the Act refers to "colour, race, nationality or ethnic or national origins." Lord Phillips, the President of the Court, and 4 other colleagues (Lords Mance, Kerr and Clarke and Lady Hale) all held that the test laid down by Orthodoxy, while clearly *motivated* by religious reasons, was a test of "ethnic... origin"- at [45] (that is, the test did not simply refer to "descent" from a type of ancestor, but the purpose of the test was to constitute a person a member of the Jewish "ethnic" group).

Lord Phillips indicated at [9] that the result of the case may point to a need for Parliament to re-think the legislation; but as it stands, once direct racial discrimination is established (that is, discrimination which uses racial origin as the direct criterion of the decision), then there is no defence available.

Four members of the Court, Lords Hope, Rodger, Walker and Brown, ruled that the criterion used was not "racial" but "religious", and hence did not fall foul of the legislation governing direct discrimination.

Lord Rodger in particular felt that the decision of the majority must be wrong:

225. The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief. If the majority are right, expressions of sympathy for the governors of the School seem rather out of place since they are doing exactly what the Race Relations Act exists to forbid: they are refusing to admit children to their school on racial grounds. That is what the Court's decision means. And, if that decision is correct, why should Parliament amend the Race Relations Act to allow them to do so? Instead, Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this secular court but it has no basis whatsoever in 3,500 years of Jewish law and teaching.

226. The majority's decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong.

Lord Rodger's comment points to a fascinating aspect of the litigation. The *Equality Act 2006* (UK) allows "faith-based" schools to apply selection criteria based on their religious beliefs.¹¹

But this case saw a direct conflict between that rule and the law on racial discrimination. For Lord Rodger, there should have been a way of avoiding the clash. For the majority, however, once the decision could be characterized as being on "racial grounds", then there was nothing more that could be done.

¹¹ That is, to be precise, the prohibition under that Act in s 49, against an educational establishment discriminating against a pupil "in the terms of which it offers to admit him as a pupil", is under s 50 said not to apply to a "foundation or voluntary school with religious character", and other religious schools. But, as this case illustrates, the fact that a school may be exempt from a breach of s 49 of the *Equality Act 2006*, does not immunise it from being in breach of other provisions of the law.

There is another type of discrimination prohibited by the legislation (and all similar discrimination laws, including those in Australia.) This is called "indirect discrimination", and it occurs where a criterion is applied to some decision which is not, on its face, one that relates to race; but where, when the *impact* of the criterion is examined, it is seen to have a more detrimental effect on people of one race than it does on people of another race.¹² In the case of indirect discrimination, as it is a more complex type of issue, the law usually allows some justification to be offered.

A claim of indirect discrimination had been made in the *JFS case*, in case the claim of direct discrimination failed. Two members of the Supreme Court, Lord Phillips and Baroness Hale, who found that there was direct discrimination, did not go on to rule on whether or not there was a case of indirect discrimination, presumably preferring to leave that issue to be determined in a case where it was necessary to do so. But the other members of the Court did go on to consider the issue.

Perhaps oddly, there was a marked division of opinion among the 4 Law Lords who held that there had been no *direct* discrimination, on this issue of whether there was *indirect* discrimination.

Lord Hope held that there had been a case of indirect discrimination. Even assuming (as his Lordship had held) that the decision was not made directly on racial grounds, the effect of the criterion would be to impose a higher hurdle on those with no direct descent from Jewish mother.¹³

On the issue of justification if a case of indirect discrimination were made out, his Lordship at [209] said the policy could in theory be justified: "a faith school is entitled to pursue a policy which promotes the religious principles that underpin its faith". That is the reason why the *Equality Act 2006* (UK) allows faith-based schools to discriminate on religious grounds. But he found that insufficient evidence had been presented to show that the policy was "proportionate"- see [214].

He pointed out at [205] that if *prima facie* indirect discrimination is shown, the defence involved the question

Whether JFS can show that the policy had a legitimate aim and whether the way it was applied was a proportionate way of achieving it. The burden is on JFS to prove that this was so...

He held that the aim that JFS had was "legitimate"; but then went on to say that it was not "proportionate". The School had not shown that it had gone through the process of considering "the impact that applying the policy would have on M and comparing it with the impact on the school" [211]. In the end his Lordship's view

¹² For example, a criterion for a job may be that applicants be of a certain height. This, however, may be indirectly discriminatory against applicants from certain ethnic groups whose height tends to be less than that of others. If the "height" criterion cannot otherwise be justified as "reasonable" and "proportionate" it may be illegal.

¹³ As his Lordship says at [205]: "M and all other children who are not of Jewish ethnic origin in the maternal line, together with those whose ethnic origin is entirely non-Jewish, were placed at a disadvantage by the oversubscriptions policy when compared with those who are of Jewish ethnic origin in the maternal line."

was that the issue had not been properly addressed in the evidence:

There may perhaps be reasons, as Lord Brown indicates (see para 258), why solutions of that kind might give rise to difficulty. But, as JFS have not addressed them, it is not entitled to a finding that the means that it adopted were proportionate (at [212]).

Lord Walker at [235] agreed with Lord Hope. By contrast, Lords Brown and Rodger argued strongly that this was a situation where it was reasonable for the school to wish to offer its services first of all to Orthodox Jews, and that any other scheme would have been impossible to administer.

With respect, the decision of the majority seems right. While one must have the utmost sympathy for the arguments of the minority on the direct discrimination issue, it does seem to flow from the general decision of the Parliament that all discrimination on racial grounds will be unlawful. That decision means that criteria like the one at issue here, based on descent, as to whether or not someone belongs to a particular ethnic group, must be unlawful. Unless there is to be a specific statutory exemption for the Jewish community, the decision of the majority seems correct.¹⁴

Perhaps the wider impact of the decision may come in the way that the members of the court deal with the issue of indirect discrimination. Where a criterion is applied which has a "disparate impact" on people from a particular protected group, the approach which seems to be sanctioned by a majority of the members of the Supreme Court here is to consider whether or not it is related to a "legitimate" aim, and whether or not it is implemented in a "proportionate" way—that is, can the alleged discriminator demonstrate that the severity of the impact of the rule on the person discriminated against, is in proportion in some sense to the harm done to the discriminator? It is suggested that this approach is sensible, and would have led to a different result if it had been properly applied in some other recently decided cases.

b. The Case of the Christian Marriage Registrar

One such case is the decision of the Court of Appeal (led by the Master of the Rolls, Lord Neuberger) in *Ladele v London Borough of Islington* [2009] EWCA (Civ) 1357 (15 December 2009).

Ms Ladele was a long-serving marriage registrar, who was also a Christian. When UK law was changed to allow the registration of same-sex relationships under the *Civil Partnership Act* 2004, she refused to participate in registering such

¹⁴ It may be noted as a matter of interest that the problem here relates very specifically to a religion that defines itself on racial grounds. Other religions such as Islam and Christianity would seem not to face this precise problem. A key feature of the Christian faith, for example, is that Christianity is not now a religion where racial origin makes any difference. Paul can say in *Galatians* 3:28 that "There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus." If the early Jerusalem church found it necessary to suggest rules that should have been observed by Gentile believers (*Acts* 15:20, 29), these were rules that were also binding on Jewish believers.

partnerships, her view being that the law was effectively designed to equate these relationships with marriage. As Lord Neuberger records at [7]:

Ms Ladele held “the orthodox Christian view that marriage is the union of one man and one woman for life”, and she “could not reconcile her faith with taking an active part in enabling same sex unions to be formed”, believing it to be “contrary to God’s instructions”.

Her employer, LBI, dismissed her for refusing to register the partnerships. Evidence showed that it was up to local councils to designate their registrars as those who would register civil partnerships, and that the Council could have chosen not to designate Ms Ladele to this office. But complaints against her refusal to register the partnerships had been made by two openly gay registrars, and the Council decided to order all registrars to be involved.

The initial Tribunal hearing found that the Council had discriminated against Ms Ladele on the ground of her religion, contrary to the *Employment and Equality (Religion or Belief) Regulations 2003*. But the Employment Appeals Tribunal (EAT) overturned this finding.¹⁵ Elias J gave a careful analysis. With respect, his Honour correctly concluded that there was no *direct* discrimination against Ms Ladele. LBI had not signalled her out for detriment because she was a Christian; all they had done was refuse to exempt her from a general requirement imposed on all the registrars. (See the discussion in the EAT judgment at [52].)

It is hard to understand how the Council’s stance can be said to be “proportionate”. It was accepted that the unavailability of Ms Ladele to register the partnerships would not in any way have impeded the registrations- there were clearly a sufficient number of other registrars who were happy to do the work. Hence why is it “proportionate” to the provision of a “non-discriminatory” service for the Council to require Ms Ladele to either act against her conscience or resign her job?

Elias J accepted submissions by the Council (and “Liberty”, a civil rights group allowed to intervene) that “the aim of combating discrimination is necessarily undermined if acts of discrimination by staff are knowingly permitted” – [98]. But this seems to beg some important questions. The word “knowingly” is important- who would have known about Ms Ladele’s actions? Unless her actions were publicised by other staff, presumably members of the public at large would have no idea as to which registrars were allocated to which task.

One cannot avoid the impression, reading the facts, that in fact one of the main interests being catered for by the Council lay in the fact that the two gay registrars felt “put down” by Ms Ladele’s objections, and perhaps had threatened to “go public” unless something were done. (See para [12]- the members of staff complained that some “were refusing to do civil partnerships... alleged that it was an act of homophobia and that they felt discriminated against.”)

In addition, it seems hard to conceive how the decision in this case does not involve the “balancing” of the rights of one group with the rights of another. Yet there seems to have been a refusal by the Appeal Tribunal to acknowledge this- see

¹⁵ *London Borough of Islington v Ladele* (UKEAT/0453/08/RN; Elias J presiding; 19 Dec 2008).

the comments at [112]: “the issue is not... a matter of giving equal respect to the religious rights of the claimant and the rights of the gay community”. With respect, these are indeed fundamental issues that cannot be brushed aside. The Tribunal seems to argue in a circle when, at [111], in finding the Council justified in requiring all registrars to perform the duties, they comment-

They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform... where her personal stance involved discrimination on grounds of sexual orientation.

This statement ignores the fundamental question- is not Ms Ladele entitled to some consideration for her religious beliefs? The Appeal Tribunal makes it quite clear that it disapproves of Ms Ladele’s stand when it used the word “connive” in para [117]- Council “were not required to connive in what they perceived to be unacceptable discriminatory behaviour by relieving the claimant of these duties”. But it is quite unclear whether they properly weighed up the extent of the harm caused to Ms Ladele, in comparison with what harm would actually have been caused by simply allowing her not to participate – from her point of view, not obliging *her* to “connive” at the State supporting a relationship she perceived as contrary to the word of God.

How did the Court of Appeal deal with these issues? At [45] Lord Neuberger notes that “aim” of the Council was not simply to provide an efficient civil partnership registration service; its aim was a broader one of “being ‘an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others’”. This of course puts the aim in a way that most favours the Council, but for the moment can be accepted.

The difficulty again lies, to my mind, in the word “discriminate”. In what sense did Ms Ladele’s refusing to participate in same-sex partnership registrations “discriminate” against persons of homosexual orientation? The evidence showed that no one who wanted such a ceremony was denied it, as the Council had more than enough registrars to do the job. There seems to be no concrete harm that was done to any of the customers of the Council. In the end, as noted above, it was the two other gay registrars who complained. But even they did not complain, for example, that their workload had been increased by Ms Ladele’s decision. Their complaint was that they found her *attitude* “offensive” or “homophobic”. But Lord Neuberger did not focus on these issues.

Indeed, in what is a very disturbing passage, his Lordship said at [51]:

the aim of the Dignity for All policy was of general, indeed overarching, policy significance to Islington, and it also had fundamental human rights, equality and diversity implications, whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished.

That is an amazing trivialisation of the right to freedom of religion. For a start, it seems to reduce the right to mere “internal” beliefs and what happens on a Sunday! If freedom of religion, and freedom to manifest religion (explicitly protected

under art 9 of the *European Convention on Human Rights*), is to mean anything, then it must cover actions that are in accordance with those beliefs in spheres other than the purely “religious” venue of church meetings. A more realistic statement of what was at stake here was, on the one hand, the right of some employees not to be “offended” by someone else’s opinions, which were not harming them or any members of the public, and on the other hand the right of Ms Ladele to earn a living at a profession to which she aspired.

The conclusion at para [52] demonstrates precisely why this decision is wrong:

Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele’s refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington’s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington’s employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele’s refusal was causing offence to at least two of her gay colleagues; Ms Ladele’s objection was based on her view of marriage, which was not a core part of her religion; and Islington’s requirement in no way prevented her from worshipping as she wished.

Taking these points *seriatim*:

(1) “Ms Ladele was employed in a public job and was working for a public authority”- true, but nothing in the ECHR says that public authorities are free from the obligation to respect the freedom of religion of public servants;

(2) “she was being required to perform a purely secular task, which was being treated as part of her job”- but if freedom of religion means anything, it applies across a range of activities, not just “religious” ones;

(3) “Ms Ladele’s refusal to perform that task involved discriminating against gay people in the course of that job”- this is the key proposition which is disputed above; no gay person was actually worse off in any legally relevant sense because of her actions;

(4) “she was being asked to perform the task because of Islington’s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington’s employees, and as between Islington (and its employees) and those in the community they served”- again, this point depends on the last- there was no actual discrimination;

(5) “Ms Ladele’s refusal was causing offence to at least two of her gay colleagues”- no doubt many attitudes of others may cause “offence”; but unless the law proscribes such behaviour, it is not legally relevant;

(6) “Ms Ladele’s objection was based on her view of marriage, which was not a core part of her religion”- this is a most disturbing comment, because it implies that the court must make a religious evaluation about what is, and is not, at the “core” of a religion¹⁶- and in any event it would seem to be strongly arguable that the centuries-old orthodox view of marriage lies very near to the core of Christian

¹⁶ That this is not a merely theoretical possibility is demonstrated in the 2 Australian decisions noted below; see in particular the discussion of Judge Hampel in the *Cobaw* case.

ethical beliefs; and

(7) “Islington’s requirement in no way prevented her from worshipping as she wished” - a patronising comment which sees “freedom of religion” watered down to “freedom to go to church”.

This view of Ms Ladele’s freedom of religion (protected, as Lord Neuberger is forced to acknowledge, by art 9 of the ECHR) as a minor right which can be cast aside when someone is simply “offended” by it, can be sharply contrasted with the way that rights based on “sexual orientation” are to be treated:

59. By contrast, decisions of the Strasbourg Court such as *Salguero da Silva Mouta v Portugal* (2001) 31 EHRR 47 and *EB v France* (2008) 47 EHRR 21 emphasise that, to quote from paragraph 90 in the latter case, “[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8”. It is not suggested that, by permitting Ms Ladele not to officiate at civil partnerships, Islington would have infringed anyone’s rights under the Convention, but observations such as these demonstrate the importance which the Convention should be treated as ascribing to equality of treatment irrespective of sexual orientation.

In other words, a clear Convention right protecting the right to manifest religious belief can be swept aside, but a right which is not even mentioned in the Convention requires “convincing and weighty reasons” if it is even to be lightly disturbed.

The Master of the Rolls then went on to consider another argument raised for the first time on appeal. This was that since the commencement of the *Equality Act (Sexual Orientation) Regulations 2007*, SI 2007/1263 (“the 2007 Regulations”), which make it unlawful to discriminate against persons on the grounds of their sexual orientation, LBI were actually obliged to dismiss Ms Ladele if she refused to perform civil partnership ceremonies.

The argument seems correct- once Ms Ladele had been appointed a civil partnership registrar, she would then not have been entitled to refuse to solemnise a partnership between persons of the same sex, especially since reg 3(4) of the 2007 Regulations makes it clear that civil partnership is not “materially different” from marriage for the purposes of the regulations. There may be a question as to whether the drafting of these regulations gives sufficient recognition of the strong freedom of religion right spelled out in art 9 of the ECHR. But it does seem true that the regulations as drafted would have this effect.

However, as Lord Neuberger also points out, it would not have been discriminatory for the Council to not *appoint* Ms Ladele as a civil partnership registrar in the first place, a step that she had requested. So in the end this argument does not seem to make the Council’s case any stronger- it simply pushes the point where Ms Ladele’s freedom of religion was not recognised back to the decision to appoint her as a registrar.

It is as well to remember what the effect of this decision must be. Ms Ladele had a genuine objection to being involved in a newly expanded area of her responsibilities (it is not, for example, as if she approached for a job an organisation which already recognised same sex partnerships). Her objection could easily have been accommodated within the work practices of the Council, and indeed there is

some evidence that other Councils had done so by not appointing registrars with a religiously-based objection to the position. By doing this, the Council would not have been making any particular public statement; no persons seeking a civil partnership registration would have been, or in fact were, inconvenienced in any way. The objection to this course of action came from two fellow staff members who “took offence” at Ms Ladele’s actions. In the end the offended feelings of these staff members were given priority over Ms Ladele’s ability to work at her chosen profession without violating her conscience.

With respect, this must be wrong. If there was ever a case where indirect discrimination on the basis of religious belief were to be found, it seems this should have been it. It is to be hoped that the more rigorous analysis of the “proportionality” between protected interests and the interests of the discriminating body, spelled out in the decision of the Supreme Court in *JFS*, will be applied when the *Ladele* case goes on appeal to the ECHR. In *JFS* a major reason for the majority of the members of the Court finding that there had been indirect discrimination, was a failure to examine the severity of the “disparate impact of the policy” on the various groups involved- see Lord Hope at [211]. Here it seems to be clear that there were a number of other policies that the Council could have adopted to further their legitimate aims of encouraging nondiscrimination on the basis of sexual orientation, short of an ultimatum requiring Ms Ladele to choose between her job and her faith. The simplest of all was not putting her into the position where she would be required by law to conduct the registrations.

It may be that what lies beneath the Council’s policy was a sense that “these sort of people”, people who have views that are different to the prevailing orthodoxy of complete moral neutrality on questions of sexual conduct, should not be employed in public positions. This may be the trend of public law in the UK and Australia, and if so Christians will simply have to persevere with their commitment to their Lord and trust that he will provide what they need to do so.

But until that point is reached, it seems that the law at the moment, particularly the law of the UK (where a right to freedom of religion, and the right to “manifest” religious beliefs “in public or private”, in “practice and observance” as well as in worship, is enshrined in a binding Convention), should allow a Christian person’s right to continue to work in circumstances such as those faced by Ms Ladele here.

c. The Case of the Christian Airlines Worker

The difficulties and uncertainties faced by professing Christians in the UK context are further illustrated by the appeal in *Eweida v British Airways PLC* [2010] EWCA Civ 80 (12 Feb 2010).

Ms Eweida, a committed Christian, worked for British Airways (“BA”) in a customer service area. BA had a policy that no jewellery was to be visible. Ms Eweida wanted to display a small cross around her neck. She claimed that BA’s

refusal to allow this was discriminatory. The claim was rejected by the Employment Tribunal, and then again on appeal to the EAT.¹⁷

It was of course a claim of indirect discrimination, as a general policy was applied to all visible jewellery (although it is worth noting that other items of “religious” attire, such as a hijab, a turban and a skull-cap had been allowed to be worn by other staff). The EAT upheld the original Tribunal finding that there had not been indirect discrimination, on the somewhat curious basis that the claimant had not been able to demonstrate that there were any *other* Christians who wanted to wear a visible cross who had not been able to.

This seems curious, in the sense that most people would not regard it as crucial to an act of discrimination of this sort that there be more than one person involved. But the EAT read reg 3(1)(b) of the *Equality (Religion or Belief) Regulations* 2003 as meaning that a disadvantage that the claimant had suffered “must be a disadvantage suffered by others who share her religion or belief” (see [11]).

With respect, this seems an unlikely intention to attribute to the drafters.¹⁸ The wording of the regulations explicitly says that the relevant criterion “puts *or would put* persons of the same religion or belief as B at a particular disadvantage” (emphasis added.) Surely the hypothetical “would” allows the court to imagine a class of Christians who want to display a common symbol of their faith visibly, rather than requiring a stream of witnesses to that effect? Nevertheless, the Tribunal was clearly of the view that “the relevant disadvantage must be one which is shared by a group”- [16]; and in the end the Appeal Tribunal agreed:

“It must be possible to make some general statements which would be true about a religious group”- [60]; “BA did not act in a way which amounted to indirect discrimination because there was no evidence that a sufficient number of persons other than the claimant shared her strong religious view that she should be allowed visibly to wear the cross”- [77].

Perhaps at this stage it is worth a comment on one point. Both the EAT and later the Court of Appeal stressed that Ms Eweida’s was the only formal complaint about not being able to wear a cross that had been received. With respect, this seems fairly disingenuous. If there is such a policy, then it might be expected that many employees, even those who would otherwise strongly prefer to wear a visible cross, would not even make such a request, for fear of annoying their employer. Even if there were no formal disciplinary process following such a request, many pressures on employees (including rostering and whether or not future promotion is available) may make them not wish to “rock the boat”. Probably the only way of ascertaining whether or not there were other such employees was to conduct an anonymous survey of some sort; the case shows no evidence that BA ever volunteered to do this.

¹⁷ See the appeal UKEAT/0123/08/LA, 20 Nov 2008, Elias J presiding. appeal to the EAT

¹⁸ For an excellent review of the decision making this point (among others) see Nicholas Hatzis “Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination” (2011) 74/2 *Modern Law Rev* 287-305.

The other interesting point about the EAT decision is the discussion around the question whether, if the requirement not to display the cross had been held to be indirectly discriminatory, BA would have been able to justify the requirement as a “proportionate means of achieving a legitimate aim.” The EAT upheld the Tribunal’s ruling that in fact BA’s blanket ban on all visible jewellery was not proportionate, in that it did not distinguish between jewellery simply worn for cosmetic purposes and that which had a religious significance- see [19]. Their decision was assisted by the fact that after the dispute arose, the policy was amended to allow approved forms of religious or “charitable” symbols to be displayed.

Some unsatisfactory aspects of the EAT decision were corrected in the Court of Appeal. Sedley LJ noted at [13] that the Appeal Tribunal were probably wrong to have concluded as they did that the “purpose” of indirect discrimination law is to deal with “group discrimination”. But the judgment supports the view that under the relevant regulations, there must be “some identifiable portion” of the workforce, rather than merely a single individual, which is subjected to a disadvantage- [15]. While discussing the difficulties of applying such a view at [18], the judgment does not take what one might have thought to be the obvious view that since the interpretation is almost unworkable, it cannot have been intended. Instead, Ms Eweida’s claim is seen to fail on what looks like a forensic mishap, the failure to call 2 or 3 colleagues with similar views.

In addition there is a decidedly worrying tone to his Lordship’s comments. He goes out of his way to note that Ms Eweida seems to have been very forceful in putting her views, and his comments seem to be strongly influenced by his disapproval of her “adversarial” attitude- see the negative comments at [3], [25] (“a sectarian agenda”), [28] (“a single employee who after 6 or 7 years of compliance with the dress code has decided that it is no longer compatible with her beliefs”),[33]-[34].

With respect, these matters do not seem to bear on the real issues. In fact, they are positively misleading. The long-standing dress code had involved a high-necked uniform. It was the new uniform that had provoked the issue. The comment at [33] that Ms Eweida refused (“on whose advice we do not know”, suggesting of course some person of ill will attempting to provoke litigation) BA’s “accommodating offer” to move her to another position implies that she should have been prepared to accept what she saw as discriminatory behaviour.

In the end, his Lordship ruled that in fact BA would have been justified in doing what they did, even if their actions had been found to have been discriminatory against Christians as a group- [37]. The slighting comment that the visible wearing of the cross was only a “personal preference” rather than being “called for” by her religious beliefs elides some very important issues about the extent to which a right of freedom of protects positions taken which are motivated (if not positively demanded) by a person’s religious beliefs.¹⁹ It seems that if the *JFS*

¹⁹ See the discussion in the Australian cases mentioned below about whether action which “conforms” to doctrine has to be “required by” that doctrine, or merely “consistent with” the doctrine.

court's emphasis on the need for a careful weighing of the impact on the individual believer, in comparison with that on the employer or others, had been taken into account, the blanket ban on all jewellery could well have been viewed as a disproportionate response to whatever the problem was that the policy was dealing with.²⁰

The curious addendum in para [40] notes that the new *Equality Bill* treats indirect discrimination on all grounds in a way similar to the wording of the regulations in issue here. But what does *this* comment mean?

[40]....But it is to be noted that the same definition is used for all the listed forms of indirect discrimination, relating to age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice. This case has perhaps illustrated some of the problems which can arise when an individual (or equally a group) asserts that a provision, criterion or practice adopted by an employer conflicts with beliefs which they hold, but which may not only not be shared, but may be opposed, by others in the workforce. It is not unthinkable that a blanket ban may sometimes be the only fair solution.

Is his Lordship seriously suggesting that an appropriate response to the difficulties of recognising freedom of religion and freedom of expression in the workplace would be avoided by a “blanket ban” on *all* expressions of religious faith in the workplace? Or perhaps he is suggesting a “blanket ban” on employing anyone with religious beliefs? Both suggestions are equally outrageous, but neither seems clearly excluded by the tone of the judgment.

What Ms Eweida claims to have suffered may have been not the worst kind of religious discrimination. But her religiously based views (even if mere “preferences”) were surely entitled to serious consideration. It can only be hoped that a better interpretation of the relevant regulations can be found, which avoids the odd result that discrimination is acceptable if only practiced against one person.

d. The Case of the Christian Relationship Counsellor

McFarlane v Relate Avon Ltd [2010] EWCA Civ B1 (29 April 2010), a decision of Laws LJ in the English Court of Appeal, is a short judgment refusing leave to appeal from the earlier decision of the Employment Appeal Tribunal at [2009] UKEAT 0106_09_3011 (30 November 2009). It raises again this important question of whether someone who adheres to traditional Biblical Christianity should be given any consideration (as a matter of law) when their religious views conflict with what is required by their employer.

²⁰ An odd aspect of the judgment of Sedley LJ is that the purpose of the policy, surely a key aspect of any decision about “proportionality”, is almost completely ignored. The only comment comes in para [31]: “They considered that the aim of the uniform code was undoubtedly legitimate- a finding which requires no explanation”. We are not told whether the code was designed based purely on “image”, or for safety reasons, or as a way of ensuring that employees could not communicate any religious or political views that they had- each of which are possibilities, but each of which would have required differing responses, presumably.

Mr McFarlane was a “relationships counselor” who was employed by Relate. His job required him to provide counseling to couples whose relationships were in difficulty. One aspect of his work was “psycho-sexual therapy” which involved detailed advice about sexual behaviour. He had requested that he not be assigned same-sex couples to provide this sort of counseling to, on the basis that as a Christian he objected to homosexual intercourse as sinful.²¹

He was summarily dismissed from his position. He mounted a claim against Relate for remedies relating to his dismissal, on the basis (*inter alia*) that he had been discriminated against indirectly on the basis of his religion, and that his dismissal was unjustified. His case, of course, is very similar to that of Lillian Ladele, noted above.

Here Laws LJ upholds the decision of the EAT, upholding the dismissal of the discrimination claim by the first instance Employment Tribunal decision, by reference to the *Ladele* decision. But there are some other important features to this decision. In particular there is the fairly odd spectacle of a witness statement that was sent to the Court of Appeal by a former Archbishop of Canterbury, Lord Carey. The thrust of Lord Carey’s statement (some of which is quoted in the judgment of Laws LJ) was to suggest that a special panel of appeal judges be appointed which did not include (among others) the Master of the Rolls, Lord Neuberger, who had given the lead judgment in the *Ladele* case.²²

It must be said, with the greatest of respect for Lord Carey, that this was an unwise decision. No tribunal will lightly accept that its most senior member is biased. In the circumstances it seems fairly clear that Lord Carey’s attempted intervention probably led to a more negative tone to the decision to refuse leave to appeal than would otherwise have been the case.

Nevertheless, there are some alarming features about Laws LJ’s judgment. In particular, at para [12], there is a full citation of Lord Neuberger’s comments at para [52] of *Ladele*, which I expressed grave concerns about above. It seems this paragraph is going to continue to exercise a significant influence on future decisions in this area. As noted, however, it is at almost every point a denial of the importance that should be afforded under UK law, and the European Convention on Human Rights, to the exercise of freedom of religion. It assumes that “religion” is only concerned with attending worship services. It allows a policy decision to avoid “discrimination” as a general aim by a body, to over-ride the freedom of religion of employees where that freedom would have *no* practical impact on the enjoyment of

²¹ There seems to be something of an apparent inconsistency here, in that presumably Mr McFarlane also believes that heterosexual intercourse outside marriage is sinful (though this does not appear from the various reports.) However, perhaps the view could be taken that couples could be counseled on appropriate heterosexual behaviour without endorsing its morality, but that any involvement in homosexual behaviour would amount to endorsing its legitimacy.

²² Lord Carey’s witness statement (which can be viewed as a whole at <http://timescolumns.typepad.com/gledhill/2010/04/carey-warns-of-civil-unrest-over-dangerous-antichristian-rulings.html>) concludes with the following words: “The Judges engaged in the cases listed above should recuse themselves from further adjudication on such matters as they have made clear their lack of knowledge about the Christian faith.” The decisions referred to included the *Ladele* decision in the Court of Appeal.

rights by persons who are alleged to be discriminated against. In this sense *Ladele* is indeed similar to *McFarlane*, and the cases are (with respect) equally wrong.

It may be recalled that in the *Ladele* case there was no evidence at all that any same sex partners had been disadvantaged by Ms Ladele's unwillingness to participate in registration- there were more than enough other officers who could have done the work, and no complaint was made about increased workload by other officers. In *McFarlane* there is no evidence that any same-sex couples who needed help were refused such help because of Mr McFarlane's stance. Yet just as the Council's policy in *Ladele* was regarded as sufficient justification for dismissing Ms Ladele, here the general "non-discrimination" policy was held to be sufficient ground for dismissing Mr McFarlane, with no evidence of harm to anyone.

The decision would no doubt have rested there had it not been for Lord Carey's comments. Laws LJ chooses to respond to the statement, partly at least on the ground that he takes it that reveals, as he says at [16], a "misunderstanding of the law". In what way, then, do Lord Carey's comments misunderstand the law? One aspect of this misunderstanding is that he paints decisions of the court that find that there is "discrimination" as equivalent to a finding of disreputable behaviour and bigotry. He then charges that the courts are wrongly accusing Christians in general of being bigoted.

This, it must be said, is an odd stance. It is especially odd given that the decisions being complained about are not decisions where Christians are found to have "discriminated" as a matter of law, but decisions where tribunals have ruled that Christians themselves have not been discriminated *against*. Perhaps his Grace's view is that the reasons Christians have been failing in their claims is that they themselves are viewed as behaving in a discriminatory fashion. But this is not really the way that the decisions have been expressed.

So Laws LJ is correct to remind Lord Carey at para [19] that, in effect, "discrimination" is a legal construct, and that a finding of discrimination (particularly the complex issue of indirect discrimination) does not mean that such conduct "falls to be condemned as disreputable or bigoted". But Laws LJ goes on into much deeper waters when he engages with what he sees as a call from Lord Carey to support the doctrines of the Christian faith as such. It must be said that Lord Carey's statement does indeed move in this direction at some points. At para 12 of his statement (quoted in para [17] of the judgment of Laws LJ) he says that "the highest development of human spirituality is acceptance of Christ as saviour and adherence to Christian values." This is clearly an affirmation of Christianity as the preferable religion.

But in the rest of the statement Lord Carey is not really urging that members of the judiciary support the Christian faith as such; he is instead saying that recent decisions have, in his view, flowed from a misunderstanding of Christianity, and he even points out that it is likely that judges may well be even more mistaken about religions other than Christianity. (That, at any rate, is how I read his comment at para 18 of his statement that "it is difficult to see how it is appropriate for other religions to be considered by the Judiciary where the practices are further removed from our traditions".)

The response of Laws LJ, however, is to the perceived claim that the judges

ought to give preference to Christianity. In doing so his Lordship correctly points out the difference between the law protecting Christians' "right to hold and express a belief" on the one hand, and on the other hand "the law's protection of that belief's substance or content". In his Lordship's view, the legal system cannot weigh in on the side of one faith or another.

With respect, this is perfectly reasonable. But it is a matter of concern that his Lordship felt it necessary to support his view of the "even-handedness" of the legal system, not (as could have been done) by reference to convention obligations or general principles of religious freedom, but by comments denigrating religion in general.

His Lordship's remarks at [23]-[24] are worth noting:

23... But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer **religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence**. It may of course be *true*; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claims.

24 The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is **irrational, as preferring the subjective over the objective**. But it is also divisive, capricious and arbitrary. {emphasis added}

What is deeply offensive and concerning about these comments are that they were completely unnecessary for resolution of the issues in this decision, or indeed even for a calm and measured response to Lord Carey's admittedly somewhat unwise comments. Far from simply maintaining a position of even-handedness on the merits of a religious point of view as opposed to a "secular", his Lordship brings the full force of his office to bear in favour of a secularist perspective. All religious faith, of whatever description, is written off as not worthy of any serious consideration, because it is "subjective". It is "incommunicable", not susceptible of "any kind of proof or evidence". In other words, for the law to support such a view is "irrational".

It is not entirely clear how Laws LJ has arrived at his view that all religion is subjective and not based on evidence. Is this now to be regarded as a matter of judicial notice? Is this a matter on which it would be possible to offer evidence? Suppose there were a religion that presented the claims of its founder by the early preachers producing evidence that he had risen from the dead;²³ whose proponents went about in an attempt to "persuade" and "reason" with others;²⁴ where the founding documents of that religion indicated that if a particular historical event were found on analysis not to have happened, then the religion would be "in vain"?²⁵

²³ Acts 2:22-36, 13:23-41, 17:30-31.

²⁴ Acts 9:20-22, 17:2-4 ("reasoned", "explaining and proving"), and many other examples in Acts.

²⁵ 1 Corinthians 15:12-19.

But perhaps this would not be sufficient to convince his Lordship, who seems effectively to “define” religious faith as completely a matter of private and incommunicable opinion.

It should be stressed that the present author agrees with the sentiment that the law of a modern “secular” state should not weigh in to support one faith as against another. In that sense Lord Carey’s comments are misconceived. But this is a view that can be supported as a matter of public policy, not because all religions are wrong (which is what Laws LJ’s views come down to, despite his attempt to preserve an illusion of even-handedness by the off-handed comment that “it may of course be true”), but because all religions should have a level playing field to present the arguments that they choose to make to persuade others of the validity of their position.

In the end, as his Lordship says, Mr Macfarlane’s case was decided the way it was because it was not relevantly different from the *Ladele* decision. For reasons put forward above, my view is that the *Ladele* decision itself was wrong, because it did not properly conduct the analysis of whether the action of dismissal is “proportionate” to the purely “internal” harm (if indeed it can be called harm) suffered by a body when some of its members do not share all its values. Unless members of the public are actually denied services they should be able to expect from a firm or government body, this sort of harm should not outweigh the interests of employees in being able to do their work while not violating their conscientiously held religious beliefs. While Lord Carey’s remarks are not all well-founded, one aspect of his concerns is a reality- that if policies of this sort continue to be applied, conscientious Bible-believing Christians will be excluded from more and more areas of employment. In the end, it seems fairly clear that this will be to the detriment, not the benefit, of society at large.

It should be noted that all three of the above cases have now been taken on appeal to the European Court of Human Rights.²⁶ The result of these appeals is not yet known; although it may be noted that the ECHR is not noted for giving a broad interpretation to freedom of religion rights. Interestingly, however, in what has been seen as an unusual move, the UK Equality and Human Rights Commission has just announced that it will be appearing to argue the case on behalf of a “reasonable accommodation” of religious beliefs being made by employers.²⁷

e. The Case of the Christian Foster Care Agency

With the next decision we move from the UK closer to home, to Australia. Of course the legislative context is not precisely the same, and one very important difference between Australia and the UK is that in general Australian courts are not dealing with a “Charter” of human rights. However, we shall see in the next case that this is now not entirely true- some jurisdictions do have a Charter, and there is always the possibility of a future adoption of such a thing elsewhere. (Though it has

²⁶ For Ms Ladele and Mr McFarlane, see Applications 51671/10 and 36516/10; for Ms Eweida’s, see Application 48420/10.

²⁷ See <http://www.equalityhumanrights.com/news/2011/july/commission-proposes-reasonable-accommodation-for-religion-or-belief-is-needed/>.

to be said that it does not seem likely at the Federal level at the moment, nor in States where there is a “conservative” government.)

But the case of *OW & OV v Members of the Board of the Wesley Mission Council*²⁸ comes from the state of NSW, where there is no general “Charter”. Nevertheless, it provides a good example (or at least the final decision does!) of what I would say is the effective operation of a “balancing clause” protecting religious freedom.

The case had a protracted history in the courts. The basis of the claim was that OW and OV, a same-sex couple, applied to become foster carers for children in need, to the Wesley Mission, who provided such services. The Mission advised them that they were not eligible to be such under the Mission’s guidelines, which did not regard homosexual couples as suitable foster parents. The Mission relied on the traditional Christian view of marriage as the ideal environment for the raising of children. In turning down the application, they relied on s 56 of the *Anti-Discrimination Act 1977* (NSW) (“ADA”), which relevantly provides:

56 Religious bodies

Nothing in this Act affects: ...

(c) the appointment of any ... person in any capacity by a body established to propagate religion, or

(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

This provision was relevant because the ADA provides that it is unlawful to discriminate against a person on the basis of their sexuality, and it was conceded correctly by the Mission that unless s 56 applied, that they had done just that.

At first instance the Administrative Decisions Tribunal found both that there had been discrimination, and also that s 56 did not apply.²⁹ A key part of their reasoning was that a preference for “traditional marriage” (ie “monogamous heterosexual partnership”) was not a “doctrine” of the Christian church as a whole. This was partly established by the leading of evidence from ministers from within the Uniting Church that there was disagreement among theologians on the point. (The Uniting Church, of course, is the “umbrella” body within which the Wesley Mission operates. However, the Wesley Mission represents what might be fairly called the “evangelical” or Biblically conservative wing of the church, and is not uncommonly at odds with the broader leadership of the church.)

This decision was set-aside on appeal to the Administrative Decisions Tribunal Appeal Panel, which held that the original Tribunal had misdirected itself by requiring that a doctrine be uniformly accepted across the whole of “Christendom” before it could count for the purposes of s 56.³⁰ This decision itself was appealed to

²⁸ [2010] NSWADT 293 (10 Dec 2010).

²⁹ See *OV and anor v QZ and anor (No 2)* [2008] NSWADT 115.

³⁰ See *Members of the Board of the Wesley Mission Council v OV & OW (No 2)* [2009] NSWADTAP 57 (1 October 2009).

the NSW Court of Appeal, which in effect affirmed the Appeal Panel's ruling.³¹ The matter then came back to the Appeal Panel in these proceedings. The Appeal Panel reviewed the evidence that had previously been presented to the Tribunal by representatives of the Wesley Mission and concluded that the word "doctrine" was broad enough to encompass, not just "formal doctrinal pronouncements" such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included "moral" as well as "religious" principles.³² The evidence of Rev Garner, who spoke of the doctrinal issues, was accepted as showing that the provision of foster care services by a homosexual couple would be contrary to a fundamental commitment of the organisation to Biblical values. Hence the defence under s 56(d) was established.

In the course of discussing s 56(d), the Appeal Panel considered an argument that had been put forward by the applicants that any exemption under that provision would only operate in relation to so-called "pastoral" activities apparently "religious" activities like running church services. Hence, the argument ran, since the provision of foster-care placements was not a "pastoral" activity, the exemption did not apply. The Panel ruled (relying on comments that had been made in the Court of Appeal) that this distinction could not be maintained. The exemption applied to all activities of the body that either conformed to the doctrines of the religion or were necessary to avoid the relevant injury- see para [30].

In this case the Appeal Panel found both that the "first limb" of the defence was made out (ie that the refusal "conform[ed] to the doctrines of [the] religion"), and also that the "second limb" had been established (ie that allowing homosexual foster carers was "necessary to avoid injury to the religious susceptibilities of the adherents of that religion"- this was established because in his affidavit Rev Garner had commented at para [62] that "this would make our provision of foster care services unacceptable to those who support the ethos of Wesley Mission".)

It should not be thought that the Appeal Panel was necessarily happy with this decision. The Panel commented, for example, that the first limb of s 56(d) was "singularly undemanding", because all it required was that an act be "in conformity" with a doctrine, not that to do otherwise would have been "in breach" of a doctrine. It suggested that this was a matter that Parliament may like to revisit.

Nevertheless, the Appeal Panel's decision does seem to be correct. In my view the result reflects a reasonable balancing of the community's interest in non-discrimination, and the interest in freedom of religion.

f. The Case of the Christian Camping Organisation

The final case example is one that is still working its way through the court system. *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe* [2010] VCAT 1613 (8 Oct 2010) involved a complaint of discrimination on the basis of sexuality. The complainant, Cobaw, runs a project called WayOut that is designed to provide support and suicide prevention services to "same sex attracted young people". The co-ordinator of the project approached CYC (a camping organisation

³¹ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155.

³² *OV & OW* above n 28, at [32]-[33].

connected with the Christian Brethren denomination) to inquire about making a booking at a Phillip Island campsite that was generally made available to community groups. Mr Rowe, to whom she spoke, informed her that the organisation would not be happy about making a booking for a group that encouraged a homosexual “lifestyle”, as he later put it.

There was some factual dispute about what was said in the telephone conversation, and one point worth noting is that the CYC did not assist their cause in that Mr Rowe did not make a file note of the conversation at the time, and indeed failed to respond to a letter sent 2 weeks later by the WayOut convenor giving her side of the conversation (which was taken by the Tribunal as evidence supporting the WayOut account of what was said.) Some other mistakes, in my view, were made in running the case, where counsel acting on behalf of CYC seems to have taken some quite odd positions which were not really arguable (eg at one point arguing, contrary to the fairly clear words of the legislation, that the Victorian Charter of Rights was irrelevant because the conversation took place before the Charter commenced.)

However, in the end the issues were fairly clear. There had been a refusal to proceed with a booking; the reason for the refusal was connected with the CYC’s view of the philosophy of support for homosexuality as a valid expression of human sexuality; this view was a result of what was seen by the CYC to be required by the Scriptures. Despite these things, the Tribunal (constituted by Judge Hampel of the Victorian County Court), ruled against the CYC, and ordered that they had unlawfully discriminated and should pay a fine of \$5000. The decision has gone on appeal to the Victorian Court of Appeal, but at the time of writing this paper the outcome of the appeal is not known.

The legislative situation was slightly more complicated than that in the *OV* case from NSW discussed above. The primary liability was under ss 42(1)(a) and (c), and s 49, of the *Equal Opportunity Act* 1995 (Vic). These provisions prohibit discrimination on certain grounds (among which are same sex sexual orientation, and personal association with persons of same sex sexual orientation), in the areas of “services”, in “other detriments”, and in accommodation. But the Tribunal also had to take into account the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), which in effect is a general “Bill of Rights” for Victoria. The *Charter* contains a general prohibition on discrimination, in s 8; importantly, it also contains a right to freedom of religion and religious practice in s 14, and a right to freedom of expression in s 15.

In this already too lengthy paper it is not possible to give a detailed account of how Judge Hampel dealt with all the issues.³³ But some of the themes noted already as present in the UK, are repeated in this Australian judgment.³⁴

³³ For a general presentation of the issues and the decision, see a powerpoint presentation by Debbie Mortimer SC, leading counsel for Cobaw, at <http://www.humanrightscommission.vic.gov.au/files/DebbieMortimer-VEOHRCRightsHereRightsNowseminar29November2010.pps>. The reader will of course note that the author of the presentation was involved with the litigation, and is apparently continuing to act for Cobaw on the appeal. But it provides a good overview of the range of issues discussed.

The *EO Act* contains two exemptions based on religion. Section 75(2) provides:

- (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that –
- (a) conforms with the doctrines of the religion; or
 - (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

And s 77 provides:

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

Why, then, were the CYC not allowed to rely on these exemptions? Essentially, to paint with a broad brush, because Judge Hampel decided to interpret any provision dealing with “discrimination” as broadly as possible in favour of the complainant, but any provision dealing with “freedom of religion” was to be construed as narrowly as possible, to give the least possible protection to religious views.³⁵

So the Judge ruled against the CYC that they were not “a body established for religious purposes”. This was done despite the clear evidence of the constitution of the group, the first object of which was “to conduct such camping conferences and similar facilities for the benefit of the community and in accordance with the fundamental beliefs and doctrines of the Christian Brethren”.³⁶ Of the other 10 objects, 4 make explicit reference to Christianity or the Christian Brethren, and all are set in the context of the overall aim. Members of the CYC were required to subscribe to a statement of faith consistent with that of the Christian Brethren overall.

How, then, could it be concluded that this body was not “established for religious purposes”? Her Honour did refer to dicta from the NSW Court of Appeal decision in *OV and OW* to the effect that a body would not be relevantly “established” for religious purposes simply because it had been historically so set up, if it no longer carried out any such purposes.³⁷ However, with respect, this was a “red herring”. No witness said that the overall purposes of the CYC had changed since it was incorporated. Instead, Judge Hampel referred to the fact that “secular” camping activities were carried out on CYC sites, that there were websites advertising the camps which did not mention the organisation's Christian affiliations very prominently, and that in general the CYC did not inquire into the sexual activities of campers who used the facilities.

³⁴ And indeed, Judge Hampel cites with approval what I would characterise as some of the more outrageous comments of Laws LJ in the *Macfarlane* case- see *Cobaw* at [309].

³⁵ See paras [217]-[221] of the judgment, concluding in [221] with the words: “A construction that advances the purposes or objects of the *EO Act* would favour a narrow, not broad, large or liberal interpretation of the exceptions”.

³⁶ See para [237] of the judgment.

³⁷ At [239] in *Cobaw*, citing [2010] NSWCA 155.

Assuming that all those facts were true, her Honour did not seem to appreciate that none of them meant that CYC had somehow changed from a body set up for religious purposes, to some other sort of body. At the very least, the evidence showed that profits generated by the camps helped to fund the activities of the Christian Brethren denomination. Her Honour notes that some of the camps run at CYC centres *were* explicitly Christian camps.³⁸ To say, as her Honour does, that there is no “religious content required as a condition of the provision of the camping facilities”, is a very long way from saying that the organisation had moved away from the aims set out in its constitution. Some people might object to a religious group funding its core religious activities by offering services to the general community that are open to members of the public who simply wish to avail themselves of the services, the profits being used for the more general religious purposes. If so, presumably one would have to object to Salvation Army “Op Shops” being patronised by non-believers. But it seems, with respect to her Honour, to be a common feature of Australian society.

In the end, then, this is an example of applying an unduly narrow interpretation to clauses dealing with religion. An organisation which offers the benefits of Christian care to the community as a whole, which declares itself to be aimed at producing Christian outcomes and which does in fact provide services for Christian camping, is said to not be a “body established for religious purposes”!

The technique of narrow interpretation continues to be applied in the judgment, in ways that can only be summarised here. In case her Honour should be wrong about the status of CYC, she went on to consider whether what they had done “conform[ed] with the doctrines of the religion”. While her Honour at least was influenced by the NSWCA decision in *OV* to say that the “Christian Brethren” could be considered as a separate “religion” for the purposes of this clause,³⁹ when she came to decide what the content of the relevant “doctrines” were, she ended up effectively holding that all that could be considered in this area were pronouncements of “ecclesiastical authorities” similar to the Nicene Creed. The spectacle of a County Court Judge in Victoria having to decide what constitutes the core doctrines of Christianity should surely give us some pause as to whether this is the way the legislation is meant to work!

What her Honour ends up doing, of course, is to accept the evidence of one scholar over the evidence of another. The Reverend Dr Rufus Black, clearly a representative of the “liberal” wing of Christendom, was accepted when he ruled out of the category of “doctrine”, beliefs about sexuality. The Rev Canon Dr Peter Adam, a highly regarded evangelical scholar, gave evidence that beliefs about sexuality were a core part of Christian doctrine. Judge Hampel not only accepted Dr Black’s testimony (on what grounds is not entirely clear), but accompanied her rejection of Dr Adam’s views with what amounted to a sustained and completely unwarranted personal attack on Dr Adam’s integrity. In remarks that would in my view have been clearly defamatory if not made under cover of judicial immunity, Judge Hampel questioned Dr Adam’s independence and impartiality, calling both “seriously

³⁸ At [247].

³⁹ At [259].

compromised”.⁴⁰ What dreadful breach of ethics had led to this attack? Simply the fact that Judge Hampel believed that portions of his written evidence had been “influenced” by comments made by the solicitor for CYC. In addition at points he said things for the purpose of “supporting the stance of CYC”.

Perhaps to someone unfamiliar with litigation these may seem serious errors. Judge Hampel is certainly not such a person. Her Honour would be well aware that expert witnesses, while of course under an obligation to tell the truth as they see it in their independent judgment, are regularly called by one side or another, *because* they agree with the views of one side or another. There was absolutely *no* suggestion that Dr Adam had lied, or that anything he put forward was not a view he in fact held. The fact that in the initial draft of a witness statement he did not address the issues that the legal advisors thought needed to be addressed, and that he was prepared to agree to redraft his statement accordingly, is completely unexceptionable. It is difficult to determine why Judge Hampel seems to have been so offended by his testimony (or, to be frank, to work out how her Honour had access to early drafts of his testimony!)

To read Judge Hampel’s account of Dr Black’s testimony, as someone familiar with the extensive debates in the theological academy over almost all the issues that are glossed over, is, to be frank, painful. At one stage, for example, Dr Black is recorded as saying that the Brethren interpret scripture “literally”, and this “does not allow for an interpretation of the words based on their operation in a figurative or metaphorical way”.⁴¹ That this simplistic view is set in implied contrast to the views of the Principal of Ridley Theological College beggars belief. Later we are told that Dr Adams and a group of lay witnesses “relied on a passage from Leviticus as the strongest source of the prohibition on homosexuality”. Without the transcript of the testimony I cannot be positive, but I would be very surprised if Dr Adam said any such thing. The paragraph concludes with the classic “gotcha” moment enjoyed by modern commentators who attack the Biblical view of homosexuality: you rely on Leviticus, but that book (and other parts of the Bible) require the stoning of mediums, the killing of adulterers, and (horror of horrors!) “requiring women to obey their husbands”! If the matter were not so serious, it would be laughable.

In the end we have the spectacle of Judge Hampel ruling as follows: that “beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the [Christian Brethren] religion”.⁴² Never mind that the legislation does not use the word “fundamental”. Never mind that a Judge who seems to have no real understanding of Christian doctrine and the history of the interpretation of the Bible has been forced to come to a theological judgment.

Her Honour then also went on, in case anyone thought there was any chance that religion would be given any proper consideration, to hold that even if a view that homosexuality was sinful could be regarded as a “doctrine” of the Christian Brethren, refusing to give the support of the CYC camping site to a group formed to promote the view that homosexuality was a normal and ordinary part of human

⁴⁰ See paras [279]-[280].

⁴¹ At para [296].

⁴² At [305].

identity, could not possibly be something that “conformed” to the doctrine. For Judge Hampel the by-now familiar “narrow” road of interpretation meant that this fairly general word must mean that the action was “required” or “obligatory” or “dictated” by the doctrine.⁴³ It may be recalled that the Appeal Panel in the final *OV* hearing concluded that the word “conform” was a very “undemanding” standard, not being something “required” by doctrine. But Judge Hampel read the word much more tightly. The fact that no general enquiry was made of campers about their sexual activities was said to mean that the refusal of a booking in these cases was not “required” by doctrine.

A point that seems to have been ignored by the Tribunal is that there seems to be a clear difference between a policy which makes no particular enquiry of campers about their proposed sexual activities, and the booking of a group which has been clearly established to lobby for a particular type of sexual activity which the CYC regards as contrary to the Bible. Suppose a Nazi group asked for a booking? The mere fact that in the past no enquiries were made about the political affiliations of individual campers, surely should not prevent management concluding that it would be contrary to an expressed commitment to Christian values to provide the premises for those purposes? Yet the difference between these situations was not addressed in any serious way in the judgment.⁴⁴

4. Concluding comments

Recognition of the right to freedom of religion, established after a long battle in Western society, is still an important issue. One of the themes of the above cases is how courts (and Parliaments, which set the rules to be applied by courts) should undertake this task. At the moment one unfortunate feature of provisions of the law that achieve the balancing process (between the prohibition of discrimination, and the recognition of rights of free exercise of religion) are often characterised in popular and legal discussion as “exemption” clauses. To do so is to accept a discourse in which the only “real” human rights are anti-discrimination rights, with all others jostling for scraps of recognition around the edges.⁴⁵

In fact provisions of the sort that have been discussed here ought to be recognised for what they are, “balancing provisions”, which seek to balance the equally important rights not to be discriminated against on irrelevant grounds, with the right of those who have religious commitments to have recognised that sometimes those commitments are in fact relevant to legitimate decision-making.

In my view the majority approach of the UK Supreme Court in the *JFS* litigation, on the question of “indirect discrimination”, represents an appropriate

⁴³ At [317].

⁴⁴ I am conscious that some readers may immediately conclude that I have breached “Godwin’s law” by mentioning Nazis. The point is *not* to equate those who favour same sex relationships with Nazis; it is simply to say that whether an organisation with a specific ethos, is allowed to decline to offer its services to an organisation with an opposing ethos, is surely an important question.

⁴⁵ See, for example, a recent article in the online blog “The Punch”, Raj “The faithful are feasting on religious freedoms” (7 April 2011) <http://www.thepunch.com.au/articles/faith-organisations-dining-out-on-discrimination-exemptions/>, where the author calls for “removing the legal excuses we provide for discrimination”.

one. The question that always should be addressed is of the harm done to the interests of the various parties: is there a genuine harm to someone due to the other person's exercise of religious freedom, or it is simply a "hurt to feelings"? Should someone lose their job because they refuse to compromise their deeply held religious beliefs, when allowing them to exercise their freedom of religion would do no harm to anyone else other than mere "offence"? If a religious group offers a public service to the community, a service which is available from other sources as well, should it always be required to compromise its own deeply-held beliefs?

These and other issues need to be dealt with in an even-handed way by courts and other decision-makers, giving due weight to the continuing importance of recognising freedom of religion as a reality, not simply something on paper.

Neil Foster
Newcastle Law School
July 2011