LOCATING RELIGIOUS LIBERTY IN THE UNITED KINGDOM: RELIGIOUS EXCEPTIONS AND ROLE OF REASONABLE ACCOMMODATION

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by

Matthew Jonathan Roland Gibson

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ABSTRACT

This thesis is concerned with the special protection afforded religion in United Kingdom (UK) anti-discrimination law. Initial discussions centre on the historical and normative bases for religious liberty in the UK. These debates assess the evolution of domestic legal protection of religion and critique prevailing principles (in particular, the idea of human dignity) underpinning the variety of that protection. Attention is then focused on religious exceptions in UK anti-discrimination law and the practical extent to which they assist religious interests. It is clear that such special measures are aimed at religion as a collective; they do not enhance protection at the individual level. This deficit becomes more acute when considering the limiting effects of recent UK jurisprudence, specifically claims involving religion and discrimination across employment and the provision of goods and services. A particularly problematic trend exhibited in the case law is the courts' approach to determining justification and proportionality in indirect discrimination.

Accordingly, an argument is made for additional special protection. A duty of reasonable accommodation is proposed as a separate claim route in UK anti-discrimination law for religious individuals wishing to be excused from a rule. This is advocated in the field employment, it being noted that the field of goods and services poses challenges for the introduction of such a duty. Comparative analyses with Canada and the United States (US) expose two different models of reasonable accommodation. These are applied to high-profile UK cases featuring religion and indirect discrimination in employment, revealing how reasonable accommodation might have assessed those claims differently. It is submitted that the Canadian model provides a more sophisticated proportionality analysis than its US counterpart. This approach affords a more factually nuanced analysis in balancing the religious claim with a competing legitimate aim. It is contended that such a duty also coheres with both the theory of human dignity and the notion of equality as it features in the conceptual framework of anti-discrimination law.

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INTRODUCTION

THESIS OVERVIEW

This thesis focuses on the special protection afforded religion in United Kingdom (UK) anti-discrimination law. Particular attention is paid to the practical utility of religious exceptions and, beyond this, whether a case can be made for further special protection. A UK model of reasonable accommodation is duly proposed for religiously-based claims as an alternative legal mechanism to indirect discrimination in employment and the provision of goods and services.

This research is undertaken against a backdrop of burgeoning jurisprudence on law and religion in domestic anti-discrimination law. Its prime concern is with the idea that there can be special legal protection of religion over and above core guarantees such as the prohibition on religious discrimination. This special protection is initially contextualised by locating it in the historical tradition of law and religion in the UK,[1] with emphasis also on the normative network of support for legal protection of religion[2] – in particular the idea of human dignity. Subsequently, the thesis embarks upon a case-study of religious exceptions in anti-discrimination law, considering briefly their philosophical roots[3] before progressing to a more practically-orientated analysis.[4] Emphasis is on the tangible *practical* benefits such exceptions facilitate in the name of religious liberty. This assessment leads to an acceptance of the general prognosis that such exceptions occur only in highly specific circumstances and that they are – necessarily – restrictively drafted for the benefit of religion as a collective. This exposes gaps in anti-discrimination protection of religious interests at the level of the individual believer. Recent case law[5] reveals not only how common situations have fallen outside those covered by the exceptions, but also that the courts have restrictively applied discrimination law rules to those disputes, especially in relation to indirect religious discrimination and the linked issues of justification and proportionality. Consequently, it is asked whether, and if so how, religion should

[1] See chapter 1.
[2] See chapter 2.
[3] See chapter 3, section 3.1.
[4] See chapters 4 and 5.
[5] Surveyed in chapter 6, section 2.1.

enjoy further special protection in the more familiar settings in which religious individuals seek protection.

As a result, it is submitted that reasonable accommodation needs exploring as a substitute mechanism to indirect discrimination.[6] The theoretical and conceptual implications of introducing the doctrine are critically assessed: there is an emphasis on the key parts played by human dignity and equality, respectively, in the framework of anti-discrimination law and how these cohere with reasonable accommodation.[7] The doctrine is then critiqued as it exists in Canada[8] and the United States (US),[9] these jurisdictions providing two prominent and famous comparative models of reasonable accommodation. These two models are then applied to well-known UK cases concerning religion and discrimination.[10] This reveals how the more attuned, nuanced and intricate approaches to proportionality inherent in those models (albeit considerably more so under the Canadian system) would have required judges to engage in a more sophisticated balancing of a religious individual's need for rule adjustment as against another's competing legitimate aim. Ultimately, it is argued that there is a more innovative and schematic approach to proportionality inherent in Canadian reasonable accommodation; this recommends that model over its US counterpart as a useful alternative claim route to indirect discrimination for religion in the UK. Significantly, the process demonstrates how some UK cases might have been decided differently, highlighting how the doctrine could add value to the adjudication of religious disputes. The proposal for a domestic test of reasonable accommodation for religion also chimes with recent institutional and stakeholder enthusiasm for the doctrine.

RELATIONSHIP TO EXISTING LITERATURE

The genesis of this idea certainly lies in the deficiencies of the indirect discrimination case law. However, it also springs from related academic discussion by figures whose work fits into a variety of different areas. The research question takes its

[6] See chapter 6, section 3.
[7] See chapter 6, section 3.3.
[8] Chapter 7.
[9] Chapter 8.
[10] See chapters 9 – 11.

normative cue from the findings of individuals such as Lucy Vickers[11] and Christopher McCrudden[12] on religion and human dignity; meanwhile, philosophical bases for legal exceptions are drawn from the research of (amongst others) Rex Ahdar and Ian Leigh,[13] together with Brian Barry.[14] Coverage of the religious exceptions themselves in anti-discrimination law is influenced by the observations of Russell Sandberg.[15] When introducing reasonable accommodation, conceptual issues concerning its link with existing perspectives on equality and anti-discrimination law are addressed in the light of arguments advanced by commentators such as Lisa Waddington and Aart Hendriks[16] and Dagmar Schiek et al.[17] Practical matters addressing indirect discrimination and the deficiencies of the justification analysis particularly refer to work by both Vickers[18] and Sandberg,[19] but also more generally that of Erica Howard[20] and Dominic McGoldrick.[21] Meanwhile, the work of Julian Rivers[22] is instructive in framing a contrast between the rights of religious groups and religious individuals, critical to the concluding proposal for the introduction of reasonable accommodation of religion in the UK.[23]

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[11] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), pp. 36 – 41.

[12] C. McCrudden, 'Religion, Human Rights and Equality in the Public Sphere (2011) 13 Ecclesiastical Law Journal 26, pp. 34 – 35. McCrudden also writes more generally about human dignity as the basis for human rights: 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655.

[13] R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), pp. 309 – 311.

[14] B. Barry, *Culture and Equality: an egalitarian critique of multiculturalism* (Oxford: Polity Press, 2001), pp. 40 – 54.

[15] R. Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), pp. 117 - 128, and R. Sandberg, 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, pp. 173 – 180.

[16] L. Waddington and A. Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination' (2002) 18 International Journal of Comparative Labour Law and Industrial Relations 403, pp. 406 – 415.

[17] D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (Oxford: Hart, 2007), pp. 631 – 632 and p. 744 – 754.

[18] Above n. 11: pp. 54 – 81, pp. 126 – 135, pp. 158 – 172, and pp. 219 – 234. See also L. Vickers, 'Religious Discrimination in the Workplace: an emerging hierarchy?' (2010) 12 Ecclesiastical Law Journal 280, pp. 298 – 299.

[19] Above n. 15, *Law and Religion*, pp. 108 – 117.

[20] E. Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Abingdon: Routledge, 2012), pp. 120 – 121, pp. 133 – 134 and pp. 139 – 144.

[21] D. McGoldrick, 'Accommodating Muslims in Europe: from adopting Sharia law to religiously based opt outs from generally applicable laws' (2009) 9 Human Rights Law Review 603, pp. 625 – 627.

[22] J. Rivers, *The Law of Organised Religions: between establishment and secularism* (Oxford: Oxford University Press, 2010), pp. 318 – 322.

[23] See chapter 12, sections 1 and 2.

Given the breadth and depth of this existing research it is necessary to distinguish it from the instant project. This thesis makes an original contribution to domestic scholarship on law and religion in three key ways: i) in identifying limits to religious exceptions it links this with the need to address the growing imperative for clearer adjudication of individuals' religious needs. Reasonable accommodation is proposed as a way of addressing this gap. This necessitates a close comparative and critical analysis of reasonable accommodation, developing work by Howard[24] and Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive[25] which has summarised but not extensively critiqued the reasonable accommodation systems in Canada and the US; ii) this analysis includes a methodical application of these models to religious disputes in the domestic anti-discrimination case law. It significantly extends the research of those such as Howard[26] and Vickers[27] by revealing at a *practical* level how reasonable accommodation may admit of a more rigorous balancing of competing interests. The systematic application of reasonable accommodation models to the facts of domestic cases is novel and unique. It also addresses recent calls by the Equality and Human Rights Commission (EHRC) for research into the possible effects of any domestic introduction of reasonable accommodation for religion;[28] iii) finally, the thesis completes the case for the domestic introduction of reasonable accommodation by exploring relevant theoretical, conceptual and policy perspectives. The ability to draw together these different strands of research on reasonable accommodation presents a hitherto unexplored opportunity to compose a specific case for a reasonable accommodation duty to be incorporated into domestic anti-discrimination law in relation to religion.

CHAPTER OUTLINE

Part I of the thesis begins by establishing a framework in which to place the analysis on religious exceptions and reasonable accommodation. This exercise exposes the

[24] Above n. 20, pp. 129 – 134.
[25] E. Bribosia, J. Ringelheim and I. Rorive, 'Reasonable Accommodation for Religious Minorities: a promising concept for European antidiscrimination law?' (2010) 17 (2) Maastricht Journal of European and Comparative Law 137, pp. 139 – 150.
[26] See above n. 24.
[27] Above n. 11, pp. 180 – 206.
[28] See EHRC news release in July 2011on reasonable accommodation: <http://www.equalityhumanrights.com/news/2011/july/commission-proposes-reasonable-accommodation-for-religion-or-belief-is-needed/>, accessed 12th September 2012.

historical, normative and legal context of religious liberty development in the UK across chapters one, two and three, respectively. Chapter one charts the evolution of religious liberty in the UK through strict establishment to modern freedoms; chapter two discusses popular normative perspectives on the protection of religion by law. Chief amongst these theories is the emergence of human dignity and the inter-connected notions of autonomy and equality which are threaded throughout later discussions on the introduction of religious exceptions and duties of reasonable accommodation. Chapter three concludes Part I by tracking the range of domestic legal protection for religion before considering the phenomenon of religious exceptions, their philosophical roots and why the law might seek to advance extra-special protection for religion.

Part II investigates the substantive religious exception in anti-discrimination law and, in particular, how they may inform a modern conceptualisation of domestic religious liberty. This takes place in chapters four and five across both employment and the provision of goods and services, respectively, so as to give a broad view as to the practical use of the religious exceptions themselves. It is argued that, whilst the limiting of religious exceptions is understandable, they can only be currently enjoyed by religions as collective bodies. Consequently, Part III places focus on religious individuals in anti-discrimination law. Chapter six investigates whether further special protection could be introduced and, if so, the extent to which this would make any difference to the pursuit of individual religious interests. The imperative for this as dictated by recent case law in indirect discrimination is outlined and a duty of reasonable accommodation is proposed.

This duty is then explored from two comparative angles in the remainder of Part III. Chapters seven and eight provide an analysis of how those tests are applied in the relevant jurisdictions in question, namely Canada and the US respectively. This offers a fuller understanding of their advantages and disadvantages. It also provides a more detailed and informed platform from which to critically apply the models to selected domestic cases in employment in Part IV. Chapter twelve concludes by uniting the arguments advanced across Parts II to IV into a coherent case for the introduction of a domestic reasonable accommodation duty for religion.

A final note should be made about terminology. Given the focus in this thesis on religion in *anti-discrimination* law, the labels 'freedom of religion' or 'religious freedom', traditionally associated with human rights claims, seem inapposite. As a result, the umbrella terms 'religions liberty' and 'religious interests' are used interchangeably for purposes of expediency and convenience.

The law is stated as it stood on 30th August 2012.

CHAPTER 1: A HISTORY OF RELIGION IN THE UNITED KINGDOM

1. INTRODUCTION

The legal framework of religious liberty protection in the United Kingdom (UK) is extensive. This contemporary network of domestic law supporting religion should initially be set in historical context, reflecting the approach of Sandberg: '[i]n order to know where you are going, you need to know where you have come from'.[1] The aim of this chapter is to map the general contours of religion's place in the UK. Discussion will shed light on the gestation of religious interests in the UK, from early and protracted piecemeal developments through to an abrupt shift towards 'the active promotion of religious liberty'.[2] Chapters two and three, respectively, will then outline normative perspectives on law and religion and the modern-day substantive UK legal protection of religion.

2. THE DEVELOPMENT OF ESTABLISHMENT

2.1. The rise of Anglicanism

As highlighted by Knights, religious liberty in the UK can be traced back to '[t]he Roman invasion from circa 43 BC … [which] had a major impact on the spread of Christianity'.[3] There later followed the establishment of Christian churches to protect particular strands of Christianity in the UK, specifically the Anglican Church of England[4] which was also established in Wales during the mid-sixteenth century[5] and later formally in Ireland,[6] and the Presbyterian Church of Scotland.[7] This afforded

[1] R. Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), p. 17.
[2] M. Hill, 'Church and State in the United Kingdom: anachronism or microcosm?' in S. Ferrari and R. Cristofori (eds.) *Law and Religion in the 21st Century* (Farnham: Ashgate, 2010), p. 199.
[3] S. Knights, *Freedom of Religion, Minorities and the Law* (Oxford: Oxford University Press, 2007), p. 2.
[4] Established as the official state church through the *First* and *Second Acts of Supremacy 1534* and *1559*, respectively.
[5] J. Lucas and R. Morris, 'Disestablishment in Ireland and Wales', in R. Morris (ed.) *Church and State in 21st Century Britain* (Basingstoke: Palgrave Macmillan, 2009), p. 111.
[6] By the *Act of Union 1800* which united the hitherto independent Church of Ireland and that of England and Wales.
[7] The Church of Scotland is regulated by the *Church of Scotland Act 1921*.

official state support for forms of Christianity throughout the UK, privileging their position and status at the expense of either other strands of Christianity or other religions – Abrahamic or otherwise. In England, it is noted that 'the Church ... always occupied – and continues to do so – a position of political privilege through its connections with the Crown and Parliament'.[8] However, as Bradney explains, 'there is no Establishment Act that establishes the link between the Church of England and the state. Instead, establishment is the result of an historical process of the passage of statutes and the making of precedents that has bound together the Church of England and the state'.[9] This is supported by Smith who contends that, '[t]he Establishment of the Church of England is as scattered, and as profoundly historical and pragmatic, as any other part of the constitution, and it has been developed and adapted to change much in the same way'.[10]

The benefits reaped by the established churches were highly significant. Morris has noted that in England during the nineteenth century:

> Parliament was a wholly Protestant body and predominately Anglican. Anglican archbishops and bishops – all appointed by the state – were ex officio members of the House of Lords … The financial support of the clergy and the fabric of the churches themselves depended on a system of local hypothecated taxation … underpinned by the state. All citizens, whatever their faith, were liable to pay these taxes. The only two universities in England were open to members of the Church of England alone.[11]

The establishment of the Church of England in Wales and Ireland also elevated the influence of Anglicanism in those provinces. Notably, 'there were financial benefits which included rights to tithe and church tax regardless of parishioners' confessions, and the right to membership of the relevant legislature, conferring a degree of political power'.[12] This was particularly difficult to accept for other denominations in Ireland given that the 1861 census revealed that Anglicans comprised only 11.9 per

[8] A. Lynch, 'The Constitutional Significance of the Church of England', in P. Radan, D. Meyerson and R. Croucher (eds.), *Law and Religion: God, the state and the common law* (Abingdon: Routledge, 2005), p. 168.
[9] A. Bradney, *Law and Faith in a Sceptical Age* (Abingdon: Routledge, 2009), pp. 56 – 57.
[10] C. Smith, 'A Very English Affair: establishment and human rights in an organic constitution', in P. Cane, C. Evans and Z. Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008), p. 161.
[11] R. Morris, 'Establishment in England: main developments since 1800', in Morris, above n. 5, pp. 18 – 19.
[12] Lucas and Morris, in Morris, above n. 5, p. 111.

cent of the population. Roman Catholics constituted 77.6 per cent and Presbyterians 9 per cent: '[t]he[se] results illustrated the absurd position of the Established Church',[13] which was able to exert influence over other religions and enjoy considerable advantages from a minority position.

2.2 Presbyterianism

Establishment of the Church of Scotland gifted Presbyterianism a similarly privileged and special status north of the border. Its evolution 'ebbed and flowed and changed ... throughout the period from the 1690s to the 1920s'.[14] One constant factor was the Church of Scotland's independence from Parliament to the extent that 'the state and Church were conceived as inhabiting simultaneous but separate spheres'.[15] A particular manifestation of this was the creation of the General Assembly as the Church of Scotland's supreme decision-making body whose mixed functions incorporated a legislature, a court and an executive. The continued separation today of Church and state in Scotland is partly reflected in the maintenance of the General Assembly's existence. Its continued lack of state subordination signifies an important contrast in the modes of establishment in Scotland and England which have subsequently affected the autonomy and influence that Christianity has enjoyed in these regions. In contrast to the Church of England, 'the Church of Scotland is established, in the sense of being recognized and protected in statute, but it is nevertheless, jealous of its own independence. The sovereign swears an oath to protect the Church of Scotland but (unlike the Church of England) she does not make ecclesiastical appointments'.[16] The result is the granting of an even wider degree of religious liberty to Presbyterianism than has been achieved for Anglicanism in England.

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[13] *Ibid*., p. 112.
[14] M. MacLean, F. Cranmer, and S. Peterson, 'Recent Developments in Church/State Relations in Scotland' in Morris, above n. 5, p. 92.
[15] R. Morris, 'Establishment in Scotland', in Morris , above n. 5, p. 78.
[16] R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), p. 82.

2.3 Consequences of early establishment

Bradney has argued that creation of the Churches in England and Scotland is indicative of the fact that 'at a very basic level, the Christian God, and more than that the particular Christian God of two churches, is written into the constitution of Great Britain ... it is clear that establishment means that there is a close formal link between the Church of England and the Church of Scotland and the State, and thus between religion and the State'.[17] Establishment emphatically privileges the authority, liberty, power and status of a particular religion. In the UK, at least prior to the modern era, this significantly elevated the position of the Christian God at the expense of other faiths.

3. THE MODERN ESTABLISHED CHURCHES

3.1 Disestablishment in Ireland and Wales

Religious establishment has now ceased in some provinces of the UK. The Church of Ireland was disestablished by the *Irish Church Disestablishment Act 1869* which formally completed this process on 1st January 1871. The Church of England in Wales was disestablished early in the next century by the *Welsh Church Act 1914*, with the *Church in Wales (Temporalities) Act 1919* setting the date for disestablishment as 31st March 1920. Establishment today in England and Scotland continues in the form of their respective Churches.

3.2 Establishment in England

One continuing and anachronistic feature of the Church of England's privileged status is the requirement that successors to the throne be Protestant.[18] The same requirement also precludes the sovereign or heir to the throne from marrying a Roman Catholic; significantly, it does not prevent marriage to a person of no or any other non-Anglican religion. It is remarkable that such, albeit highly confined, anti-Catholic discrimination is allowed to exist in a modern liberal democracy given its

[17] Bradney, above n. 9, p. 56.
[18] *Act of Settlement 1700, s. 2.*

'controversial'[19] status; indeed, this serves to show how the Church of England still enjoys advantages over other denominations within the Christian faith and other religions.

A further advantage relates to the power to pass legislative acts known as 'Measures' under the *Church of England Assembly (Powers) Act 1919*: these relate directly to the Church's operation. Whilst such Measures enjoy the invulnerability of Acts of Parliament,[20] this 'is somewhat lessened by the fact that they must receive the approval of the Queen to be lawful'.[21] Nevertheless, '[i]n practice neither Parliament nor the monarchy generally challenge the Measure passing through',[22] suggesting a degree of deference: '[t]he importance of Measures as a symbol of the autonomy of the Church of England is not to be underestimated'.[23] The Church of England Assembly was replaced by the General Synod of the Church of England under the *Synodical Government Measure 1969*, with the power to pass Measures retained. Additionally, it was given the ability to legislate by Canon, such provisions forming part of the domestic legal system 'granting greater freedom for the church and an increasing divergence from the norm of integration of church and state in central government and administration'.[24] These practical advantages have receded with the advent of steps taken to reduce religious privilege: notably, the abolition of the common law criminal offence of blasphemous libel which protected the Church of England from denouncements of contempt. [25] This removed one of the significant, if rarely used, legal protections of the established denomination which had become 'highly controversial in such a pluralistic society as the United Kingdom'.[26]

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[19] J. Oliva, 'Church, State and Establishment in the United Kingdom in the 21st Century: anachronism or idiosyncrasy?' [2010] Public Law 482, p. 487.
[20] M. Hill, *Ecclesiastical Law* (Oxford: 2nd edn, Oxford University Press, 2007), pp. 14 – 15. This has been confirmed elsewhere: see *R v. Archbishop of Canterbury, ex parte Williamson*, per Sir Thomas Bingham MR, unreported, The Times (9th March 1994).
[21] Bradney, above n. 9, p. 60.
[22] Knights, above n. 3, p. 75.
[23] Oliva, above n. 19, p. 490.
[24] Smith, in Cane, Evans and Robinson, above n. 10, p. 162.
[25] *Criminal Justice and Immigration Act 2008, s. 79(1)*. However, this has been replaced by the enactment of new criminal law offences committed against religion: see discussion in chapter 3, section 2.1.
[26] J. Oliva, 'The Legal Protection of Believers and Beliefs in the United Kingdom' (2007) 9 Ecclesiastical Law Journal 66, p. 71.

Whilst a move away from state control might align the Church of England with the Church of Scotland in terms of autonomy, the Church of England nevertheless remains under the ultimate control of the state – although there may have been a 'gradual loosening of the ties between the Church and the State [in England]'.[27] However, this does not affect the undeniable benefits of establishment which the Church continues to enjoy: '[t]he privileges of the Church of England are various ... [they] include the less tangible benefits of access to places of political power as well as direct advantages in, for example, the way in which property is held'.[28] Unsurprisingly, in a time of religious liberty awareness, 'increasingly questions are being asked about the role of religion in the public sphere'.[29]

3.3 Establishment in Scotland

The Church of Scotland also continues to enjoy special privileges. Chief amongst these is *Article IV* of the Schedule containing the Articles Declaratory to the *Church of Scotland Act 1921*, which gives the Church the right and power (subject to no authority) to legislate and adjudicate in any matters of doctrine, worship, government, and discipline in the Church. This renders it firmly independent of Parliament, Ahdar and Leigh submitting that this 'affirm[s] the Church's long-standing claim to self-government ... which the Scottish courts have used as a reason for non-intervention in the church's affairs'.[30] This demonstrates a more comprehensive possession of power than that afforded the Church of England. It also outlines how the degree of establishment in Scotland exists in a weaker form than that in England, although '[t]he Church of Scotland continues to hold itself out as being 'the national Church in Scotland''.[31] In times of commitment to greater religious liberty, the fact that Presbyterianism is afforded a legislative right, together with an ability to self-govern free from parliamentary control, remains 'a conundrum'[32].

[27] Bradney, above n. 9, p. 71.
[28] *Ibid*., p. 62.
[29] Knights, above n. 3, pp. 15 – 16.
[30] Ahdar and Leigh, above n. 16, p. 82.
[31] Bradney, above n. 9, p. 55.
[32] Ahdar and Leigh, above n. 16, p. 82.

4. THE EFFECTS OF ESTABLISHMENT: RELIGIOUS PERSECUTION

Degrees of religious persecution and discrimination in the UK have been the concomitant results of establishment. This places the religious liberty enjoyed today in sobering context.

4.1 Inter- and intra-faith challenges

Incidents of religious persecution in the past support the view that 'overall, religious freedom has a precarious history in England'.[33] This is reinforced by Christian attitudes towards not only other religions but also denominations within Christianity itself. These attitudes arguably continue to this day: 'within the [Christian] groupings, some would not classify the others as truly Christian denominations. Thus, the potential exists for discrimination between religions and within them'.[34] This basis for intolerance, persecution and suppression was lamented in *R v Secretary of State for Education and Employment, ex p Williamson* (*Williamson*)[35] by Lord Walker who remarked that, 'not only has the last two thousand years of the Christian Church been marred by the torture and killing of apostates, heretics and witches, as interpreted on the permission of the Bible, but also by the division and hostility between its own different churches and sects'.[36] Specific examples of discrimination include the prohibition of freedom to worship in licensed premises in England, which was relaxed for non-conformists under the *Act of Toleration 1689*[37] but not extended to Catholics, Jews or atheists. The latter would have to 'wait much longer before suppression of their freedom of individual belief ... [was] eventually lifted'.[38] Roman Catholics were further discriminated against by the *Test Acts* of *1673* and *1678* which excluded them from Parliament, holding public office, voting,

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[33] Knights, above n. 3, pp. 2 – 3. The precarious history of religious freedom is also found in other jurisdictions, particular the US which, whilst respecting religious freedom under *Amendment 1* of the *US Constitution 1787*, engaged in religious persecution before and after establishment of the constitution. See K. Boyle and J. Sheen (eds.), *Freedom of Religion and Belief: a world report* (London: Routledge, 1997), pp. 153 – 164.
[34] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 4.
[35] [2005] UKHL 15.
[36] At para. 56.
[37] The Bill of Rights the year before did not grant any further extensions of religious liberty.
[38] Lynch, in Radan, Meyerson and Croucher, above n. 8, p. 179.

inheriting land, joining the army and owning property.[39] In Ireland, the majority Roman Catholic population was oppressed by additional penal laws, although these were relaxed towards the end of the eighteenth century in civic and economic areas.[40] As a result, '[h]istorically non-Anglicans were under various legislative disadvantages, including the inability to attend university or to occupy public offices. In practice, the main groups disadvantaged were non-conformist Christians (such as Quakers, Baptists, and Methodists), Roman Catholics and Jews'.[41] These forms of discrimination were redolent in the UK's regions until the late eighteenth and early nineteenth centuries.

5. TOWARDS GREATER RELIGIOUS LIBERTY

5.1 Religious emancipation

Ahdar and Leigh contend that '[t]he criticism that establishment equates to religious discrimination is plainly informed by modern notions of religious pluralism'.[42] This is understandable given the relatively recent legal conceptualisation of discrimination and the spread of non-Christian religions around the world. Nevertheless, it is possible to show that elements of religious liberty emerged prior to the twentieth century, suggesting that some 'discriminatory' effects of religious establishment were being recognized earlier. Disestablishment in Ireland and Wales removed some privileges for their respective members. For example, all Irish bishops lost their places in the House of Lords and Crown patronage, appointments and lay patronage also ceased. After disestablishment '[t]he Church of Ireland declined into the twentieth century, especially in southern Ireland, although it remained unified after the creation of the Irish Republic in 1922'.[43] This removal of state support for Anglicanism was mirrored in Wales where the effects of disestablishment were similar. For example, all Welsh bishops were removed from the House of Lords, and patronage was abolished. For religious liberty purposes disestablishment is symbolic: it demonstrated an attempt by the state to reduce the influence of a hitherto dominant

[39] F. Alicino, 'Constitutionalism as a Peaceful "Site" of Religious Struggles' (2010) 10 (1) Global Jurist 1, pp. 19 – 20.
[40] Lucas and Morris, in Morris, above n. 5, p. 113.
[41] Ahdar and Leigh, above n. 16, p. 303.
[42] *Ibid*., p. 131.
[43] Lucas and Morris, in Morris, above n. 5, p. 116.

faith in certain parts of the UK. Such developments reveal shifts in the religious power possessed by groups in these provinces.

Despite continued church establishment in England and Scotland, there was a removal of various discriminatory effects felt by other faiths which significantly enhanced their liberty. Of particular importance was the 1828 repeal of the *Test Act 1673* which afforded civil rights to Catholics, Nonconformists, and non-Christians. Even more notable were legislative attempts to extend religious liberty to other even more oppressed groups. The *Roman Catholic Relief Act 1829* provided long-awaited emancipation for Catholics in society: it facilitated greater toleration and reversed most of the discriminatory laws affecting them.[44] However, such emancipation was not immediately extended universally to other groups.[45] Indeed, significant religious liberty for Jews did not occur until the passing of the *Jewish Disabilities Act 1845* and the *Jewish Relief Act 1858* which, amongst other matters, removed some of the religious obstacles to office and employment that had existed due to requirements to take Christian oaths. The *Reform Act 1832* altered the religious composition of the House of Commons, 'making it a both a less Anglican institution and one more open to the arguments of non-Anglicans'.[46] The progression of religious liberty continued in subsequent statutes such as the *Marriage and Registration Acts of 1836*, whereby the state was permitted to conduct civil marriage and registration – formerly both functions of the Churches.[47] Other notable statutes included the *Religious Disabilities Act 1846*,[48] the *Burial Act 1880*,[49] the *Oaths Act 1888*,[50] and the *Local Government*

[44] Knights, above n. 3, p. 3.
[45] Morris, above n. 11, in Morris, above n. 5, p. 21.
[46] *Ibid*., p. 20.
[47] Excepting Quakers and Jews.
[48] This ended direct legal coercion of religion in England and Scotland and formally allowed for freedom of worship.
[49] This conferred a general right of burial in graveyards with or without a religious service. Prior to this, Anglican clergy were able to insist on conducting burial services on Church of England graveyards irrespective of the deceased's religious denomination. For recent controversies concerning rights to determine the treatment of a relation's remains, see the unsuccessful *Article 9* claims under the *European Convention on Human Rights 1950* (*ECHR*) in *R (on the application of Rudewicz) v. Secretary of State for Justice* [2012] EWCA Civ 499 and *Re: St Andrew* [2011] 2010/48 Ely Cons Ct. See also *Ghai v. Newcastle City Council* [2010] EWCA Civ 80 regarding a Hindu's unsuccessful *Article 9* claim to be cremated on an open-air funeral pyre.
[50] This permitted the substitution of religious declarations for non-religious affirmations in all oath-taking cases, including in Parliament. Oath-taking is now governed by the *Oaths Act 1978*. On domestic parliamentary oaths see the discussion in *McGuinness v. United Kingdom* [1999] ECtHR (No. 39511/98) where the applicant's claim that to take the prescribed oath of allegiance to the British monarchy would have offended his Northern Irish republican beliefs under *Article 10* was found to be manifestly ill-founded by the European Court of Human Rights (ECtHR). Contrast this with *Buscarini*

Acts of *1888* and *1894*.[51] The result of this legislative activity was that '[f]rom the middle years of the nineteenth century the experience of the Church of England was often of an increasing alienation from the nation and from the state apparatus through which many of its affairs were administered'.[52] The cumulative effect of these statutory provisions was a loosening of Anglicanism's tight grip on religious dominance in the UK leading to 'considerable liberty for all religious groups'[53] as the twentieth century beckoned.

6. FUTURE CHALLENGES

6.1 The church-state relationship

Recent ecclesiastical jurisprudence has further diluted the conception of establishment. For example, the House of Lords was required to distinguish the Church of England from the state in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* (*Aston Cantlow*).[54] It was decided that a parochial church council (PCC) was not a public authority; rather, it was a private religious organisation enforcing private acts. Lord Rodger stated that in the twenty-first century:

> the Church of England has important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position but they do not mean that it is a department of state ... [T]he PCC's general function is to carry out the religious mission of the Church in the parish, rather than to exercise any governmental power. Moreover, the PCC is not in any sense under the supervision of the state ... I consider that the PCC is not a core public authority ... .[55]

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v. San Marino (*Buscarini*) (1999) 30 EHRR 208 where the applicants had been elected to the Parliament of the Republic of San Marino and subsequently required to take the relevant religious oath. The ECtHR found *Article 9* had been violated as it included the freedom not to hold religious beliefs or practise a religion.

[51] These provisions weakened the Church of England's presence in civic life: the first introduced elected county councils and the second abolished vestry parochial administration and substituted secular elected parish councils.

[52] Smith, in Cane, Evans and Robinson, above n. 10, pp. 172 – 173.

[53] J. Rivers, *The Law of Organised Religions: between establishment and secularism* (Oxford: Oxford University Press, 2010), p. 19.

[54] [2004] 1 AC 546.

[55] At paras. 156 and 166.

This might beg the question whether, ultimately, 'all forms of establishment involve restrictions on religious liberty'.[56] *Aston Cantlow* highlights that 'we may be seeing a gradual change in the way that the judiciary perceives the Church of England and the Church of Scotland',[57] leading to:

> deeper implications for the Church's status in English law *as a church* - ... does that bring the Church's constitutional status into question more generally? ... does that have any implications for the Church of *Scotland*? Or does the Church of Scotland possess a particular legal status arising from the 1921 Act and the Articles Declaratory that the Church of England does not have?[58]

The decision in *Aston Cantlow* has led some to ask 'whether we believe that there is a continuing justification and rationale for the public provision of the services of religion as provided for by Establishment. The attitudes of the majority of the House of Lords in *Aston Cantlow* would seem to indicate a withdrawal of support from such provision'.[59] Indeed, '[i]t is undeniable that the time is now more ripe for a fundamental reassessment and remodelling of the relationship between the church and the state',[60] suggesting a move away from traditional notions of religious protection towards better facilitation of religious pluralism through a review of how religions and the state should best co-exist.

6.2 The limits of self-governance

In Scotland, the ability of the Church to self-govern is now restricted where claims invoke the jurisdiction of the civil courts. This was confirmed in *Percy v. Board of National Mission of the Church of Scotland* (*Percy*)[61] where the House of Lords decided that the appellant's sex discrimination case was indeed a matter of civil law. The majority[62] concluded that an employment contract for services between the appellant and the Church took 'the relationship outside the exclusive jurisdiction of the ecclesiastical courts so that the provisions of the Church of Scotland Act 1921 no

[56] Ahdar and Leigh, above n. 16, p. 138.
[57] MacLean, Cranmer, and Peterson, in Morris, above n. 5, p. 101.
[58] *Ibid*., p. 103 (original emphasis).
[59] Smith, in Cane, Evans and Robinson, above n. 10, p. 184.
[60] *Ibid*., p. 183.
[61] [2006] 2 AC 28.
[62] 4:1.

longer appl[ied]'.[63] Dissenting, Lord Hoffmann preferred to view the appellant as an 'office-holder' and not as an employee of the Church, although a point on which all of their Lordships agreed was that 'in matters of discrimination law the constitutional status of the Church of Scotland offers it no special protection'.[64] This demonstrates that 'both Church and State are trying to decide where to draw the boundary of Article IV'.[65] In future, it seems the courts may be willing to intervene in Church of England and Church of Scotland matters (alongside those of other religious bodies) where there is a sufficient distinction between internal religious issues on which the court is unable to rule, and religious issues arising from disputes which domestic law governs. Hill believes this is particularly likely in relation to the established churches given their 'unique' status and the judiciary's preparedness to enter into their affairs.[66] Religious affairs of faiths outside the established churches were considered in *New Testament of God v. The Rev. S. Stewart*[67] where the UK-based appellant was a member of a religion with headquarters located in the United States (US). The Employment Appeal Tribunal followed the majority in *Percy* demonstrating a willingness to intervene in legal matters affecting the operation of non-established religious bodies too. This begins to demonstrate equivalence between established *and* other religions, albeit in a limited area. It also highlights that, where internal church issues extend beyond the 'manifestation of private or collective spiritual beliefs which are not amenable to adjudication by the state',[68] the law is prepared to intervene whatever the religion.

6.3 The role of the courts in religious liberty claims

In the regulation of religious legal disputes, the domestic courts have indicated they will not necessarily shirk from pronouncing on the content of religion. Sandberg argues this is evidence of an increasing 'juridification of religion'.[69] In *R (on the*

[63] MacLean, Cranmer, and Peterson, in Morris, above n. 5, p. 97.
[64] *Ibid*., p. 98.
[65] *Ibid*., pp. 105 – 106.
[66] M. Hill, 'Judicial Approaches to Religious Disputes' in R. O'Dair and A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001), p. 419.
[67] [2007] IRLR 178.
[68] Hill, in O'Dair and Lewis, above n. 66, p. 415. See also M. Hill, Editorial (2010) 12 (3) Ecclesiastical Law Journal 263, pp. 264 – 265 and comments by Lord Nicholls in *Williamson* at para. 22.
[69] R. Sandberg, 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, p. 161, n. 32.

application of E) v. JFS Governing Body (*JFS*),[70] which concerned the potential discriminatory effect of a Jewish school's admissions policy, the issue of judicial approaches to intra-faith matters was addressed. Lord Hope contended that whilst 'it is not the business of the courts to intervene in matters of religion ... the divide is crossed when the parties to the dispute have deliberately left the sphere of matters spiritual over which the religious body has exclusive jurisdiction and engaged in matters that are regulated by the civil courts'.[71] Therefore on some occasions it will be unavoidable for the courts to interpose themselves in matters of substantive religion even thought they may not relish having to consider religious doctrinal matters alongside the legal question in issue[72] given the reluctance of the courts 'to adjudicate doctrinal disputes'[73] despite Parliamentary guidance.[74] There is also the danger of judicial 'majoritarianism' as a court's own experience of religion may impoverish analysis of legal determinations of issues such as religious manifestation or justification of interference with religious interests. In Western jurisdictions this may have implications for the liberty of minority faiths.[75]

The willingness of courts to intervene in purely religious matters in legal disputes clearly creates tension. It is argued that the courts 'should not enter into matters of religious doctrine at all'[76] and that 'where issues of a religious or doctrinal nature permeat[e] the pleadings in [a] case ... [the] matters raised [are] properly categorised as non-justiciable'.[77] For example, in *His Holiness Sant Baba Jeet Singh Ji Maharaj v. Eastern Media Group Limited and Singh*,[78] Eady J. reinforced the fact that 'doctrinal issues', 'regulation or governance or religious groups', and 'religious issues', 'do not readily lend themselves to the sort of resolution which is the normal function of a judicial tribunal. They may involve questions of faith or doctrinal

[70] [2009] UKSC 15.
[71] At paras. 157 – 158.
[72] For example, in *JFS* the UK Supreme Court declared it was uncomfortable at having to adjudicate on a religious dispute: per Lord Phillips at para. 8.
[73] A. McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 (1) Industrial Law Journal 1, p. 9. See also comments by Sandberg, above n. 69, pp. 177 – 178 and L. Vickers, 'Religious Discrimination in the Workplace: an emerging hierarchy?' (2010) 12 Ecclesiastical Law Journal 280, p. 285.
[74] In relation to domestic discrimination law see the *Equality Act 2010*: Explanatory Notes, p. 16.
[75] For references to judicial majoritarianism in relation to specific religions, for example Rastafarianism, see M. Gibson, 'Rastafari and Cannabis: framing a criminal law exemption' (2010) 12 Ecclesiastical Law Journal 324, pp. 326 – 327.
[76] Hill, Editorial, above n. 68, p. 264.
[77] *Ibid*., p. 264.
[78] [2010] EWHC 1294 (QB).

opinion which cannot be finally determined by the methodology regularly brought to bear on conflicts of factual and expert evidence'.[79] Nevertheless, uncertainty as to where the boundary lies between non-justiciable internal religious doctrine, as contrasted with religious issues invoking the law, is likely to continue because either 'judges feel more qualified adjudicating on issues concerning religions that they consider they are familiar with ... [o]r [because of] ... religious agnosticism becoming more apparent among the judiciary itself than was probably the case in the past'.[80]

A final matter involving the courts and religion concerns the legality of establishment itself. Religious neutrality was professed by Laws LJ in *McFarlane v. Relate Avon Ltd*[81] when he commented that, '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'.[82] Nevertheless, the validity of establishment remains accepted within limits. It will not automatically be considered a breach of any *ECHR* rights:[83]'[t]he argument that establishment amounts to a form of impermissible state preference of one religion over others or none does not gain much support from the Convention'.[84] Indeed, 'the existence or lack of an established church in a state is not of itself a violation of the ECHR'.[85] Indeed, the ECtHR has found that various features of establishment do not contravene *Article* 9, including state funding of both religions[86] and education,[87] often due to the fact that the *ECHR*'s own discrimination provision in *Article 14* does not cover such arrangements,[88] it being limited to anti-discrimination concerning the rights enshrined in the *ECHR* itself. However, the ECtHR has also been keen to outline that

[79] At para. 5.
[80] C. McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecclesiastical Law Journal 26, p. 30.
[81] [2010] EWCA Civ B1. See also chapter 6, section 2.1, and chapter 9, sections 8 – 10.
[82] At para. 17.
[83] *Darby v. Sweden* (1991) 13 EHRR 774.
[84] I. Leigh, 'Freedom of Religion: public/private, rights/wrongs', in M. Hill (ed.), *Religious Liberty and Human Rights* (Cardiff: University of Wales Press, 2002), p. 135.
[85] S. Knights, 'Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights,' in R. Grillo et al (eds.), *Legal Practice and Cultural Diversity* (Farnham: Ashgate, 2009), p. 288.
[86] For example, see *Iglesia Bautista (El Salvador) v. Spain* (1982) 72 Eur Comm'n HR Dec & Rep 256.
[87] For example, see *X & Y v. UK* (1982) 31 Eur Comm'n HR Dec & Rep 210; and *X v. UK* (1978) 14 Eur Comm'n HR Dec & Rep 179.
[88] C. Evans and C. Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) 3 Brigham Young University Law Review 699, p. 715.

there are limits on establishment.[89] This will be the case particularly with religious pluralism and the adoption of alternative legal systems for religious groups,[90] indicative of the fact that 'establishment of a religion must not have a profound effect on the political and legal system of a country'.[91]

7. CONCLUSION

In the 2001 UK Census,[92] although the number of people who identified themselves as Christian constituted 72 per cent of the population,[93] significant minorities identified themselves with other faiths. Islam, although still evidently a minority UK religion,[94] is the next largest religious group in the country. The expansion of both Islam and other minority faiths is indicative of a diversified religiosity in the UK. Indeed, hundreds of thousands of respondents in the 2001 Census identified themselves as belonging to either Hinduism,[95] Sikhism,[96] Judaism[97] or Buddhism[98] Other religious groups with which 159 thousand UK respondents identified included Spiritualists,[99] Pagans,[100] Jain,[101] Wicca,[102] Rastafarians,[103] Bahà'ì[104] and Zoastrians.[105] However, those who identified themselves as having no religion, which was interpreted as to include atheists and agnostics, constituted 16 per cent of the UK.[106] This group became the next most popular after Christians. Donald observes that 'certain trends are apparent: a decline in the numbers affiliated to historic churches, a rise in those stating that they have no religion and (especially in

[89] For an example of such a limit see the decision in *Buscarini*, above n. 50.
[90] See *Refah Partisi (The Welfare Party) v. Turkey* (2002) 35 EHRR 3.
[91] Evans and Thomas, above n. 88, p. 713.
[92] In 2001 the collection of information regarding religious identity was new to the Census in England, Scotland and Wales, although the subject had been included in previous Censuses in Northern Ireland. The results of the 2011 UK Census are currently awaited.
[93] 41 million respondents. See the Office for National Statistics: 'Focus On Religion, 2004 Summary Report' available at <http://www.ons.gov.uk/ons/rel/ethnicity/focus-on-religion/2004-edition/index.html>, accessed 10th August 2012.
[94] *Ibid*.: 1.6 million respondents – three per cent of the UK.
[95] *Ibid*.: 558,000 respondents – one per cent of the UK.
[96] *Ibid*.: 336 thousand respondents – under one per cent of the UK.
[97] *Ibid*.: 267 thousand respondents.
[98] *Ibid*.: 149 thousand respondents.
[99] *Ibid*.: 32 thousand respondents.
[100] *Ibid*.: 31 thousand respondents.
[101] *Ibid*.: 15 thousand respondents.
[102] *Ibid*.: 7 thousand respondents.
[103] *Ibid*.: 5 thousand respondents.
[104] *Ibid*.: 5 thousand respondents.
[105] *Ibid*.: 4 thousand respondents.
[106] *Ibid*.: 9 million respondents.

England) an increase in faiths carried by post-war and post-colonial immigration'.[107] The rich religious and non-religious landscape of the UK has encouraged others to consider the best mode of religious integration in the UK. Echoing the efforts made to accommodate Muslim religious practices, Poulter has commented that the post-1960s attempts to afford cultural pluralism (inclusive of religious difference) within limits[108] now represent 'current British policy'.[109] However, at the same time Poulter stresses that such limits assume necessary minimum standards and shared values.[110] Such research outlines the changing mode of UK integrationist policies over the latter half of the twentieth century. This reflects the fact that there exists a changing vision of religious liberty in the UK today, one that takes cognisance of 'significant changes in the nature of religious life in Britain, in the characteristic forms of religion, in civil religion and in religion's influence in different social arenas'.[111]

These developments have occurred against a backdrop of concern regarding establishment and the place of religion in the modern state. Debates on the established Churches' future embody a growing awkwardness with the nexus that establishment produces between the state and strands of Christianity. After centuries of establishment, the influence and spread of the two remaining established Churches is diminishing amongst an ever-more diverse collection of faiths: 'the time is now more than ripe for a fundamental reassessment and remodelling of the relationship between the church and state'.[112] Nevertheless, Oliva highlights that some minority religions are of the view that as long as the established faiths preside over a multi-faith society with sensitivity, tolerance, respect and non-interference, there should be no resentment of its special relationship with the British state.[113] Following on from this historical account of domestic religious liberty development, chapter two will trace some of the key normative theories supporting the creation of legal rules protecting religion.

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[107] A. Donald et al, *Equality and Human Rights Commission Research Report 84: religion or belief, equality and human rights in England and Wales*, p. 32. Available at: <http://www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf>, accessed 24th August 2012.
[108] S. Poulter, *Ethnicity, Law and Human Rights* (Oxford: Oxford University Press, 1999), p. 21.
[109] *Ibid*.
[110] *Ibid*., p. 22.
[111] L. Woodhead, 'Introduction', in L. Woodhead and R. Catto (eds.), *Religion and Change in Modern Britain* (Abingdon: Routledge, 2012), pp. 7 – 8.
[112] Smith, in Cane, Evans and Robinson, above n. 10, p. 183.
[113] Oliva, above n. 19, pp. 503 – 504.

CHAPTER 2: NORMATIVE PERSPECTIVES ON LAW AND RELIGION

1. INTRODUCTION

Having traced the historical origins of religious liberty in the United Kingdom (UK), the theoretical approaches underpinning modern legal protection of religion can now be explored. This will also include brief discussion of the legal definition(s) of religion;[1] detailed consideration of the ways in which the UK protects religion is reserved for chapter three.

The objective of this chapter is to ground contemporary law and religion in popular normative theories[2] of religious liberty. This is a preliminary exercise: full treatment of such contested theories is beyond the scope of this thesis. Instead, an overview of the relevant debates is offered. This enables the analysis which follows later to be located in the wide-ranging field of theoretical enquiry which asks: why legally protect religious interests in the first place?[3]

2. HUMAN DIGNITY

The concept of dignity is a popular justification for the protection of religious liberty and one that forms a cornerstone of liberal theory. Evans has submitted that this is linked to the view that religious truth should not be suppressed – as advocated at one stage by J. S. Mill.[4] It assumes, firstly, that religion intrinsically forms part of both the essence and nature of being human (an ontological claim) and, secondly, that it is appropriate, if not necessary, to affirm and recognise this on the basis of autonomy. In relation to the former, religion is 'closely related to an individual's concept of

[1] See comments made in section 2 of this chapter. The legal definition of religion is addressed more fully in chapter 3, sections 2.2 and 2.3.
[2] The focus will be on secular explanations rather than religious reasons.
[3] This position pre-supposes that religious liberty deserves distinct protection and cannot 'be adequately protected using ... [human] rights such as the right to privacy, the right to freedom of association and the right to freedom of expression. This is because it is arguable that freedom of religion is just a specialised sub-species of these other human rights and requires no additional protection': L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), pp. 26 – 27. Vickers rejects this argument: see pp. 27 – 28.
[4] C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), p. 27.

identity and self-respect, and the cost to the individual of renouncing religious affiliation should not be underestimated'.[5] In relation to the latter, religion is 'protected because it is a key aspect of personality and autonomy, based on personal choices about conceptions of the good'.[6] This amounts to a 'guarantee of diversity within liberal society according to which individuals and groups are free to pursue their own conceptions of the good, including religious ones'.[7]

As a theory of religious protection, human dignity has its ideological roots in human rights principles. Indeed, the United Nations *Universal Declaration of Human Rights 1948* (*UDHR*) declares that '[a]ll human beings are born free and equal in dignity and rights'.[8] Even more forcefully, '[t]he normative foundation of the entire edifice of modern human rights is the public doctrine of *inherent dignity*'.[9] Nevertheless, beyond this definition of human dignity there is little consensus on how best to arrive at a more robust conception of what dignity means.[10] In any case, reliance on human dignity does not mean that all interests stemming from 'conscience' are protectable: it is only those matters 'which feed into an individual's ability to make sense of the world, and through which they develop a sense of the good, that require protection. Thus a person's interest in being allowed to participate in, for example, country dancing because of its importance to them as a form of artistic expression will not require the same level of protection as a belief relating to the existence of a supreme being'.[11] This is the case particularly where dignity may be cited by two parties on either side of a clash, an inherent weakness indicative of the fact that 'dignity is often accused of being deployable by both sides to an argument'.[12] However, the concept

[5] L. Vickers, 'Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief' (2011) 31 Legal Studies 135, p. 138.
[6] *Ibid*.
[7] I. Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 Oxford Journal of Law and Religion 109, p. 111.
[8] *Article 1, UDHR*.
[9] T. Lindholm, 'Philosophical and Religious Justifications of Freedom of Religion or Belief' in T. Lindholm, W. C. Durham and B. Tahzib-Lie (eds.) *Facilitating Freedom Of Religion Or Belief: a deskbook* (Leiden: Martinus Nijhoff), p. 47 (original emphasis).
[10] See discussion by C. McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecclesiastical Law Journal 26, pp. 34 – 35.
[11] Vickers, above n. 3, p. 40.
[12] T. Khaitan, 'Dignity as an Expressive Norm: neither vacuous nor a panacea' (2012) 32 Oxford Journal of Legal Studies 1, p. 14.

of dignity does feed into the legal determination of what a religion is.[13] Vickers summarises this as:

> includ[ing] a belief that reality extends beyond that which is capable of perception by the senses. To be "religious" the belief system must also have some relation to man's nature and place in the universe and his relation to things supernatural: it must have something to say to adherents about their place and function in the world. Religious beliefs should require or encourage adherents to observe particular behavioural standards or codes of conduct, and may include specific practices having supernatural significance, such as rites of worship.[14]

Within the debate about affirmation of human dignity on the basis of autonomy, there is a realisation that equality also has a part to play. Whilst this may appear conceptually blurred it has been said that 'it situates it as part of a *broader* moral and political philosophy'.[15] Moreover, regarding the roles of autonomy and equality in contributing to an understanding of human dignity, '[e]ven if there is no agreement as to which is the foundational concept, they are deeply interlinked, and there is agreement that a commitment to providing protection for human rights can be based on the concepts of equality, dignity and autonomy'.[16] In relation to religion, the idea of equality connotes the view that all religions and religious individuals should be treated equally but also that they should be treated differently from other non-religious groups precisely because they are different. This difference between formal and substantive equality, respectively, means that 'a focus on dignity as part of our understanding of equality should lead to a broader concept of equality than one based purely on formal equality'.[17] However, the theory of human dignity and the linked themes of autonomy and equality do not presume that religion will transcend other interests; indeed, Vickers notes that they 'merely … demonstrate that religious interests are valid interests that need consideration alongside other interests that flow equally from a concern for human dignity and equality'.[18] It is perfectly conceivable that sometimes individuals' autonomy in reifying the self will lead to a clash between the dignity rights of religion as against those of another particular group or religion,

[13] In relation to both human rights and anti-discrimination law definitions of 'religion', respectively, see discussions in chapter 3, sections 2.2 and 2.3.
[14] Above n. 3, pp. 38 – 39.
[15] Evans, above n. 4, p. 32 (emphasis added).
[16] Vickers, above n. 3, p. 38.
[17] Vickers, above n. 5, p. 148.
[18] Above n. 3, p. 40.

meaning that ways around such problems must be found. It might be said that this presents a problem for human dignity as an explanation for affirming various interests, including those of religion. Lewis contends that this problem is reflected in religious liberty jurisprudence where there exists an 'inability to pin down quite why religious [liberty] is valued [and] the absence of a clearly defined and universally accepted rationale'.[19] There is not space here for a detailed excursus into the various ways religion could be defined as a basis for deriving a more sound normative approach to the issue of human dignity. Suffice it to say that it is a factor the courts still must grapple with at a legal level[20] bearing in mind, as Evans notes, that religious liberty 'is one important aspect of autonomy or individual dignity, but there are other important aspects of autonomy that sometimes conflict with religious [interests]'.[21] On this balance, McCrudden signals that 'many recent legislative interventions adopt ideas of proportionality when rights of interests conflict'.[22] Proportionality is revisited in detail when considering the utility of 'reasonable accommodation' as a form of religious 'exception' later in the thesis.[23]

3. TOLERATION

This presents a further important justification for protecting religion, as classically expounded by Locke.[24] Ironically, given the history of religious persecution by Christianity, Locke was at 'pains to emphasise the peculiarly Christian nature of toleration,'[25] this exposing for tolerant Christians 'an evident and embarrassing inconsistency between the content of their theory and their practice in propagating it'.[26] Nevertheless, whilst many interpretations of toleration have been suggested, particularly of the types suggested by figures such as Hobbes, Rousseau, Locke and J.S. Mill, it may be said – at risk of generalisation – that the concept simply permits

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[19] T. Lewis, 'What Not to Wear: religious rights, the European Court and the margin of appreciation' (2007) 56 International and Comparative Law Quarterly 396, p. 405.
[20] For example, see the clash between religious interests and issues of sexual orientation found in the cases discussed in chapter 9 when exploring the legal device of 'reasonable accommodation'.
[21] Above n. 4, p. 32.
[22] Above n. 16, p. 37.
[23] See Parts III, IV and V.
[24] J. Locke, 'Letter Concerning Toleration' (1685), in D. Wooton (ed.) *John Locke Political Writings* (London: Penguin, 1993).
[25] J. Waldron, 'Locke: toleration and the rationality of persecution', in S. Mendus (ed.), *Justifying Toleration* (Cambridge: Cambridge University Press, 1988), p. 62.
[26] *Ibid*.

the realisation of religious liberty, although disagreements exist as to the nature of that liberty.

When conduct is tolerated is it merely disapproved of or is it viewed as immoral? Assuming toleration must connote moral rejection, given that it 'presupposes that what one is tolerating is to some extent undesirable, improper, misguided, or wrong',[27] this raises the additional question, 'why should one accept that which one disapproves of if one has the power to stop it; more particularly, how can one morally justify permitting or even facilitating that which one morally disapproves of? One might tolerate something one simply found distasteful, but moral judgements are of a different order to things of matter and taste'.[28] Evidently, whilst this may indicate a moral inconsistency in tolerating, for example, religious interests where they are deemed immoral, to ignore religious interests on this basis would be equally problematic. For example, Locke's argument for toleration was influenced by his view that 'a false belief, even if it is objectively and demonstrably false, cannot be changed by a mere act of will on the part of its believer ... it is therefore irrational to threaten penalties against the believer no matter how convinced we are of the falsity of his beliefs'.[29] However, the fact that toleration in this form does not necessarily have to imply approval of religions or affirm their validity does indicate conceptual problems in its basis for protecting religious liberty. It follows that any form of toleration which stems from scepticism is conceptually weak; as a result some have argued for the state to affirm the intrinsic value of religions so that mainstream and minority groups can be better integrated into society. This has been called for by those who have submitted that '[a]ny coherent conception of [religious freedom] ... depends upon the premise that religious belief has special value and deserves special protection'.[30]

Of course, this presents a particular problem for secular states who 'could affirm the value of religions for their own sake, only at the expense of a schizophrenic disregard

[27] Evans, above n. 4, p. 22.
[28] A. Bradney, *Law and Faith in a Sceptical Age* (Abingdon: Routledge, 2009), p. 37.
[29] J. Waldron, in S. Mendus, above n. 25, p. 70.
[30] J. Webber, 'Understanding the Religion in Freedom of Religion', in P. Cane, C. Evans and Z. Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008), p. 26.

for the nature of its own foundation'.[31] In any event, affirmation of various religions by either a secular state or one with an established faith poses the problem of 'accommodating mutual respect across fundamental normative divides',[32] something which 'remains a live issue that needs to be candidly addressed'.[33] Even if it may be satisfactorily addressed, such a plurality of sets of incompatible premises, 'each of which may constitute internally well-grounded support for freedom of religion or belief, appears as a whole to be incoherent and hence not a reasonable public grounding'.[34]

These rather intractable problems aside, toleration may be a 'pragmatic'[35] justification for religious liberty although it lacks the ability of dignity and equality to better *validate* the intrinsic value of religion in people's lives. It also assumes a position of conflict and minority suppression before religion can be protected – when circumstances are such that religious adherents are not under threat of alienation from society this is too limited a basis for religious liberty. Moreover, Lewis suggests that a position of toleration does not automatically follow merely because something is disapproved of: rather, suppression could be the answer,[36] particularly if more pragmatic. These challenges underline some of the weaknesses of toleration.

4. NEUTRALITY

Another basis for explaining the importance of protecting religious interests is the concept of 'neutrality' which 'may be invoked in order to prevent the state from interfering in the internal affairs of religious communities'.[37] In further support of this Vickers argues:

> [g]iven the increasingly multi-cultural nature of modern Britain, it is strongly arguable that the state should remain neutral on religious issues. This remains the case, notwithstanding the fact that England has an established Church,

[31] Bradney, above n. 28, p. 44.
[32] Lindholm, in Lindholm, Durham and Tahzib-Lie, above n. 9, p. 23.
[33] *Ibid*.
[34] *Ibid*.
[35] Evans, above n. 4, p. 23.
[36] Lewis, above n. 19, p. 402.
[37] M. Evans and P. Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36 (3) Religion, State and Society 205, p. 205.

> and can be seen in the commitment of the Government to promote multi-faith dialogue, to introduce legislation to prohibit religious discrimination, and in its commitment to international human rights standards which protect religious freedom and freedom from religious discrimination.[38]

A state's claim to neutrality is 'reflective of a broad liberal proposition that the State should make no choices in terms of what should be the good in its citizen's lives, instead leaving that choice to the individuals concerned'.[39] In relation to religion, 'it should be neutral 'in the sense of not identifying itself with one particular religion or belief''.[40]

However, objections to a neutrality-based justification for religious liberty protection are strong, predominately because 'neutrality is an ambiguous term'[41] and 'a rather elusive notion'.[42] This ambiguity relates to the fact that a liberal democracy's commitment to neutrality in the guaranteeing of religious liberty alongside other rights must itself be founded upon a non-neutral assumption where 'the role of the state is to place restrictions and limitations upon what the scope of individual freedom is in the interests of the broader community'.[43] This has resulted in the concern that 'what liberalism sees as the necessity to be "reasonable" is not always seen by others as being an objective or value-free matter'.[44] Indeed, this view of neutrality is likely to be particularly supported by religious adherents as '[f]aith not reason is typically the language of religion'.[45] Neutrality is thus potentially an inherently problematic concept as the basis for the protection of religious interests – a problem which possibly exists whether viewed from either secular or religious perspectives. Moreover, the use of neutrality in justifying protection of religious liberty necessarily precludes the affirmation of any specific religion's value or worth – a factor which appears difficult to reconcile with the special status accorded some

[38] L. Vickers, 'Religion and Belief Discrimination and the Employment of Teachers in Faith Schools' (2009) 4 Religion and Human Rights 137, p. 144.
[39] Bradney, above n. 28, pp. 29 – 30.
[40] H. Bielefeldt, 'Freedom of Religion or Belief – a human right under pressure' (2012) 1 Oxford Journal of Law and Religion 15, p. 24.
[41] R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), p. 87.
[42] R. Audi, 'Natural Reason, Natural Rights, and Governmental Neutrality Towards Religion' (2009) 4 Religion and Human Rights 157, p. 172.
[43] Evans and Petkoff, above n. 37, p. 206.
[44] Bradney, above n. 28, p. 30
[45] *Ibid*. The ECtHR has also strongly favoured this concept of state neutrality in its jurisprudence and this development has been critiqued by Evans and Petkoff, above n. 37, pp. 205 – 206.

religions through the process of establishment or the granting of legal protection to certain mainstream or minority faiths. This involves saying there is something about religion that justifies treating it differently to other interests. Such differences in preferential treatment are problematic on neutrality grounds.

Further problems arise from '[t]he inability of political theory, and of liberal states, to remain neutral with regard to either conceptions of the good or to culture has been pointed out over and over again ... Neutrality suggests the possibility of a hands-off policy to culture, which is impossible'.[46] However, proponents of neutrality have forcefully argued that the existence of laws favouring or disfavouring particular religions and their practices does not prevent governments claiming neutrality as their founding principle: 'laws and policies must be justified in terms of public reasons. But public reasons are not supposed to be *value free* or *apolitical reasons*. On the contrary, the defenders of neutrality claim that public reasons represent moral values, albeit of a special kind, namely shared moral values'.[47] Indeed, neutrality as a concept is versatile enough for it to be relied upon in different ways by national and regional courts in developing separate strands of jurisprudence on religious interests.[48] Seemingly, this may mean that '[n]eutrality might, in some societies, result in enhancing religious affiliation and commitment and, in others, in reducing them'.[49] Nevertheless, others have taken a non-neutral perspective when arguing for the protection of religious rights[50] and many have offered completely alternative justifications for protecting freedom of religion as a human right.[51] Ultimately, the

[46] R. Gavison and N. Perez 'Days of Rest in Multicultural Societies: private, public, separate?' in Cane, Evans and Robinson (eds.), pp. 206 – 207.
[47] D. Meyerson, 'Why Religion Belongs In The Public Sphere', in Cane, Evans and Robinson, above n. 30, p. 58 (original emphases).
[48] Compare the case law of the US Supreme Court which takes a strict view on religious neutrality with that of the ECtHR which takes a relaxed attitude towards religious neutrality given that is must 'accommodate a variety of national church-state arrangements, including establishment': M. Movsesian, 'Crosses and Culture: state-sponsored religious displays in the US and Europe' (2012) 1 Oxford Journal of Law and Religion 1, p. 2.
[49] Audi, above n. 42, p. 172.
[50] For example, see T. Macklem, 'Faith as a Secular Value' (2000) 45 McGill Law Journal 1, who argues that a valuable moral and secular reason for religious liberty protection is its capability for contributing to the human wellbeing of religious people and that this is worthy of state protection. This aligns religious liberty with the valuing of human dignity as discussed above, section 2.
[51] For example, see G. Watt, 'Giving Unto Caesar: rationality, reciprocity and legal recognition of religion' in R. O'Dair and A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001), p. 45, who argues that neutrality is impossible. In its place, when justifying particular legal protection for religion, Watt submits that the recognition of a form of reciprocity between religion and the state is preferable and desirable. However, such reciprocity must be predicated on the 'rational capacity' of the religious claim.

problem with neutrality may be viewed as one of utopianism: 'it will always remain a "work in progress" within an unfinished societal learning process'.[52] On this basis it is argued by some that this limitation should simply be accepted; at the same time, because it is accepted it will be necessary that:

> members of minorities should have the possibility to demand, to a certain degree, personal adjustments when general legal provisions collide with their conscientious convictions. Such measures of 'reasonable accommodation', which often have been criticized as allegedly privileging minorities, in fact should be seen as an attempt to rectify situations of indirect discrimination … even in liberal democracies that are devoted to the principle of neutrality in questions of religion.[53]

This has implications for neutrality as a theoretical idea underscoring religious liberty. It may be argued that it weakens it conceptually, undermining the goal neutrality seeks to achieve. However, at the same time it may be better understood as an argument for simply helping to realize the idealistic and utopian objectives of neutrality at a pragmatic level. In any event, it provides a useful perspective on neutrality as a basis for protecting religious interests in the context of permitting reasonable accommodation – a form of religious protection analysed in detail later in the thesis.[54]

5. CONCLUSION

5.1 Plurality of justifications

The development of normative perspectives on the protection of religious liberty has been extensive. Whilst it is clear that such thinking has resulted in arguments for guaranteeing religious interests being based, not on religious views themselves of rights protection, but in more secular logic where the case is 'better made using reasoning which is not dependent on religious belief',[55] it is also clear that no

[52] Bielefeldt, above n. 40, p. 24.
[53] *Ibid*., pp. 24 – 25.
[54] See Parts III, IV and V.
[55] Vickers, above n. 3, p. 33.

particular theory or philosophy of religious liberty protection dominates normative discourse.

At the domestic level there is increasing evidence of an 'obligation to be tolerant – almost, one could say, neutral – as between different Christian confessions, and more generally toward the other Abrahamic religious [*sic*] and toward religious groups at large'.[56] Given the competing popularity of the human dignity view this means that problems are likely to persist in identifying a coherent and subjectively appropriate philosophical rationale for the right to religious liberty.[57] Moreover, theoretical secular justifications have 'developed pragmatically, not programmatically, though they coincide generally with those justifications implicit in instruments of international law'.[58] This pragmatism evidently finds itself utilised in the academic literature; meanwhile, various judicial decisions at the domestic level indicate that 'there are at least some clear statements about the importance of pluralism, tolerance and fair treatment of minorities as fundamental applicable principles in a democratic nation'.[59] These include comments by Silber J. that tolerance is important as to the religious rites and beliefs of other races and other religions[60] and remarks by Arden LJ to the effect that '[p]luralism involves the recognition that different groups in society may have different traditions, practices and attitudes and from that value tolerance must inevitably flow. Tolerance involves respect for the different traditions, practices and attitudes of different groups. In turn, the court must pay appropriate regard to these differences'.[61] Knights has highlighted that such judicial attitudes have also been outlined at Strasbourg – it is necessary to recognize 'the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purposes of safeguarding the interests of minorities themselves but to preserve a cultural diversity of value to the whole community'.[62]

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[56] M. Freedland and L. Vickers 'Religious Expression in the Workplace in the United Kingdom' (2009) 30 Comparative Labor Law and Policy Journal 597, p. 599.
[57] Lewis, above n. 19, p. 405.
[58] N. Doe and A. Jeremy, 'Justifications for Religious Autonomy' in O'Dair and Lewis, above n. 51, p. 441.
[59] S. Knights, 'Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights', in R. Grillo et al (eds.), *Legal Practice and Cultural Diversity* (Farnham: Ashgate, 2009), p. 287.
[60] *R (on the application of Watkins Singh) v. The Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), at para. 84.
[61] *Khan v. Khan* [2007] EWCA Civ 399, at para. 46.
[62] *DH v. Czech Republic* [2008] ECHR 922, at para. 181.

Such attempts at justification demonstrate how thoughts and attitudes have progressed during the twentieth and twenty-first centuries, leading to greater legal acknowledgement of such protection.

5.2 Application of justifications across law and religion

The justifications explored above affirm a range of bases on which religious interests could be protected; this chapter's aim has to been to signpost some of the more prominent theoretical underpinnings of protecting religious liberty. Whilst these normative principles are perhaps most closely linked with protecting religion at the human rights level they are increasingly viewed as appropriate reasons for protecting religion via other legal means. For example, in relation to human dignity's relationship with law and religion, Vickers has remarked that '[f]ull and meaningful enjoyment of autonomy, equality and dignity … requires protection for *both* freedom from religious discrimination and freedom of religion',[63] signifying how dignity as a guiding concept is of relevance to arguments for protecting law in different ways. She affirms this elsewhere stating that 'both [religious discrimination and freedom of religion are] said to be based fundamentally on the same concepts, a respect for individual's essential autonomy, dignity and equality'.[64] Moon also notes the increasing dignity discourse present in discrimination law.[65] Related to this, equality can be seen as a critical basis for prohibiting forms of discrimination on the grounds of specific protected characteristics. This has been a relatively recent development in the latter half of the twentieth century[66] after the emergence of philosophical and theoretical arguments for recognizing religious human rights freedoms. Equality as a founding principle of discrimination law may be said to have developed at common law,[67] although 'it is not regarded as so embedded in our social and political norms as to yet require the law's unwavering support'.[68] In sum, the various explanations in this chapter place modern religious liberty in useful theoretical and normative

[63] Vickers, above n. 3, p. 43 (emphasis added).
[64] *Ibid*., p. 226.
[65] G. Moon, 'Dignity Discourse in Discrimination Law: a better route to equality?' (2006) 6 European Human Rights Law Review 610, pp. 625 – 626.
[66] 'For most practical purposes, anti-discrimination law was limited to race and sex discrimination, but the closing years of the twentieth century saw the addition of other grounds'. J. Rivers, 'Law, Religion and Gender Equality' (2007) 9 Ecclesiastical Law Journal 24, p. 26.
[67] K. Monaghan, *Equality Law* (Oxford: Oxford University Press, 2007), p. 31.
[68] *Ibid*., p. 33.

context for the purposes of the rest of the thesis, with human dignity (and the linked themes of equality and autonomy) emerging as a popular normative paradigm. This will be recalled as this thesis contemplates protection of religion in the next chapter and through parts III and V.

CHAPTER 3: LEGAL PROTECTION OF RELIGION AND THE USE OF RELIGIOUS EXCEPTIONS

1. INTRODUCTION

The normative perspectives surveyed in chapter two provide a useful basis from which to investigate the range of United Kingdom (UK) legal provisions protecting religious liberty in the twenty-first century. This body of 'religion law'[1] guarantees religious interests and is so called because 'of the emergence of religion law as a legal sub-discipline. An argument can now be made that these laws and their respective case laws are best seen as part of something called religion law'.[2]

Such modern religious liberty protection is afforded by legal mechanisms through which the religious claims of individuals may be filtered: these claims are predominately channelled through criminal, human rights and anti-discrimination laws. Whilst 'religion law' has been understood to comprise both human rights and anti-discrimination laws as its two 'pillars,'[3] criminal law is also included in the discussion which follows to acknowledge recent attempts to criminalise certain conduct capable of harming religion. The first half of this chapter will detail these three mechanisms, focusing chiefly on anti-discrimination law given its relevance to the central theme of this thesis: investigation of legal mechanisms which provide enhanced special protection for religion. The second half of this chapter introduces and critiques the concept of the legal exception, the first example of special protection for religion which this thesis investigates in Part II.

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[1] A term coined by R. Sandberg: *Law and Religion* (Cambridge: Cambridge University Press, 2011), p. 117.
[2] *Ibid*.
[3] *Ibid*. See also R. Sandberg, 'A Uniform Approach to Religious Discrimination? The Position of Teachers and Other School Staff in the UK', in M. Hunter-Henin (ed.) *Law, Religious Freedoms and Education in Europe* (Farnham: Ashgate, 2011), p. 332.

2. THE MAIN PILLARS OF DOMESTIC RELIGION LAW

2.1 Criminal law

The criminal law has been used to provide some limited protection to religion.[4] Such attempts have been made successfully via the *Protection from Harassment Act 1997*.[5] More specific examples are the *Racial and Religious Hatred Act 2006* which has amended the *Public Order Act 1986* so that various acts intended to provoke religious hatred are prohibited.[6] This aligns religious hatred protection with that for race (although this already[7] covered Sikhs and Jews).[8] Similarly, other relatively new statutory crimes protecting religion exist in the form of religiously aggravated offences under the *Anti-terrorism, Crime and Security Act 2001*. This amends[9] the relevant part of the *Crime and Disorder Act 1998*[10] so as to include these types of offences alongside racially aggravated provisions.

2.2 Human rights law

The *Human Rights Act 1998* (*HRA*) incorporates[11] the *European Convention on Human Rights 1950* (*ECHR*) and its body of rights into domestic law across the UK.

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[4] However, recall from chapter 1 n. 25, that the crime of blasphemy protecting Christian beliefs has been repealed.

[5] For example, see *Christ of Latter Day Saints v. Price* [2004] EWHC Admin 325 and *Singh v. Bhaker* [2006] Fam Law 1026 where injunctions were awarded against, respectively, an individual who continually harassed members of the Mormon Church and a Sikh mother-in-law for mistreating her daughter-in-law subsequent to an arranged marriage.

[6] The main offences are contained in *Part 3A, ss. 29B – G*. These are acts intended to stir up religious hatred relating to the use of words or behaviour or display of written material (*s. 29B*), publishing or distributing written material (*s. 29C*), public performance of a play (*s. 29D*), distributing, showing or playing a recording (*s. 29E*) or broadcasting or including a programme in a programme service (*s. 29F*). Possessing inflammatory material is also proscribed (*s. 29G*). Notably, *s. 29J* states that nothing in *Part 3A* shall restrict the protection of freedom of expression.

[7] See *Mandla v. Dowell Lee* [1983] 2 AC 548 where Lord Fraser set out criteria for determining a racial group: p. 562. See also *R (on the application of E) v. JFS Governing Body* [2009] UKSC 15 at para. 41, per Lord Phillips.

[8] This extension of hatred laws to include religion was not without controversy: for discussion and suggestions for wider reading see Sandberg, above n. 1, pp. 141 – 144.

[9] *S. 39.*

[10] *S. 28.*

[11] The *ECHR* rights are technically not justiciable in domestic courts. However, at the vertical level (as between private litigants and public authorities) such authorities being defined in *ss. 6(3)* and *(5)* of the *HRA*, public authorities must not act in a way which is incompatible with an *ECHR* right as outlined in *s. 6(1)* of the *HRA*. Moreover, at the horizontal level (as between two parties of private litigants) UK legislation in on-going proceedings must be interpreted consistently with the *ECHR* rights as provided for in *s. 3* of the *HRA*.

These rights include the free-standing guarantee under *Article 9*[12] of freedom of thought, conscience and religion, along with an anti-discrimination provision in *Article 14*,[13] which must be claimed in conjunction with an *ECHR* right. Moreover, included as a result of 'religious lobbying'[14] and indicative of Parliament's willingness 'to give preferential treatment to religious groups',[15] *s. 13(1)* of the *HRA* provides that '[i]f a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right'.

To trigger *Article 9* there must initially be evidence of a religion or belief. Regarding the former, '[t]he definition of religion is rarely used as a filtering device'[16]; indeed, others have said that 'at times cases have been disposed of on other grounds, without addressing in depth whether the belief system in question was "religious"'.[17] On this basis, a range of claims to have been considered in Strasbourg include scientology,[18] pacifism[19] and druidism.[20] 'Belief' is defined to mean something which 'denotes views that attain a certain level of cogency, seriousness, cohesion and importance',[21] and this relates to religious and non-religious beliefs.[22] Thus, because Strasbourg has 'given little consideration to creating a formal definition of religion or belief, beyond

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[12] *(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, and 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 for the protection of the rights and freedoms of others.

[13] The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[14] R. Sandberg and N. Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 Cambridge Law Journal 302, p. 303.

[15] *Ibid*.

[16] Sandberg, above n. 1, p. 47.

[17] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 14.

[18] *X and Church of Scientology v. Sweden* (1978) 16 DR 68.

[19] *Arrowsmith v. United Kingdom* (1978) 19 D&R 5.

[20] *Chappell v. United Kingdom* (1987) 53 DR 241.

[21] *Campbell and Cosans v. United Kingdom* (1982) 4 EHRR 293 at para. 36.

[22] It was said by Lord Nicholls at para. 24 in *R v Secretary of State for Education and Employment, ex p Williamson* [2005] UKHL 15 that non-religious beliefs 'must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious belief'.

the requirement of some vaguely-defined notion of coherence',[23] there is a generous approach to these initial definitional matters in *Article 9* cases. This allows claims to be filtered through the other tests contained across *Article 9(1)* and *(2)*: specifically manifestation of, and interference with, religion under the former, and justification for interference (proportionality) under the latter.[24]

2.3 Anti-discrimination law

Discrimination on grounds of religion or belief is now also proscribed in the UK.[25] This will be discussed in detail[26] prior to the focus on extra-special protection of religion in anti-discrimination law which take place across Parts II to V. Discussion will be centred on the range of anti-discrimination law existing in Great Britain due to its immediate relevance and wider area of application.[27] As Vickers notes, 'the protection in Northern Ireland is very similar'[28] although 'the historical and political context of the [anti-discrimination] protection is peculiar to Northern Ireland, and so this experience is not always of direct relevance to the rest of the UK'.[29]

2.3.1 Initial efforts to prohibit religious discrimination

Until recently[30] there existed separate provisions dealing with religious discrimination in, amongst other areas, employment[31] and the provision of goods,

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[23] C. Evans, 'Religious Freedom in European Human Rights Law: the search for a guiding conception' in M. Janis and C. Evans (eds.), *Religion and International Law* (Leiden: Martinus Nijhoff, 2004), p. 390.

[24] Detailed debates in the field of *Article 9* concerning the distinctions between religion/belief, beliefs held/beliefs manifested, individual manifestation/group manifestation, and public manifestation/private manifestation, are beyond the scope of this chapter.

[25] There is separate legislation outlawing discrimination in Northern Ireland on the grounds of religious belief or political opinion in, amongst others, the fields of employment and the provision of goods, facilities and services. See the *Fair Employment and Treatment (Northern Ireland) Order* 1998 (SI 1998/3162) as amended by the *Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003* (SI 2003/520).

[26] Attention will be directed towards direct and indirect forms of discrimination given their relevance to the case study rather than associated forms of discrimination such as victimisation and harassment.

[27] Vickers, above n. 17, also takes this approach to analysis of UK laws on religious discrimination (p. 121), as does P. Roberts, 'Religion and Discrimination: balancing interests within the anti-discrimination framework', in N. Doe and R. Sandberg (eds.) *Law and Religion: New Horizons* (Leuven: Peeters, 2010), p. 71.

[28] Vickers, above n. 17, p. 121.

[29] *Ibid*., p. 121, n. 4.

[30] 1st October 2010.

facilities and services[32]. Both of these provisions conceptualised discrimination as capable of being both direct[33] and indirect[34] (the definitions of which are considered briefly below in the context of the updated UK anti-discrimination law[35]). These measures were necessitated by the UK's membership of the European Union (EU) which requires member states to protect against forms of discrimination including on grounds of religion or belief. The relevant EU initiative relies on a legal basis granted in the *Treaty of Amsterdam* and now found in *Article 19* of the *Treaty on the Functioning of the European Union*.[36] This provision affords the EU considerable scope to take steps to eliminate discrimination based on sex, racial or ethnic origin, disability, age, sexual orientation and religion or belief. In 2000 this resulted in Directive 2000/78/EC[37] which established a general framework for equal treatment in employment and occupation relating to religion or belief and accompanying protected characteristics – excepting sex[38] and racial or ethnic origin[39] – which all member states were required to implement.

Outside the employment context the EU does not currently require member states to provide protection against discrimination on, amongst other grounds (excluding sex and race/ethnicity), religion or belief. It has been said this 'perhaps indicat[es] a lack of consensus at EU level about the range of areas where religion ought to be a protected category'.[40]However, a new draft Equal Treatment Directive has been proposed which would remedy this deficiency. Whilst this is to be welcomed, the protection guarantees currently required by the EU have created an anti-

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[31] *Employment Equality (Religion or Belief) Regulations 2003* (*RB Regs 2003*), (SI 2003/1660) *Part II*.
[32] *Equality Act 2006* (*EqA 2006*), *Part II, ss. 44 – 55*.
[33] *RB Regs 2003*, *Regulation 3(1)(a)*; *EqA 2006, s. 45(1)*.
[34] *RB Regs 2003*, *Regulation 3(1)(b)*; *EqA 2006, s. 45(3)*.
[35] See below, section 2.3.2.
[36] Previously *Article 13(1)* of the *Treaty of Amsterdam 1997* as amended by the *Treaty of Lisbon 2007*.
[37] Employment Equality Directive, 27 November 2000, [2000] OJ L303/16.
[38] See Directive 2002/73/EC of 5th October 2002 [2002] OJ L269, amending Directive 76/207/EEC (Equal Treatment Directive) which prohibits sex discrimination in employment and vocational training. Also, see Directive 2004/113/EC of 13 December 2004, [2000] OJ L373/37, implementing the principle of equal treatment between men and women in the access and supply of goods and services.
[39] The anti-discrimination power granted to the EU originally by the *Treaty of Amsterdam* also resulted in Directive 2000/43/EC of 29th June 2000, [2000] OJ L180/22. This implemented the principle of equal treatment based on race or ethnicity in relation to employment and training together with a wider range of contexts such as access to goods and services.
[40] P. Shah, 'Religion in a Super-Diverse Legal Environment: thoughts on the British scene', in R. Mehdi et al (eds.) *Law and Religion in Multicultural Societies* (Copenhagen: DJØF Publishing, 2008), p. 74.

discrimination imbalance between the higher level of protection accorded to both sex and race/ethnicity and the lower level of protection accorded the other identified characteristics, including religion and belief. As noted, the UK has already taken steps to enact such protection outside employment for religion or belief, in particular within the area of goods and services provision.

Express religious exceptions within anti-discrimination law have also developed. Once again, until recently these were contained in various separate pieces of domestic anti-discrimination legislation.[41] Additionally, the *Equality Act 2006* (*EqA 2006*) established the Equality and Human Rights Commission (EHCR)[42] 'bringing together the three existing equalities areas (gender, race and disability) and adding responsibilities for religion or belief, sexual orientation and age. The EHRC is also tasked with responsibility for 'good relations'.[43]

Early domestic attempts to tackle religious discrimination were welcomed. For example, 'there was a perception, particularly amongst the Muslim community, that existing discrimination law was unfair because Jews and Sikhs were already protected under the Race Relations Act 1976',[44] highlighting the important contribution made by new anti-discrimination provisions in advancing protection for religious groups and particularly religious minorities. To this extent, 'the formal and substantive position has changed very greatly in recent years',[45] although some have lamented the incremental rate at which domestic anti-discrimination provisions for religion or belief progressed, there being an impression of 'a piecemeal development'.[46] Moreover, the disparity in protection regarding employment as compared with goods and services provision between 2003 and 2006 stood in contrast to, for example, protection in these areas which existed under the *Race*

[41] For detailed discussion of these exceptions and provisions, see chapters 4 and 5.
[42] *S. 1*.
[43] L. Woodhead and R. Catto, '"Religion or Belief": identifying issues and priorities', Equality and Human Rights Commission 2009, p. 4.
[44] N. Addison, *Religious Discrimination and Hatred Law* (Abingdon: Routledge, 2007), p. 27.
[45] M. Freedland and L. Vickers 'Religious Expression in the Workplace in the United Kingdom' (2009) 30 Comparative Labor Law and Policy Journal 597, p. 598.
[46] R. Sandberg, 'To Equality and Beyond: religious discrimination and the Equality Act 2006' (2006) 8 Ecclesiastical Law Journal 470, p. 470.

Relations Act 1976[47], the *Sex Discrimination Act 1975*[48], and the *Disability Discrimination Act 1995*.[49]

2.3.2 Religious discrimination and the Equality Act 2010

The myriad discrimination provisions which existed at the domestic level presented an unsatisfactory state of affairs. Various commentators criticised this with McColgan commenting that '[d]omestic provisions on discrimination are complex and … lacking in coherence or consistency. Piecemeal reform over the years has resulted in a tangle of acts and regulations whose variety owes little to principle and much to happenstance'.[50] Further, Connolly noted that '[t]he bewildering amount of legislation and anomalies ... have inevitably led to the call for a single equality act. In 2000, it was estimated that there were at least 30 relevant Acts, 38 statutory instruments, 11 codes of practice, and 12 EC Directives and Recommendations directly relevant to discrimination'.[51] Ultimately, neither McColgan nor Connolly were particularly in favour of a wholly streamlined and straight-jacketed single equality act. Indeed, McColgan has subsequently argued against a 'one size fits all' approach to discrimination protection for the various protectable characteristics, specifically in relation to religion and belief where there may be arguments proposed for 'attenuating' the current protection on this ground in some of the various discrimination contexts.[52] Connolly also warned against a single equality act, submitting that its existence 'assumes that equality is the best vehicle to tackle particular social ills, which are many and varied ... [T]he symmetrical nature of the equality principle makes it an inadequate model in the areas of religion, disability, pregnancy, sexual harassment and the historical results of discrimination ... [R]eform may be better accomplished with dedicated laws tailored to their respective goals'.[53]

Nevertheless, as a result of the legislative mire and increasing calls for domestic discrimination laws to be simplified, the UK government passed the *Equality Act*

[47] See *ss. 4* and *20*, respectively.
[48] See *ss. 6* and *29*, respectively.
[49] See *ss. 4* and *19*, respectively.
[50] A. McColgan, *Discrimination Law: text, cases and materials* (Oxford: Hart, 2005), p. 9.
[51] M. Connolly, *Discrimination Law* (London: Sweet & Maxwell, 1st edition, 2006), pp. 35 – 36.
[52] A. McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 Industrial Law Journal 1, p. 1.
[53] Connolly, above n. 51, p. 36.

2010 (*EqA 2010*) which now brings together all strands of anti-discrimination guarantees into one single document with the objective, according to the Act's Explanatory Notes, being 'to harmonise discrimination law and to strengthen the law to support progress on equality'.[54]

Under the *EqA 2010* religion and belief join age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation as a 'protected characteristic'[55] for the purposes of anti-discrimination law. Discrimination in relation to religion or belief is conceptualised as being either direct[56] or indirect.[57] Direct discrimination occurs where A treats B less favourably than A treats or would treat others because of B's religion or belief and such discrimination cannot be justified – there is no defence in the *EqA 2010*. In relation to both the *RB Regs 2003* and the *EqA 2006*, Sandberg has noted that 'the 2010 Act replaces the words "on grounds of" with "because of" ... the change in wording may have the effect of broadening the definition'.[58] Indirect discrimination takes place where A applies a provision, criterion or practice (PCP) to B which is discriminatory in relation to B's religion or belief. A PCP will be discriminatory where i) it applies to persons with whom B does not share a religion or belief; ii) it puts, or would put, persons with whom B shares a religion or belief at a particular disadvantage when compared with others; iii) it puts, or would put, B at that disadvantage; and iv) A cannot show it to be a proportionate means of achieving a legitimate aim.[59] The need for a comparator in anti-discrimination law reveals how these claim routes make 'it easier to accommodate claims based on collective practice than those based on individual conscience'.[60] The critical difference between direct and indirect discrimination is that the latter can be justified even if a disadvantage can be shown: the original legitimate aim behind the PCP must be proportionate in achieving its objective. This creates a fine balancing act given that 'in the legal context ...

[54] *EqA 2010*: Explanatory Notes, p. 3.
[55] *S. 4*.
[56] *S. 13*.
[57] *S. 19*.
[58] Sandberg, above n. 1, p. 104 – 105.
[59] The test for indirect discrimination in religious discrimination appears unchanged from those tests contained in the *RB Regs 2003* and the *EqA 2006*.
[60] J. Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecclesiastical Law Journal 371, p. 390.

mathematical precision is impossible'.[61] This reference to proportionality is of significance given that it acts is a filtering device. It is explored in relation to domestic cases of indirect religious discrimination in chapters nine to eleven when discussing the factors used to determine justification and whether a model of reasonable accommodation would afford a wider interpretation of proportionality.

The prohibition on religious discrimination exists in, amongst other areas, employment[62] and the provision of services.[63] 'Provision of services' is defined to include provision of goods and facilities.[64] Within the definition of 'religion and belief' under *s. 10* of the *EqA 2010*, a reference to religion includes a reference to a lack of religion and a reference to belief includes a reference to a lack of belief. [65] 'Belief' is defined to mean any religious or philosophical belief. Whilst the *EqA 2010*'s Explanatory Notes make it clear that the law will treat as a religion those faiths which have a 'clear structure and belief system'[66] (applicable also to denominations within a religion), 'philosophical belief' is defined more fully to be 'a belief genuinely held that is not an opinion or viewpoint based on the present state of information available, that is to a weighty and substantial aspect of human life and behaviour, that attains a certain level of cogency, seriousness, cohesion and importance, that is worthy of respect in a democratic society, that is compatible with human dignity and that does not conflict with the fundamental right of others'.[67]

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[61] Vickers, above n. 17, p. 54.
[62] *S. 39*.
[63] *S. 29*.
[64] *S. 31(2)*; *EqA 2010*: Explanatory Notes, p. 30.
[65] Other discrimination strands have been also defined symmetrically. For example, sexual orientation discrimination protects both homosexual and heterosexual individuals: see *English v. Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421, per Sedley LJ at paras 38 – 39. Disability discrimination continues to be non-symmetrical under the *EqA 2010* so as to only protect disabled and not able-bodied individuals. Within the Act's definition of disability in *s. 6*, 'a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability' (*s. 6(3)(a)*).
[66] See *EqA 2010*: Explanatory Notes, p. 16
[67] *Ibid*. This was reproduced from *Grainger plc v. Nicholson* [2010] IRLR 4 (*Grainger*), per Burton J. at para. 24. The Explanatory Notes also advise that humanism and atheism would be beliefs for the purposes of *s. 10* whilst adherence to a particular football team would not: p. 16. Much media attention has also been paid to 'Jediism' which also does not satisfy the definition of religion in the *EqA 2010*: see various reports, for example: <http://www.guardian.co.uk/commentisfree/belief/2010/mar/18/jedis-religious-rights-star-wars>, accessed 13th August 2012. 'Philosophical belief' was considered to include 'environmental beliefs' by Burton J. in *Grainger*: '[t]he belief must be of a similar cogency or status to a religious belief' (at para. 26). Burton J. also highlighted the relevance of the ECHR jurisprudence on what counts as a 'philosophical belief': para 27. *Grainger* may be criticised on the grounds that environmental beliefs stem from scientific research (the present state of information available) and not something

The *EqA 2010* came into force on 1st October 2010[68] and deals with acts of discrimination occurring after this date. Previous domestic laws concerning both anti-discrimination on grounds of religion or belief and express religious exceptions are now repealed.[69] Litigation concerning discriminatory acts which occurred wholly before 1st October 2010 will proceed under the relevant repealed legislation[70] whilst continuing acts of discrimination occurring before and after 1st October 2010 will be litigated under the *EqA 2010*.[71]

2.4 Cumulative effect of religion law

The existence of the different models of protection confirms that '[t]he use of human rights law to deal with disputes concerning religion is now being supplemented by the use of the new equalities legislation relating to religion'.[72] It embodies a broadening of the UK's conceptualisation of religious liberty in the late twentieth century and post-2000 era. The extension of religious protection from human rights norms to the spheres of criminal and – in particular anti-discrimination laws – represents a concerted attempt to enhance the scope of domestic religious liberty guarantees. Meanwhile, *s. 13* of the *HRA* indicates recognition of organisational rights although this does not affect protection for individuals under the criminal, human rights and anti-discrimination provisions.

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philosophical in definition. Recent beliefs to have been upheld include a belief in public service broadcasting's capacity to promote cultural interchange and social cohesion – arguably based upon social science research (and, thereby, the present state of information available): *Maistry v. British Broadcasting Corporation* [2011] EqLR 549; a belief that foxhunting is wrong: *Hashman v. Milton Park (Dorset) Ltd* [2011] EqLR 426: and a belief in spiritualism, life after death and psychic powers: *Greater Manchester Police Authority v. Power* [2009] EAT 0434/09/DA. 'Philosophical belief' does not include political beliefs (*Kelly v. Unison* (2009) ET 2203854/08), a belief in a global conspiracy theory to establish a new world order (*Farrell v. South Yorkshire Police Authority* [2011] EqLR 934), or the belief in wearing a poppy to show respect to servicemen: *Lisk v Shield Guardian Co Ltd* [2011] EqLR 1290.

[68] *Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010/2317, article 2*.

[69] *Ibid*., *schedule 2*.

[70] *Ibid*., *article 14*.

[71] *Ibid*., *article 7*.

[72] Woodhead and Catto, above n. 43, p. iv.

3. THE PHENOMENON OF RELIGIOUS EXCEPTIONS

Alongside the core religion law, recent decades have also witnessed the gradual development of religious exceptions. These complement the 'pillars' of religion law identified above in extending guarantees of religious liberty. Such exceptions are expressly granted by the legislature and provide another form of legal accommodation for religion: they exist in specific circumstances affording exoneration from the operation of a particular rule.

A number of these exceptions exist to both criminal and civil laws.[73] For example, under the *Criminal Justice Act 1988* (*CJA*), *s. 139* of which deals with offences of possessing articles with blades or points in public places, those who carry a blade or point in public will be excepted from criminal law sanctions if such items are carried for, amongst other, religious reasons.[74] School children are granted a similar exception if they wish to wear a similar article whilst at school.[75] Whilst these exceptions were drafted with the Sikh practice of carrying the kirpan in mind they apply generally to all religions. Other religious exceptions in the criminal law which specifically benefit Sikhs include the exception from legislation requiring the wearing of motorcycle crash helmets[76] (so that turbans may be worn); a criminal law exception for Rastafarians so that they may be excused from laws prohibiting possession of drugs has also been considered.[77] Outside the criminal law, specific exceptions for Sikhs have also been found in the *Horses (Protective Headgear for Young Riders) Regulations 1992*, which provide that Sikh children are not required to wear protective headgear when riding horses,[78] and the *Employment Act 1989* where there is an exception for Sikhs excusing them from wearing safety helmets on construction sites.[79] Special rules on animal slaughter also exist for Muslims and Jews.[80]

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[73] As these laws apply in England and Wales.
[74] *S. 139(5)(b)*.
[75] *CJA, s. 139A(4)(c)*.
[76] *Road Traffic Act 1988, s. 16(2)*.
[77] M. Gibson, 'Rastafari and Cannabis: framing a criminal law exemption' (2010) 12 Ecclesiastical Law Journal 324, pp. 337 – 344.
[78] SI 1992/1201, *Regulation 3(1)*.
[79] See *ss. 11(1) – (2)*. The legitimacy of this exception is affirmed by the *EqA 2010, Schedule 26, para. 5*.
[80] See the *Welfare of Animals (Slaughter or Killing) Regulations 1995*, (SI 1995/731) *Regulation 2*.

Whilst these exceptions demonstrate the granting of privileges to individuals of faith, the exceptions themselves are haphazard. Sandberg has said that '[i]t is difficult to say that such exceptions constituted a new phase of religious [liberty]. The exceptions were rare, often hard fought for, specific and limited ... They were more in the tradition of religious toleration, removing specific legal disabilities'.[81] However, away from these isolated examples a rather more extensive set of religious exceptions has developed – notably in domestic anti-discrimination law, particularly the spheres of employment and the provision of goods and services: here, exceptions for religion 'are by no means unusual'.[82]

At the EU level, exceptions for all employers to anti-discrimination on the grounds of sex in employment and vocational training are permitted by Directive 2002/73/EC.[83] These are general exceptions as opposed to *religious* exceptions solely for *religious* employers. Additional general exceptions for all employers to anti-discrimination on the grounds of disability, age, sexual orientation and religion or belief in employment and 'occupation' are permitted by Directive 2000/78/EC.[84] In this Directive, exceptions specifically for the benefit of churches and other organisations with an ethos based on religion or belief are also permitted,[85] although *Article 4(2)* only provides for this in relation to discrimination 'on grounds of religion or belief'. As already noted,[86] there is currently no EU provision concerning discrimination in the context of services, goods and facilities provision apart from on grounds of sex or race/ethnicity. A proposed EU equality Directive[87] has outlined that protection on, amongst other grounds, religious discrimination would provide member states with discretion to allow religious exemptions in certain contexts for churches and other organisations based on religion or belief. Those contexts would include access to and supply of goods and services available to the public.[88] Further developments are awaited.

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[81] Sandberg, above n. 1, pp. 31 – 32.
[82] R. Sandberg, 'Gods and Services: religious groups and sexual orientation discrimination' (2008) 10 Ecclesiastical Law Journal 205, p. 205.
[83] *Article 2(6)*.
[84] *Article 4(1)*.
[85] *Article 4(2)*.
[86] Sandberg, above n. 1, p. 37.
[87] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.
[88] *Article 1*.

3.1 A focus on religious exceptions?

A key premise of this thesis is that religious exceptions afford specialised protection for religion and that this merits further exploration to determine what those exceptions contribute to religious liberty. A number of commentators have considered that it is sound principle to grant legal exceptions from laws so as to accommodate religious interests. The fact that such a case can be made has been increasingly noted. For example, McGoldrick has argued that this 'has to be premised on the view that there is something special about religion that makes it more deserving. The basis of what makes it special can be a combination of insights drawn from philosophy, history, politics, traditions, culture, the treatment of minorities and a particular view of the contribution of religion to community or society'.[89] This locates the legitimacy of religious exceptions in the range of ideas alluded to in chapter two supporting the evolution of religion law.

Regarding a theoretical basis for religious exceptions, Sandberg has identified that their existence in anti-discrimination law suggests something beyond mere toleration of religion.[90] It begins appealing to the need to preserve religious dignity, autonomy and equality. In relation to equality, a key basis for anti-discrimination law, exceptions feed into 'the common claim that equality actually requires differential treatment of individuals or groups according to their social and cultural backgrounds or ethical outlooks (think, for example, of the debates on ... legal exceptions or exemptions)'.[91] In this way there is the 'suspension of strict legal equality in the name of some other value, such as the preservation of a cultural context for autonomous choices; equal opportunities, or equal respect or recognition'.[92] In particular, religious exceptions represent a claim that religion should be treated differently with regard to fundamental legal rights and responsibilities: there is a willingness to shield religion from legal censure if it breaks a designated rule. This is predicated on the basis that just because a non-religious majority finds a particular

[89] D. McGoldrick, 'Accommodating Muslims in Europe: from adopting Sharia law to religiously based opt outs from generally applicable laws' (2009) 9 Human Rights Law Review 603, p. 627.
[90] Sandberg, above n. 1, p. 37.
[91] E. Rossi, 'The Exemption that Confirms the Rule: reflections on proceduralism and the UK hybrid embryos controversy' (2009) 15 Res Publica 237, p. 238.
[92] M. Ferretti and L. Strnadová, 'Rules and Exemptions: the politics of difference within liberalism' (2009) 15 Res Publica 213, p. 215.

religious exception unpalatable 'is not a sufficient reason to disregard a fundamental right'.[93] Related to this point, Sandberg has drawn attention to the fact that '[o]ne of the major concerns implicit in modern religion law is the extent to which religious groups are expected to live up to secular standards. This underpins the conflict concerning exceptions in discrimination law'.[94]

Where there is a case for special religious treatment via an exception, there has to be a precise balancing of interests between the practicality of accommodating the religious interest and the original objective(s) of the law in question. In essence, the decision to create a religious exception from a rule must be proportionate, carefully weighing matters of policy against the various ways in which an exception could be defined. Plainly, '[a] religious exception to the law ... will be recognised only if there is no substantial cost to the rights of others or to the public interest'.[95] Doyle has commented that exceptions will seek to pursue 'a legitimate aim in a proportionate manner and ... have been drafted ... to ensure that end'.[96] This may result in either a loosely or tightly defined exception, the exact definition depending on a number of complex assessments including how far religious interests should be able to participate in the social, economical and political elements of public life. There is clearly a view that a world without religious exceptions would lessen religion's stake in society. Conversely, consideration must equally be taken of the interests and dignity of others who may be affected by a religious exception and any other policy reasons for curtailing a religious exception linked back to the rule in question. The balance requires that 'religious ... rights are not absolute; they will have to give way in the face of competing rights and interests'.[97] Once this balancing exercise is complete, the frontiers of the exception can be analysed to determine their practical import.

Aside from proportionality and practicality, the actual aim of the legal provision from which exception is sought needs to be recalled: an exception may well

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[93] C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), p. 190.
[94] Sandberg, above n. 1, p. 200.
[95] R. Moon, 'Introduction: law and religious pluralism in Canada', in R. Moon (ed.) *Law and Religious Pluralism in Canada* (University of British Columbia Press: Vancouver, 2008), p. 10.
[96] B. Doyle et al, *Equality and Discrimination: the new law* (Bristol: Jordan, 2010), p. 13.
[97] B. Ryder, 'The Canadian Conception of Equal Religious Citizenship', in Moon, above n. 95, p. 90.

fundamentally compromise that law's effectiveness in achieving its objective. This moves the debate in the direction of political philosophy and its understanding of exceptions. Barry has written about this conundrum and others have summarised his scepticism: 'it is hard to steer a path between the position that doing (or avoiding) X is so important that all should do it, and the alternative position that people should be free to decide for themselves whether to do X'.[98] Indeed, Barry himself comments that:

> [i]t must be important to have a rule generally prohibiting conduct of a certain kind because, if this is not so, the way in which to accommodate minorities is simply not to have a rule at all. At the same time, though, having a rule must not be so important as to preclude allowing exceptions to it. We are left with cases in which uniformity is a value but not a great enough one to override the case for exemptions.[99]

As such, a position might be taken that exceptions 'can rarely be justified and should normally not be granted'.[100] If a law is just then it should be applied *without* exception.

Assuming the law is willing to tolerate such philosophical deficiencies (which presumably it is because it creates religious exceptions), and that this is supported by some measure of balance in proportionality, religious exceptions may seem broadly acceptable. However, even if exceptions are to remain part of the law-making process another philosophical predicament lingers: what does the creation of such exceptions reveal about religion's place and role in society? Whilst it may be 'an oversimplification to say that Britain in the twenty-first century is a secular society',[101] Sandberg has highlighted that the rise of religion law may 'actually [be] evidence of secularization in that the State is forced to protect religion as a minority interest'.[102] This idea of religious subordination may well apply to the new generation of religious exceptions and what they disclose about how religion is viewed and valued. Is the provision of a religious exception to a rule evidence of an entrenched imbalance in respect by the state towards religion? Does it signify that the

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[98] Y. Nehushtan, 'Religious Conscientious Exemptions' (2011) 30 Law and Philosophy 143, p. 144.
[99] B. Barry, *Culture and Equality: an egalitarian critique of multiculturalism* (Oxford: Polity Press, 2001), p. 62.
[100] Nehushtan, above n. 98, p. 144.
[101] Sandberg, in Hunter-Henin, above n. 3, p. 343.
[102] *Ibid*.

social, cultural, legal, and political playing-field is uneven from the start? Exceptions raise questions as to how far they actually reflect the idea that individuals are free to be religious – with all this may carry about respect and recognition of value. It may be submitted that exceptions signify that religion only possess a mere 'privilege'[103] in the relevant legal field from which exception is granted. The exception acts solely as a concession based on the whim and goodwill of the legislator. There is no wider commitment to religion beyond this. Essentially, the point is that religious exceptions may be targeted for criticism on the basis that they are indicative of religious subjugation and inequality of arms. If this is true, the debate should presumably shift back to the original law in question and the value judgement(s) it contains. In turn, this brings the focus back to Barry: where a rule is biased against a certain group or groups any exception will undermine the aim of that rule because the rule is supposed to be of general application. It is axiomatic that rules will infringe some liberties for some groups. To this extent, implementation of exceptions should be resisted because they merely mask that bias: the rule is retained as the *status quo* and, whilst practical dispensation is made for religion, the underlying and pernicious demotion of religious interests persists. At the least, this may have the effect of coercing religion; at the most, it may actively suppress it. The granting of exceptions from rules may allow such a situation to fester: far from commending religious liberty, it may devalue religious interests at a wider and more fundamental level in society.

Despite these philosophical anxieties, religious exceptions may still be preferable because of the immediate practical benefits they provide. It is on the basis that religious exceptions from rules have the potential (depending on the proportionality balance) to enhance religious liberty at the level of *practice* that this thesis proceeds in Part II (it is accepted that exceptions themselves may be challenged at a separate philosophical level). The idea of proportionality in balancing interests becomes more acute in Part III onwards when introducing the concept of reasonable accommodation and considering how useful it may be in domestic cases as a new form of 'exception' for religion in anti-discrimination law.

[103] 'Privilege' is used loosely here to indicate a low valuing of religion. It is accepted this may not be consistent with a strict Hohfeldian conception of 'rights' and 'privileges': W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16.

3.2 Issues of terminology

At a basic level of categorisation,[104] exceptions benefitting religion can exist for i) *particular* religious bodies only; ii) *any* religious bodies; or iii) both religious and *non*-religious bodies. Whilst the exceptions in each category result in some form of preferential treatment for religion, there has been inconsistency concerning the actual labelling of 'religious exceptions'. This stems from the fact that the language of 'opt-outs'[105] 'exceptions'[106] and 'exemptions'[107] has been used interchangeably[108] and consequently conflated to describe the same thing: namely, the express removal of any obligation for religious reasons to adhere to certain legal rules, be they discrimination provisions or other laws of general application.

Usefully, academic debate exists on the scope of the definitions of 'exception' and 'exemption'. It has been suggested by Ahdar and Leigh that categories (i) and (ii) above should be labelled 'exemptions' as they '[exempt] religious organisations from the operation of certain aspects of … law'.[109] However, they argue that category (iii) may not be so regarded. Instead, it provides an 'exception' for 'particular *activities* (which may or may not be limited to a particular class of defendants)'.[110] Both the

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[104] Nehushtan, above n. 98, provides a more complex categorisation of exceptions benefitting the religious and non-religious based on an approach conceived in political theory: p. 145.

[105] For example, see the terminology used by McGoldrick, above n. 89, pp. 622 – 623.

[106] 'Exception' was used in some debates in the UK Parliament on the *EqA 2010*. See references, for example, to 'exceptions for religious organisations in employment': House of Commons Hansard Debates for 11 May 2009: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090511/debtext/90511-0009.htm>, accessed 15th August 2012. 'Exception' is now used by the *EqA 2010* in anti-discrimination law. For example, see *Schedule 9*'s 'work exceptions' and *Schedule 23*'s 'general exceptions'.

[107] 'Exemption' was similarly used in debates in the UK Parliament on the *EqA 2010*. See references, for example, to 'the exemptions on discrimination, particularly on the grounds of religion and sexual orientation': House of Commons Hansard Debates for 11 May 2009: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090511/debtext/90511-0016.htm>, accessed 15th August 2012. 'Exemption' has also been used by other commentators in the anti-discrimination law context: for example, Sandberg and Doe, above n. 14.

[108] McGoldrick, above n. 89, appears to use the labels 'opt-outs' and 'exemptions' interchangeably when discussing 'religiously based opt-outs or exemptions from generally applicable laws': p. 623. The same is true of I. Leigh, 'Clashing Rights, Exemptions and Opt-outs: religious liberty and "homophobia"', in R. O'Dair and A. Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001), p. 247.

[109] R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), p. 309.

[110] *Ibid*., p. 310 (original emphasis). This repeats the same distinction originally made by Leigh in O'Dair and Lewis, above n. 108, pp. 263 – 267. It is also a distinction drawn by Rossi, above n. 91, p. 241.

'exemption' and 'exception' definitions,[111] respectively, are referenced in relation to anti-discrimination laws covering either protection for just religion[112] or general occupational requirements[113] that cover *any* body (religious or otherwise)[114]. The 'exemption' privileges the position, status and demands of a *religious* group or groups above non-religious groups in society whilst the 'exception' privileges *any* type of group which may satisfy the criteria for claiming the exception.[115] As a result, the position, status and demands of such groups whose exception claims are successful are elevated together at an equal level. Regarding 'exceptions', Parliament's motivation is not religious liberty but the need to create a way round a particular legislative requirement where it may operate unfairly on an organisation or body, be it religious or not.

Ahdar and Leigh thus indicate that correct use of the 'exemption' and 'exception' labels can be determined by how the relevant legal provision is drafted. However, there remains arbitrariness in selection of the 'exception' and 'exemption' labels. It is not obvious why either label should be more appropriate than the other in capturing the nuance identified on either side of the legal distinction drawn. Arbitrariness concerning these labels is also found in comments by Twining and Miers who remark on the 'distinction between a general exception and an exemption in a particular case'.[116] They argue that 'a distinction needs to be drawn between "making

[111] These definitions replicate the 'exemption' and 'exception' distinction set out by A. Esau, '"Islands of Exclusivity": religious organizations and employment discrimination' (2000) 33 University of British Columbia Law Review 719, pp. 750 – 751.
[112] See category (ii) above. These are discussed in chapters 4 and 5.
[113] See category (iii) above. This is the language of the *EqA 2010*; such requirements had previously known as 'genuine occupational qualifications' in the *Sex Discrimination Act 1975*. These are discussed in chapter 4.
[114] See category (iii) above.
[115] Aside from genuine occupational requirements, such 'exceptions' exist in the *EqA 2010, s. 193(1)* which allows for charities, religious or otherwise (although this distinction is not made in the text of the section) to provide benefits only to persons who share a protected characteristic. This was the subject of the litigation in *Catholic Care v. Charity Commission for England and Wales* [2011] UKFTT B1 (General Regulatory Chamber). For brief discussion of this case see chapter 6, section 2.1 and chapter 12, section 3.3.3. Other examples of category (iii) 'exceptions' are the conscience clauses contained in the *Abortion Act 1967, s. 4* and the *Human Fertilisation and Embryology Act 1990, s. 38*. As Sandberg, above n. 1, emphasises, 'these are conscientious exceptions, not religious ones. It is perfectly possible for a convinced atheist to have a conscientious objection to abortion or assisted conception': p. 31, n. 95. Similarly, McGoldrick, above n. 89, states in relation to the exception in the *Abortion Act 1967* that 'it is, of course, not limited to the adherents of any particular religious belief': p. 623.
[116] W. Twining and D. Miers, *How To Do Things With Rules* (London: Butterworths, 1999), pp. 135 – 136.

an exception" to the rule and "granting an exemption" under it'.[117] Whilst an exception for them enhances certainty of law as it generally delimits the scope of a legal rule in advance – and thus has the force and authority of Parliament to commend it – a mere exemption is not so envisaged by lawmakers and may only be subsequently applied by the courts on a case-by-case basis. Moreover, this explanation flips the meanings ascribed by Ahdar and Leigh to 'exemption' and 'exception'. In contradistinction to Twining and Miers, they state that where religious exemptions are stated 'clearly in advance, rather than requiring the justification for exemption to be considered on a case-by-case basis,'[118] a particular advantage is that '[i]t therefore gives an exempted organization greater certainty'.[119] In contrast, with exceptions 'the defendant has the onus to establish the necessity of an activity being excepted'.[120]

This uncertainty of terminology is in evidence elsewhere. Regarding category (iii), Nehushtan has made reference to an 'exemption from a legal rule that is decided for any reason whatsoever and incorporated into the law itself, i.e. the law determines the general rule and its exemptions … These exemptions are widespread and normally do not raise any important questions apart from general problems of equality'.[121] Ultimately, in relation to 'exemption' and 'exception' '[t]here do not appear to be any standard distinctions covering this ground'.[122] For present purposes, the label 'exception' is used, particularly as attention from Part II will coalesce around the *EqA 2010* where the label 'exception' has been exclusively adopted to cover all types of exception across categories (i) to (iii). This is also the approach of Vickers,[123] Roberts,[124] McColgan[125] and Sandberg, the latter commenting in the context of anti-discrimination law that '[t]here is a debate as to whether the term

[117] *Ibid*., p. 203.
[118] Ahdar and Leigh, above n. 109, p. 309.
[119] *Ibid*.
[120] *Ibid*., p. 310.
[121] Y. Nehushtan,, 'Secular and Religious Conscientious Exemptions: between tolerance and equality', in P. Cane, C. Evans and Z. Robinson, (eds.) *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008), p. 244.
[122] Rossi, above n. 91, p. 241.
[123] Above, n. 17, p. 135.
[124] See Roberts in Doe and Sandberg, above n. 27, p. 78.
[125] McColgan, above n. 52, p. 3.

'exception 'or 'exemption' should be used'.[126] Following from this, Sandberg states that he 'follows the practice of the Equality Act 2010 which refers to "exceptions"'.[127]

4. CONCLUSION

At a practical level religious exceptions signify the state's efforts to proactively accommodate religion in narrow situations where the law would, otherwise, restrict religious practices. This specific style of protection in limited circumstances lends legitimacy to such religious practices: in doing so it provides an important degree of certainty regarding religious liberty in pre-determined circumstances. The expansion of religious exceptions in the domestic law (particularly anti-discrimination law) to the extent that they are now 'common'[128] represents a key development in not only the general recognition of religious liberty, but also the increase in protection of specific religious practices which *prima facie* conflict with behaviours and actions proscribed by the state. Such exceptions grant privileged legal status to certain practices of a particular faith.

Given the proliferation of religious exceptions to recent *anti-discrimination* legislation, attention in the case-study which follows in Part II will be centred on exceptions in this field. The plethora[129] of domestic anti-discrimination legislation created in the past forty years resulting in a single equality document renders this case-study timely, particularly given that 'the granting of such exceptions and the scope of the exceptions has led to some of the greatest controversies surrounding law and religion in the United Kingdom in the twenty-first century'.[130] The incidence and scope of the religious exceptions will be appraised to judge how far they confer practical advantages to religion in the UK. In subsequent chapters an alternative type of religious 'exception' existing in anti-discrimination law – namely 'reasonable accommodation' – will be suggested to complement the exceptions discussed in Part II. The reasons for proposing this will be considered in chapter six and the debate

[126] R. Sandberg, 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, p. 159, n. 11. See also Sandberg, above n. 1, p. 117, n. 100 for the same approach.
[127] *Ibid*., 'The Right to Discriminate', p. 159, n. 11.
[128] Sandberg and Doe, above n. 14, p. 302.
[129] Sandberg, above n. 1, p. 117.
[130] *Ibid*.

will evaluate comparative models of reasonable accommodation. These models will be applied to recent domestic religious discrimination cases which have fallen outside the scope of the current exceptions: this will necessitate a closer look at proportionality to gauge whether the models would be able to protect religious liberty in different situations and, if so, how far that protection would extend at a practical level.

CHAPTER 4: RELIGIOUS EXCEPTIONS IN EMPLOYMENT

1. INTRODUCTION

In chapter three it was observed that religious exceptions predominantly exist in domestic anti-discrimination law: these exceptions are narrowly applied to highly specific sets of circumstances where the legislature has decided that the religious imperative justifies allowing 'the right to discriminate'.[1] Such exceptions act as a conciliatory attempt to better accommodate religion in the modern equality framework of anti-discrimination law. The process of affording religious exceptions from generally applicable legal rules fits the equality spirit of that framework; indeed, it shows a concerted and generous attempt to go further in protecting faith interests.

In this chapter the religious exceptions which exist in United Kingdom (UK) anti-discrimination law across employment will be reviewed. The purpose is to scope the range of protection available to determine what contribution it makes to contemporary religious liberty at a practical level. For that reason, the pre-*Equality Act 2010* (*EqA 2010*) exceptions will be included to facilitate a more informed perspective on the current legal position. In order to achieve a broad view as to how exceptions may guarantee religious interests the focus shall be on exceptions not only restricted to religious employers but also capable of use by *all* employers, religious or otherwise. This is simply for completeness: the latter is assessed comparatively briefly. Whilst religious exceptions exist to a range of protected characteristics,[2] this chapter will concentrate on those characteristics with which academic and judicial discussions of exceptions have primarily concerned themselves: namely sex, sexual orientation and religion or belief.

[1] R. Sandberg, 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, p. 159.

[2] The *EqA 2010* has recently introduced new exceptions for organised religions which apply to transsexuals (*Schedule 9, Part 1, para. 2(4)(b)*) and those who are, or have been, married or in civil partnerships (*Schedule 9, Part 1, paras 2(4)(c) – (e)*).

2. GENUINE OCCUPATIONAL REQUIREMENTS

2.1 Sex discrimination

In the *Sex Discrimination Act 1975* (*SDA*) there existed a *general* exception (not limited to religion) to the prohibition on sex discrimination referred to as 'general occupational qualifications' (GOQs).[3] This meant the sex of a post-holder could only be restricted where there was an occupational necessity for the individual concerned to be of a particular sex. Examples, which formed part of a closed list,[4] included restricting posts to men for reasons of physiology and authenticity in entertainment.[5]

The *EqA 2010* maintains a general GOQ across all protected characteristics, albeit renamed as a 'genuine occupational requirement' (GORs).[6] There is explicit reference to the need for such requirement to be a 'proportionate means of achieving a legitimate aim' [7] - perhaps because there no longer exists a closed list of relevant factors. The *EqA 2010* GOR test requires that the person to whom the requirement is applied either does not meet it, or that the employer has reasonable grounds for not being satisfied that the person meets the requirement.[8] However, where the requirement is one concerning sex, the 'reasonable grounds' test is omitted,[9] making it more challenging for employers, including religious employers, to successfully claim an occupational requirement based on sex.

2.2 Sexual orientation discrimination

There was a 'genuine and determining occupational requirement' exception (GDOR) in Regulation 7(2) of the *Employment Equality (Sexual Orientation) Regulations 2003* (*SO Regs 2003*).[10] This is retained in the *EqA 2010* as a GOR[11] which must be a

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[3] *S. 7(1).*
[4] *S. 7(2).*
[5] *S. 7(2)(a).* These were originally cited in the new law under the old *EqA 2010*: Explanatory Notes, p. 166. However, they appear to be absent from the August 2010 revised Explanatory Notes.
[6] *Schedule 9, Part 1, para. 1(1).*
[7] *Schedule 9, Part 1, para 1(1)(b).*
[8] *Schedule 9, Part 1, para 1(1)(c).*
[9] *Schedule 9, Part 1, para 1(4).*
[10] SI 2003/1661.
[11] *Schedule 9, Part 1, para. 1(1).*

proportionate means of achieving a legitimate aim[12] applying where a person either does not meet the requirement to be of a particular sexual orientation or where there are reasonable grounds for not being satisfied that they do.[13]

Two particular comments regarding this GOR shall be made in passing. Firstly, the *EqA 2010*'s excludes the word 'determining'. In the *SO Regs 2003* this word made it clear that the exception applied narrowly where there existed a very clear connection between the work to be done and the individual's sexuality. Nevertheless, it is likely the firm link between the work done and the characteristic pursued will be vigorously enforced post-*EqA 2010* given modern equality and anti-discrimination imperatives. The need for a strong connection between the characteristic and the work undertaken was highlighted in *Hubble v. Brooks*[14] where the claimant – a gay man with a long-term partner – had applied for a job in the defendant's bar and was told by the defendant that there was 'no way' he would employ a gay couple because it would be disastrous for his business.[15] The Employment Tribunal (ET) 'accepted that this was a blatant case of direct discrimination. Both the complainant and his partner were experienced bar managers and should have been considered for the position'.[16]

Secondly, even where it has been established that sexual orientation is a genuine occupational requirement and it is proportionate to apply that requirement, it must still be asked whether the person meets the GOR to the employer's satisfaction or whether they can still be denied the post because the employer believes there are *reasonable grounds for not being satisfied* that the GOR is met. The test of 'reasonable grounds' has proved controversial particularly because the employer is 'not bound in all circumstances to accept at face value'[17] a person's claim regarding their sexual orientation and, instead, may ask further related questions and form a particular view accordingly. This was addressed by Richards J. [18] in *R (on the application of Amicus and others) v. Secretary of State for Trade and Industry*

[12] *Schedule 9, Part 1, para 1 (1)(b).*
[13] *Schedule 9, Part 1, para 1 (1)(c).*
[14] Case no. 2200027/05 (4887/106).
[15] TUC: 'Sexual Orientation and Religion or Belief Cases' – A Report Prepared By B. Fitzpatrick: June 2007, p. 14.
[16] *Ibid*.
[17] L. Samuels, 'Sexual Orientation Discrimination and the Church: balancing competing human rights' (2005) 8 Ecclesiastical Law Journal 74, p. 77.
[18] Albeit under the previous GOR as contained in the *SO Regs 2003*.

(*Amicus*) [19] as raising a serious point[20] given its potential for affording the exception on *perceived* sexual orientation as opposed to *actual* sexual orientation – which may encourage prejudiced assumptions based on social stereotyping.[21] Further, it was contended that requiring an employer to 'satisfy' themselves as to a person's sexual orientation would lead to intrusive questioning of that person.[22] Ultimately, however, Richards J. found that the GOR had a sensible rationale,[23] that the test of reasonableness would preclude employers basing assumptions on social stereotypes,[24] and that the phrase 'satisfied' indicated that questioning of a person as to their sexual orientation would not have to be as intrusive 'as might be called for if it were necessary to gather sufficient evidence by way of proof of sexual orientation to meet a potential complaint of unlawful discrimination'.[25]

2.3 Religion or belief discrimination

Any organisation, religious or otherwise, may take advantage of the GOR previously contained in the *Employment Equality (Religion or Belief) Regulations 2003* (*RB Regs 2003*)[26] and now transferred to the *EqA 2010*.[27] The GOR to be of a particular religion or belief in the *EqA 2010* is drafted identically to that in relation to sexual orientation. Whilst the *EqA 2010*'s GOR only makes reference to an 'occupational requirement' it is anticipated that this should not expand what is a narrow general exception: '[t]his means that the need to be of a specific religion or belief must be a defining characteristic of the job'.[28] Religion or belief must be an essential requirement of the post.[29]

As religion or belief must be an 'occupational requirement' the GOR is restricted to those employed in religious service meaning that it is unlikely to apply to many jobs

[19] [2004] EWHC 860 (Admin).
[20] At para. 72. See also Samuels, above n. 17, p. 77.
[21] At para. 74.
[22] *Ibid*., para. 75.
[23] *Ibid*., para. 80.
[24] *Ibid*., para. 78.
[25] *Ibid*., para. 80.
[26] SI 2003/1660; Regulation 7(2).
[27] *Schedule 9, Part 1, para. 1(1).*
[28] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 135.
[29] *Jivraj v. Hashwani* [2011] UKSC 40, per Lord Clarke at para. 49.

where people feel there is a specifically religious approach to their work which requires particular selection of candidates based on their religion or belief.[30] This signifies that the GOR 'will not allow discrimination in favour of those who share a religion just because people wish to work with like-minded colleagues'.[31] In *Glasgow City Council v. McNab* (*McNab*)[32] it was confirmed by the Employment Appeal Tribunal that pastoral care teaching in a Scottish Roman Catholic faith school was not employment which could satisfy this GOR. The EAT noted that non-Catholics, including previously Mr. McNab, had acted as pastoral care teachers at St. Paul's. Hence being a Catholic could not possibly be an occupational requirement.[33] This reveals that occupational requirements (in relation to any protected characteristic) will usually be interpreted as highly restrictive in nature: '[t]o invoke a GOR requires careful consideration from the inception of the post in question'.[34] In relation to Scottish faith schools it has subsequently been commented that 'it will be difficult to convince a tribunal that being of a particular religion or belief is a genuine and determining occupational requirement for being a teacher, as it is rare (apart from where religious instruction is given) for religion to be a defining element of a teacher's role'.[35] However, the position concerning faith schools in England and Wales is different and covered by a specific – and not general – religious exception in the *Schools and Standards Framework Act 1998* as amended by the *Education Inspections Act 2006*. As this is a specific religious exception it is considered below.[36]

Finally, the *EqA 2010* maintains its stipulation that GORs will operate where a candidate does not meet the requirement *or* where the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that the person meets it.[37] Whilst it was noted above that the second alternative test may be particularly dangerous when dealing with sensitive issues of a candidate's sexual

[30] Vickers, above n. 28, p. 136.
[31] *Ibid*.
[32] Appeal No. UKEATS/0037/06/MT.
[33] per Lady Smith at para. 56. See also TUC Report, above n. 15, p. 21.
[34] TUC Report, above n. 15, p. 23.
[35] L. Vickers, 'Religion and Belief Discrimination and the Employment of Teachers in Faith Schools' (2009) 4 Religion and Human Rights 137, p. 149.
[36] See below, section 5.1.
[37] *Schedule 9, Part 1, para. 1(1)(c).*

orientation, it has been argued that the test is more straightforward to apply in seeking general exception from religion or belief discrimination:

> A person could claim, in good faith, to be of a particular religion (for example he could be baptised into the Christian Church, but not be a believer). An employer may disagree, based on poor performance in interview when questioned about faith matters. Without this additional clause it was not clear how an employer could determine whether the person does not comply with the requirement set. The additional clause would also help in cases where the question of whether the applicant complies with the faith is determined by fine theological judgements, on which even the parties do not agree. Again, the applicant may be of the view that they comply, but the employer may disagree.[38]

However, whilst it may be true that this genuinely helps employers to interrogate the religion or belief criterion, religious candidates rejected from a post on the basis of this test may perceive the decision to be equally controversial to equivalent decisions by religious employers against gay or lesbian candidates on grounds of sexual orientation.

3. EXCEPTIONS FOR ORGANISED RELIGION

3.1 Sex discrimination

Whilst GORs are important for some posts they serve very limited religious purposes where there is a need for a post-holder to be of a particular sex for religious reasons. The same is true in relation to sexual orientation and religion or belief.[39] Accordingly, although seemingly without explicit sanction by either Directive 76/207/EEC or amending Directive 2002/73/EC, the *SDA* drafted a further limited exception for religious groups where employment in a post could be limited to a particular sex,[40] 'for the purposes of an organised religion',[41] the justification for this being where such employment was *either* 'so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of

[38] Vickers, above n. 28, p. 143.
[39] See below, sections 3.2 and 4.1, respectively.
[40] *S. 19(1)*.
[41] *Ibid*.

its followers'.[42] This was plainly wider in scope than the *SDA*'s general GOQ, enhancing religious liberty in being able to use faith as a *special* basis on which to exclude people of a certain sex from employment. Significantly, it permitted sex discrimination *because* of religion. Given the legislative history behind this religious exception (which singlehandedly 'began the practice under English law to provide exceptions for religious groups'[43]) its genesis will be traced from the *SDA* through to its current incarnation in the *EqA 2010*.

3.1.1 Sex Discrimination Act 1975

The phrase 'organised religion' excluded mere 'religious organisations' as confirmed in *Amicus* in which Richards J. outlined the Government's position: '[t]here is a clear distinction in meaning between the two. A religious organisation could be any organisation with an ethos based on religion or belief. However, employment for the purposes of an organised religion clearly means a job, such as a minister or religion, involving work for a church, synagogue or mosque'.[44] The upshot of this was that a religious exception in employment when linked to an 'organised religion' was only likely to be upheld when claimed within the employment context of a specific religious body. Vickers has argued that this 'refers to the appointment of clergy, or their equivalent for other religious groups,'[45] this being exemplified when Richards J. 'gave the example that employment in a faith school is likely to be "for purposes of a religious organisation" but not "for purposes of an organised religion". The logic of *Amicus* is that, whilst an "organised religion" will also be a "religious organisation", it is not the case that a "religious organisation" is always an "organised religion"'.[46] Consequently, organisations which had religious elements or an ethos based on religion, but which themselves did not constitute a religious body, were unable to rely on religious exceptions for 'organised religions'. Given the narrowness of the term 'organised religions' it was viewed as 'appropriate to ask why certain privileges have been afforded only to the narrower category where the beneficiary is an

[42] *Ibid*.
[43] Sandberg, above n. 1, p. 160.
[44] per Richards J., at para. 91.
[45] Vickers, above n. 28, p. 140.
[46] R. Sandberg and N. Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 Cambridge Law Journal 302, p. 308

"organised religion"'.[47] Such narrowness 'mark[ed] a substantial shift away from the attitude of the government during the passage of the Human Rights Act 1998, when it was prepared to allay the fears of churches and religious bodies that their liberties might be restricted'.[48]

Assuming the exception was sought by an 'organised religion' there were two justificatory bases, the first being 'so as to comply with the doctrines of religion'. However, this only protected faiths 'which as a matter of doctrine limit ministry to one sex',[49] penalising those faiths whose doctrine was ambiguous, evolving or who lacked any form of doctrine. Nevertheless, there was a second justificatory basis which ignored matters of doctrine, focusing on offence caused to the religious susceptibilities of a significant number of followers of a faith. This was capable of wide interpretation: quite apart from how the courts were to judge the rather subjective notion of 'offence', there was ambiguity as to where to draw the line concerning a religious susceptibility. Indeed, what counted as a religious susceptibility? This second justificatory basis was potentially capable of allowing spurious or disingenuous reasons for sex discrimination by members of an organised religion to be upheld. The definition of followers as 'significant' in number was also problematic. This was criticised as:

> both imprecise and as providing too broad an exception to the non-discrimination principle. For example, it is not clear what will amount to 'a significant number of followers' ... [h]owever, the wording merely reflects the need adequately to protect the religious autonomy of religious adherents, and the fact that not all members of a religious group will have exactly the same views on issues of ... gender.[50]

Nevertheless, the phrase found support in *Amicus* from Richards J. who contended that the expression 'a significant number' is 'an ordinary English expression which courts or tribunals should have no difficulty in applying in practice: cf. "considerably smaller" in other discrimination legislation, which has proved workable in practice'.[51] This was expanded upon with the comment that reference to:

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[47] *Ibid*., p. 310.
[48] J. Rivers, 'Law, Religion and Gender Equality' (2007) 9 Ecclesiastical Law Journal 24, p. 46.
[49] Sandberg and Doe, above n. 46, p. 305.
[50] Vickers, above n. 28, p. 141.
[51] At para. 107.

> "a significant number" rather than to all or the majority of a religion's followers not only reflects the desirability of avoiding detailed statistical analysis ... but also ensures that proper account is taken of the existence of differing bodies of opinion even within an organised religion ... In my view it is legitimate to allow for the possibility of applying a relevant requirement even if the convictions in question are held only by a significant minority of followers.[52]

It remains to be seen how 'significant number of followers' will be judicially interpreted in the future. It is submitted that the possibility of the phrase 'significant number of followers' being satisfied by a significant *minority* of followers dilutes the meaning of the requirement 'significant' and expands use of the religious exception in the *SDA* to potentially controversial limits. It is not immediately clear what proportion of a faith a 'significant minority' of followers would constitute.[53]

3.1.2 Employment Equality (Sex Discrimination) Regulations 2005

This religious exception was subsequently amended by the *Employment Equality (Sex Discrimination) Regulations 2005* (*SD Regs 2005*)[54] which kept the test identical, save for the second alternative justification for the sex discrimination which was redefined to read: 'so as to avoid conflicting with the strongly-held religious convictions of a significant number of the religion's followers'.[55] This replaced the subjective concept of 'offence' with the notion of conflict avoidance related to 'strongly-held religious convictions'. Whilst an element of subjectivity remained, such religious convictions had to be 'strongly held', implying the need for something based in religious doctrine rather than feeling or instinct. The requirement that religious convictions be strongly held was an additional requirement compared to the previous exception under the *SDA*. In *Amicus* it was said that both the first ('so as to comply with the doctrines of religion') and second alternative justifications were to be interpreted objectively.[56] Sandberg has pointed out that in relation to the first justification '[d]iffering ideas concerning the interpretation and content of

[52] At para. 118.
[53] Given that 'minority' must mean 49% or lower, it could be speculated that a significant proportion of 49% of followers would be half that figure or more.
[54] SI 2005/2467; Regulation 20(1).
[55] Regulation 20(1).
[56] per Richards J. at para. 117.

doctrine render this a complicated task'[57] meaning the success or otherwise of a claimed exception may be based on uncertain reasoning.

Where doctrinal clarity of religion is problematic organised religions may resort to relying on the second justification which operates where a 'significant number' of a religion's followers 'hold particular views which do not form part of an accepted doctrine'.[58] However, this poses further difficulties given that '[d]eciding whether a significant number of followers may be offended is by no means a straightforward task. Indeed, in the case of some faiths it is further complicated by the lack of a definition of membership'.[59] Sandberg has interpreted this as meaning that 'reference should be made to the national rather than local membership of the religion in question'.[60] Even if this can be satisfied 'an employer must show that the nature of the employment and the context in which it is performed makes strongly held religious convictions a relevant matter to take into account'.[61]

Notwithstanding these problems with justification, it should be recalled that the 'organised religion' test acted as a filter, signifying that '[i]n effect, discrimination against women is [only] accepted where its [*sic*] is part of the belief system that such discrimination is necessary'.[62] As a result, the exception would 'apply only to the appointment of religious personnel ... This refers to the appointment of clergy, or their equivalent for other religious groups'.[63] For example, there would be no need to have a religious requirement as to sex in employment for posts that were non-religious, such as an administrator. The narrowness of this exception was also highlighted in *Percy v. Board of National Ministers of the Church of Scotland*,[64] where 'it would not have operated to relieve the Church of responsibility for an alleged discriminatory practice in the conditions of employment of a woman. Once a religious body has decided to admit women, it must do so on non-discriminatory

[57] R. Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), p. 120.
[58] P. Roberts, 'Religion and Discrimination: balancing interests within the anti-discrimination framework' in N. Doe and R. Sandberg (eds.) *Law and Religion: New Horizons* (Leuven: Peeters, 2010), p. 80.
[59] Sandberg, above n. 57, p. 120.
[60] Sandberg, above n. 1, p. 177.
[61] Roberts, in Doe and Sandberg, above n. 58, p. 80.
[62] Vickers, above n. 28, p. 140.
[63] *Ibid*.
[64] [2006] 2 AC 28.

terms'.[65] Interestingly, the EU requirement that religious exceptions contain 'a double test of a justified aim and proportionate means of reaching it'[66] was absent (as it was from the *SDA*), although it may be argued that it is implicit as part of the test.[67] A test of proportionality is critical in order to set successful claims for exception – and the corresponding ability to discriminate for religious purposes – at a level which requires sound justification. It has been said that such enquiries will be objectively judged by the courts.[68]

3.1.3 Equality Act 2010

The religious exception as contained in the *SD Regs 2005* is continued in the *EqA 2010*.[69] Once again, this requires that employment be for the purposes of an organised religion, although domestic parliamentary debates on the term 'organised religion' during the Act's creation reveal that this may now in fact embrace posts considered less religious in nature. The government had attempted to confirm after *Amicus* that employment for purposes of organised religion would indeed be limited to fundamentally religious posts within a religious body. In doing so it drafted a requirement that employment should only satisfy such a test where it wholly or mainly involved leading or assisting in the observance of liturgical or ritualistic practices of the religion, or promoting or explaining the doctrine of the religion (whether to followers of the religion or to others).[70] This met with support from organisations who believed that the previous test allowed religions too much power to police their internal members.[71] However, it met with significant opposition from religious representatives[72] who argued that this revision took, 'no account of pastoral or representative functions, or of any of the myriad activities carried out to meet the

[65] Rivers, above n. 48, pp. 42 – 43.
[66] Explanatory Memorandum: COM (2008) 426 2008/0140.
[67] It is currently required: see the *EqA 2010*: Explanatory Notes, para. 800.
[68] per Lord Clarke in *Jivraj v. Hashwani* (see above n. 29) at para. 59. This will apply to all religious exceptions although Lord Clarke's comments were made in relation to religious exceptions from discrimination on grounds of religion or belief. On these, see below section 4.1.
[69] *Schedule 9, Part 1, paras. 2(1)* and *2(4)(a).*
[70] B. Doyle et al, *Equality and Discrimination: the new law* (Bristol: Jordan, 2010), p. 206.
[71] As opined by M. Malik appearing for the Muslim Women's Network, House of Commons General Committee Debate for 9 June 2009: <http://www.publications.parliament.uk/pa/cm200809/cmpublic/equality/090609/am/90609s02.htm>, accessed 19th August 2012.
[72] As highlighted by Baroness Cumberlege, House of Lords Hansard Debates for 15 December 2009: <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/91215-0013.htm>, accessed 19th August 2012.

functions of a religious body. Any post where liturgy and doctrinal explanation were not the whole or main tasks would have to be open to a person of any sex, marital status, transsexual history or sexuality, whatever the beliefs of the religion'.[73] The government further amended the drafting so that employment will now be for the purposes of an organised religion if the employment is as a minister of religion, or employment relates to another post that exists to promote or *represent* the religion or to explain the doctrines of the religion.[74]

The insistence on maintaining a test of 'organised religion' may mean that the definition could fall foul of *s. 13(1)* of the *HRA* which had made it clear that particular regard was to be given to the rights of 'religious organisations'.[75] On this basis, 'it may be asked why certain privileges have been afforded only to the narrower category where the beneficiary is an "organised religion". This may actually infringe not only s. 13, but also Article 9'.[76] Further, the *EqA 2010*'s religious exception from sex discrimination does not signpost 'proportionality' or 'legitimate aim,' although once again it is likely to be implicit so that exception from domestic sex discrimination provisions is only granted in appropriate circumstances. The religious exception to sex discrimination in the *EqA 2010* maintains the supplementary tests of 'so as to comply with the doctrines or religion'[77] or 'because of the nature or context of the employment, the requirement is applied to as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.[78]

3.2 Sexual orientation discrimination

A religious exception in employment on grounds of sexual orientation also existed in the *SO Regs 2003*;[79] this has now been entirely replicated in the *EqA 2010*.[80] It covers situations where an employer needs to discriminate on such grounds for

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[73] *Ibid*.
[74] Doyle et al, above n. 70, p. 206. See also *EqA 2010*: Explanatory Notes, para. 790.
[75] See chapter 3, section 2.2.
[76] Sandberg, above n. 57, p. 120.
[77] *Schedule 9, Part 1, para. 2(5).*
[78] *Schedule 9, Part 1, para. 2(6).*
[79] Regulation 7(3).
[80] *Schedule 9, Part 1, paras 2(1)* and *(4)(f).*

purposes of an organised religion[81] and the requirement is either to comply with the doctrines of religion[82] *or* because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious conviction of a significant number of the religion's followers.[83] Once again, there is no proportionality requirement. Regarding 'organised religion', the exception will apply, for example, to a requirement that a youth worker who represents the religion be celibate[84] (but not to those who, say, primarily organise sporting activities). However, as Sandberg notes,[85] such church youth workers would have been outside the definition of 'organised religion' originally suggested by the government given its stricter reference to promoting or explaining the doctrine of the religion but not to representing it.

Significantly, the religious exception can operate even where the employer is not satisfied, and in all the circumstances is it reasonable for him not to be satisfied, that the person meets it.[86] As noted above in relation to the sexual orientation GOR, this is a controversial requirement: as applied to organised religions it does not necessarily encourage them to approach matters of sexual orientation perception in an enlightened or progressive way, particularly regarding image and stereotype. However, the exception has been applied strictly indicating that any sorts of perceptions regarding sexual orientation will be dealt with carefully and sensibly. For example, in *Reaney v. Hereford Diocesan Board of Finance*[87] the claimant was denied the job of Diocesan Youth Officer in Hereford on account of the fact the Bishop expressed concern that the claimant had previously been in a committed same-sex relationship. The Bishop refused to accept the claimant's assurance that he would remain celibate and did not offer him the post. The ET refused to permit the Bishop to rely on the exception because the claimant 'did meet the requirement imposed and it was not reasonable for the Bishop to conclude otherwise',[88]

[81] *Schedule 9, Part 1, para 2(1)(a).*
[82] *Schedule 9, Part 1, para. 2(5).*
[83] *Schedule 9, Part 1, para. 2(6).* This leaves open the possibility that mere attitudes towards sexual orientation which fall short of doctrinal requirements could satisfy the exception although this may be mitigated by 'strongly held' and 'significant number of the religion's followers'.
[84] *Reaney v. Hereford Diocesan Board of Finance*: see below n. 89.
[85] Sandberg, above n. 57, p. 121.
[86] *Schedule 9, Part 1, para. 2(1)(c).*
[87] Case no: 1602844/2006.
[88] Sandberg, above n. 57, p. 121.

particularly 'given the strength of the references in support of the claimant's good character'.[89] Clearly, '[t]he onus is ... on tribunals to apply the reasonableness test narrowly'.[90]

The fact that an employer may apply 'a requirement related to sexual orientation'[91] raises the possibility of a homosexual or heterosexual job applicant's *attitudes* towards sexual orientation also being covered by the religious exception. This is highlighted by Vickers who notes that, '[f]or example, an Anglican church may wish to appoint a priest who does not support the ordination or gay clergy ... such a requirement would be covered, even though it does not relate to the sexual orientation of the priest himself'.[92] This may not be compatible with freedom of thought, conscience and religion as to the inviolability of views held. The application of a requirement *related* to sexual orientation considerably expands the scope of the exception for organised religions if it is apt to cover situations such as those described by Vickers. This requirement shifts focus away from the sexual orientation of the job applicant themselves and places it on views and thoughts concerning sexual orientation of both the employer and putative employee – difficult personal realms which should arguably be beyond the reach of organised religions. Whilst it may be possible to hide such private views and thoughts from a prospective employer this remains a basis on which an otherwise suitable applicant may be rejected. Such an occurrence is likely to arise in practice particularly as, similar to the corresponding GOR, the employer may make such a rejection where they are not satisfied, and it is reasonable in the circumstances for them not to be satisfied, that the person meets such requirements. This state of affairs was accepted in *Amicus*, Richards J. being of the view that inclusion of the phrase 'related to' under the previous version of this exception[93] appropriately met 'the representations made by some Churches to the effect that they were not concerned with sexual orientation *per se* but with sexual *behaviour* that was related to sexual orientation'.[94] As a result, the potential breadth of this requirement illustrates the width afforded organised religions when applying this exception. Richards J. further commented that:

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[89] Roberts in Doe and Sandberg, above n. 58, p. 84.
[90] *Ibid*., p. 82.
[91] *Schedule 9, Part 1, para. 2 (4)(f).*
[92] Vickers, above n. 28, p. 140.
[93] *SO Regs 2003*, Regulation 7(3).
[94] At para 108 (original emphases).

> [a] broader point ... is that in the case of employment for purposes of an organised religion, regulation 7(3) itself makes clear where the balance is struck rather than leaving this extraordinarily difficult area for determination by tribunals on a case by case basis (with the burden of deciding e.g. whether the doctrines of a particular organised religion can themselves be said to be justified). To this extent the legislature has recognised that a requirement meeting the conditions of regulation 7(3) is necessarily a genuine and determining occupational requirement and has struck the balance in a manner that is submitted to be proportionate.[95]

It is particularly noteworthy that one justification in support of this religious exception, including the 'related to' requirement, is the clarity and guidance which it brings to what would otherwise be an impossible areas of clash upon which judges would be required to rule. This affirms the balance struck in this particular religious exception even if it does appear to afford a benevolent degree of religious liberty.

4. EXCEPTIONS FOR EMPLOYERS WITH AN ETHOS BASED ON RELIGION OR BELIEF

4.1 Religion or belief discrimination

Under the *RB Regs 2003*[96] this exception applied where an employer had an ethos based on religion or belief and made a decision as to an individual's employment with regard to that ethos and to the nature of the employment or the context in which it was carried out. The provision has now been transferred unchanged to the *EqA 2010*.[97]

This religious exception is different from those others found in sex and sexual orientation anti-discrimination laws: it is remarkably wider in scope. Freedland and Vickers have stated that '[i]n effect, a less rigorous approach is applied in deciding whether the particular job requires a particular characteristic where the employer has a religious ethos, or an ethos based on a particular belief'.[98] Indeed, there is no requirement that employment be for the purposes of an organised religion, rather the

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[95] *Ibid*.
[96] Regulation 7(3).
[97] *Schedule 9, Part 1, para. 3*.
[98] M. Freedland and L. Vickers, 'Religious Expression in the Workplace in the United Kingdom' (2009) 30 Comparative Labor Law and Policy Journal 597, p. 605.

exception will apply to '*all* employers who have an ethos based on religion or belief'[99] provided religion or belief is an occupational requirement.[100] To this extent, 'the exception and the basis on which it is exercised are simply extensions of the normal occupational requirement. It is therefore not really an exception for religious groups'.[101] Nevertheless, it will only be permitted where the requirement as to religion or belief is linked to the job role. Moreover, the genuine and occupational requirement as to religion or belief, necessitated by the nature of the employment or the context in which is it carried out, must be a proportionate means of achieving a legitimate aim.[102] The employer may still reject an applicant where they are not satisfied, and in all the circumstances it is reasonable for them not to be satisfied, that the candidate meets the religion or belief requirement.[103]

There is certainly a less stringent approach to this exception. This can be demonstrated in relation to employers who require staff to be of the employer's religion:[104] '[t]his type of employer does currently exist, for example, religious bookshops, and religious medical practices ... The imposition of a requirement to be of a particular religion would not meet the demands of [the *EqA 2010*'s GOR] as having a shared religion is not a determining characteristic of these jobs, but it may meet the requirements of [*Schedule 9, Part 1, para. 3*]'.[105] This shows that in the sphere of religion and belief in employment there is significant potential for permitted discrimination in securing religious liberty. Indeed, the scope outlined above 'allows greater latitude to employers to create discrimination on much wider grounds'.[106] The fact that the test of 'organised religion' is omitted enhances this provision's breadth of scope, contributing to a wider conceptualisation of religious liberty where religious employers need to discriminate on the basis of religion itself.

Notwithstanding the generous scope of this exception it should be noted that such flexibility is not completely unchecked. In particular, a requirement as to religion or belief still has to be *occupational*. This may present challenges for employers who

[99] Sandberg and Doe, above n. 46, p. 306 (emphasis added).
[100] *Schedule 9, Part 1, para. 3(a)*.
[101] Sandberg and Doe, above n. 46, p. 306.
[102] *Schedule 9, Part 1, para. 3(b)*.
[103] *Schedule 9, Part 1, para. 3(c)*.
[104] Vickers, above n. 28, p. 136.
[105] *Ibid*.
[106] *Ibid*., p. 137.

wish *all* their staff to have a shared religion as the genuine and occupational requirement must be linked to the job itself, meaning that the 'imposition of a religious requirement must be genuinely necessary for the purposes of preserving the religious ethos of the organisation'.[107] Here, the focus may be on the nature and strength of the organisation's religious ethos in determining how occupational a requirement is when linked to the job in question. It will be a careful balancing exercise, taking into account assessment of the organisation's religious ethos and the types of responsibilities and tasks involved with undertaking the post. This will not be a simple test to surmount as evidently there must be evidence that organisation is inherently religious in some way: for example, it was said in *McNab* that whilst Glasgow City Council facilitated Catholic education it 'could not claim to have a religious ethos of its own, even in part of its operations'.[108] The EHRC's Employment Statutory Code of Practice explains that evidence of, for example, an organisation's founding constitution[109] will be useful in establishing an 'ethos based on religion or belief'. It also highlights that '[a]n "ethos" is the important character or spirit of the religion or belief. It may also be the underlying sentiment that informs the customs, practice or attitudes of the religion or belief'.[110] Of course, the linked tests of proportionality and legitimate aim still must be satisfied.

5. EXCEPTIONS FOR FAITH SCHOOLS

5.1 Religion or belief discrimination

There exist other significant religious exceptions to domestic religion or belief discrimination provisions, although these exist in the *Schools and Standards Framework Act 1998* (*SSFA*)[111] and independently of the *EqA 2010*. In particular, faith schools in England and Wales may impose religion or belief requirements when recruiting teaching staff: this means that 'schools with a religious character ... are allowed to discriminate in favour of staff who share the religious ethos of the

[107] *Ibid*.
[108] TUC Report, above n. 15, p. 22.
[109] EHRC: Employment Statutory Code of Practice, Draft for Consultation, p. 215.
[110] *Ibid*.
[111] As amended by the *Education Inspections Act 2006*.

school'.[112] In voluntary controlled and foundation schools the religion of a candidate for the post of head teacher may be considered in the appointing process and regard may also be had to their 'ability and fitness to preserve and develop the religious character of the school'.[113] Alongside this, in the same types of schools, a fifth of teaching staff can be 'reserved' to give religious education that accords with the religious tenets of the school and these appointments may be 'selected for their fitness and competence'.[114] This is a particularly generous religious exception as '[t]he SSFA has no proportionality requirement. As a result, the ethos of the organisation, and the question of whether the requirement is really necessary, or could be achieved through less discriminatory means is not addressed'.[115] Consequently, the conceptualisation of religious liberty in the context of employment in faith schools across England and Wales is much greater than it is in other parts of the employment sphere where religious exceptions operate. Remarkably, this wider conceptualisation is not extended to other parts of the United Kingdom.[116] The exception for faith schools in England and Wales is even broader in relation to voluntary aided schools where religious requirements can be imposed on all staff, not merely the head teacher or 'reserved' teachers of religious education. Indeed, this 'seems to go well beyond what might be lawful ... [W]ith regard to teaching subjects other than religion, it is hard to see that being of a particular religion or belief would be a genuine occupational requirement of the job. It is also difficult to see how such requirements are proportionate'.[117] The inconsistency between the religious exceptions afforded for faith schools as compared to other religious organisations is stark. Such schools are subjected to far less restriction which in turn may be open to abuse.

The EqA 2010 covers educational appointments in relation to head teachers and principals of schools where there is a requirement that that person be a member of a particular religious order.[118] However, it is not apparent that the Act replaces or

[112] Vickers, above n. 35, p. 150.
[113] *SSFA*, *s. 60*, as amended by the *EIA*, *s. 37*.
[114] *SSFA*, *s. 58*, as amended by the *EIA*, *s. 37*.
[115] Vickers, above n. 35, p. 152.
[116] For the Scottish position, see above section 2.3.
[117] Vickers, above n. 35, p. 153.
[118] *Schedule 22*, *para. 3*.

impacts upon the specific faith schools provisions addressed above for such schools in England, Scotland and Wales.

6. CONCLUSION

The exceptions which benefit religion in employment are multifarious. There exist not only genuine occupational requirements for all organisations but also specific exceptions that are targeted at organised religions. Collectively, these apply so as to permit discrimination on grounds of sex, sexual orientation and religion or belief by religious bodies: they aim to enhance religious liberty at more of an 'institutional' level than an individual level. They have evolved into the *EqA 2010* versions that exist today, these being 'generally similar to those found in the old law',[119] although some key variations between the old and new law have been emphasised. However, this range of exceptions is of very limited practical use in employment given the highly restricted circumstances to which they may be applied, their narrow definitional ambit and the strict ways they have been interpreted by courts and academics commentators. This may be viewed as unsurprising. However, their utility is further circumscribed by the vagueness inherent in some of the concepts and tests employed by the legislature.

It is noticeable that the exceptions to religion or belief discrimination are wider than those in sex and sexual orientation discrimination. This permits the relevant organisations greater latitude in the pursuit of selection of workers based on religion or belief. Moreover, the religious exceptions, as opposed to the general occupational requirements, 'indicate that special treatment is being afforded to organised religions'.[120] This highlights the precious nature of those religious exceptions: whilst they may be limited, they permit an 'organic' approach to employment whereby:

> the employee is expected to participate in the mission of the organisation as a whole, and is expected to join the whole community, the whole body, in a way that transcends any narrowly defined job description. Under the organic approach as applied to religious organizations, the workplace itself constitutes a community of believers where relationships are as important, if not more so, than narrowly defined role tasks. To a degree, the religious

[119] Sandberg, above n. 57, p. 118.
[120] Roberts in Doe and Sandberg, above n. 58, p. 83.

> workplace is church where people worship together, not just *at* work, but *through* work.[121]

Esau reinforces further the special privilege of such religious exceptions by contending that they authorise so-called 'islands of exclusivity': organisations may run their internal affairs regarding appointment of personnel how they like. This entails 'giving to them a zone of liberty to at least hire their own members and enforce their own lifestyle norms that are otherwise discriminatory'.[122] Whilst the exceptions may be narrow, the fact they exist at all (and the corresponding benefits they bring) is still an important validation of extra-special religious liberty.

[121] A. Esau, '"Islands of Exclusivity": religious organizations and employment discrimination' (2000) 33 University of British Columbia Law Review 719, p. 734 (original emphases).
[122] *Ibid*., p. 827.

CHAPTER 5: RELIGIOUS EXCEPTIONS IN THE PROVISION OF GOODS AND SERVICES

1. INTRODUCTION

The religious exceptions in the provision of goods and services will now be assessed. As with chapter four, exceptions both specifically for religion and those benefitting religious and non-religious groups will be discussed to survey their practical operation, although the latter will only be footnoted given their minor status and recent genesis in the *Equality Act 2010* (*EqA 2010*). The exceptions in the pre-*EqA 2010* law will be considered once more to provide an informed view of the current crop of exceptions, whilst the focus again will be on those exceptions to sex, sexual orientation and religion or belief discrimination.

2. SEX DISCRIMINATION

Under the *Sex Discrimination Act 1975* (*SDA*) the provision of goods and services could be restricted to men. This was permitted where the place providing those goods or services was occupied or used (permanently or temporarily) for the purposes of an organised religion and the restriction to men was so as to comply with the doctrines of that religion or avoid offending the religious susceptibilities of a significant number of its followers. [1] It will be recalled that these tests were the same as those contained in the *SDA*'s exception for organised religions in employment and are consequently affected by the same problems.[2]

The same exception has subsequently been incorporated into the *EqA 2010*.[3] The provision of goods and services must still be made for the purposes of an organised religion.[4] It is now a requirement that the goods and services be provided at a place which is ('permanently or for the time being') occupied or used for the purposes of

[1] *S. 35(1)(b)*.
[2] See chapter 4, section 3.1.1.
[3] *Schedule 3, Part 7, para. 29*. The *EqA 2010* also introduces some general exceptions to sex discrimination. In limited circumstances it allows the provision of both separate services for the sexes (*Schedule 26*) and single-sex services (*Schedule 27*).
[4] *Schedule 3, Part 7, para 29(1)(a).*

organised religion.[5] Moreover, the limited provision of the goods and services must be necessary in order to comply with the doctrines of the religion or be for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers.[6] This is the same updated test as that which now operates in relation in employment in relation to exceptions for organised religion.

Significantly, the *EqA 2010* provides that only a 'minister' may take advantage of the religious exception relating to goods and services[7] as opposed to a 'person' under the corresponding *SDA* provision, highlighting a possible narrowing of this exception. However, 'minister' is defined rather broadly to include any person who 'performs functions in connection with the religion, and holds an office or appointment in, or is accredited, approved or recognised for purposes of, a relevant organisation in relation to the religion'.[8] Intriguingly, the *EqA 2010* attempts to define 'organised religion' for the purposes of this religions exception on the text of the Act[9] – something which is markedly absent from the religious exception it provides in the context of employment. According to the *EqA 2010*'s definition, the organised religion test will be satisfied if an organisation's purpose is to practise the religion, advance the religion, teach the practice or principles of the religion, enable persons of the religion to receive benefits, or to engage in activities, within the framework of that religion, or to foster or maintain good relations between persons of different religions.[10] An organisation is not an organised religion if its sole or main purpose is commercial.[11]

Whilst not falling within the ambit of sex discrimination, it is relevant to note that a new exception exists for Anglican clergy in England and Wales to refuse to solemnize the marriage of a person in their parish that they would otherwise be obliged to conduct under the *Marriage Act 1949* where they reasonably believe that one of the parties' gender is acquired under the *Gender Recognition Act 2004*. This exception also applies to those of other faiths in England and Wales whose consent is

[5] *Ibid., para 29(1)(b).*
[6] *Ibid., para 29(1)(c).*
[7] *Schedule 3, Part 7, para 29(1).*
[8] *Ibid., para 29(2).*
[9] *Ibid., para. 29(3).*
[10] *Ibid.*
[11] *Schedule 3, Part 7, para. 29(4).*

required to conduct marriages in religious premises registered under the *Marriage Act 1949*. This is a religious exception to the prohibition of gender reassignment discrimination contained in the *EqA 2010*. [12] Of course, the test of 'reasonable belief' is liable to the same interpretative issues as that used in employment.

3. SEXUAL ORIENTATION DISCRIMINATION

There exist a range of religious exceptions from guarantees against sexual orientation discrimination in the provision of goods and services. Until recently, these were found in the *Equality Act (Sexual Orientation) Regulations 2007*[13] (*SO Regs 2007*), Regulation 14 of which provided that 'organisations relating to religion or belief' could restrict the provision of goods and services where their sole or main purpose was not commercial,[14] where they were not educational establishments or (local) education authorities[15] and where this was necessary to comply with the doctrine of the organisation[16] or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.[17] Once again, the familiar alternative justification tests were used, although the compliance test related to the doctrine of the 'organisation' and not religion. This expanded the scope of the exception, as did the fact that the exception itself was defined to include organisations relating to belief.

The *EqA 2010* retains the test of 'organisation relating to religion or belief'.[18] It amends the alternative justification tests[19] in order to cater for organisations following a belief system as opposed to a religion. In the case of religion, the second alternative test is the same as before;[20] in the case of a belief system the second alternative justification test is to avoid conflict with the 'strongly held convictions relating to the belief of a significant number of the belief's followers'.[21] This

[12] *Schedule 3, Part 6, para. 24.*
[13] SI 2007/1263.
[14] Regulation 14(2)(a).
[15] Regulation 14(2)(b).
[16] Regulation 14(5)(a).
[17] Regulation 14(5)(b).
[18] *Schedule 23, para 2*.
[19] *Schedule 23, para. 2(7)* and *(9).*
[20] *Schedule 23, para. 2(9)(a).*
[21] *Schedule 23, para. 2(9)(b).*

addresses the anomaly that existed in the *SO Regs 2007* whereby organisations relating to belief had to satisfy the second alternative justification regarding 'strongly held convictions relating to religion'. Whilst this is appropriate in that it applies a logical alternative test to 'belief,' it does nevertheless signify a widening of the exception.

In the *EqA 2010* an 'organisation relating to religion or belief' is defined[22] in exactly the same way as 'organised religion' in the corresponding sex discrimination exception for religion in goods and services provision in the *EqA 2010*.[23] Whilst the test for determining such organisations is similar in these provisions, uncertainty is cast over the value of the test if it may apply equally to organisations relating to religion and organisations relating to religion or belief, the latter type potentially being capable of applying to a wider range of organisations. Sandberg notes that '[t]here is no legal articulation of the difference, if any, between an "organisation relating to religion or belief" and the term ... "organised religion"'.[24] Indeed, it has been said that the test of 'organisations relating to religion or belief' seems 'wider than that or "organised religion" under the Sex Discrimination Act 1975'.[25] Certainly, 'this is a matter of practical importance'[26] because it indicates that 'whilst an "organised religion" will always also be an "organisation relating to religion or belief", an "organisation relating to religion or belief" will not always be an "organised religion". However, the law remains silent as to the precise difference between the two'.[27] The *EqA 2010* Explanatory Notes highlight that an example of this exception in practice would be a Church refusing to let out its hall for a Gay Pride celebration as it considers that it would conflict with the strongly held religious convictions of a significant number of its followers.[28] Clearly, a Church (as an organisation relating to religion or belief) would be able to demonstrate a religious non-commercial purpose. At the other end of the scale it is unlikely that this religious exception could be enjoyed by organisations whose purposes were not directly and immediately religious so as to satisfy the *EqA 2010*'s definition in *Schedule 23, para.*

[22] *Schedule 23, para. 2(1).*
[23] *Schedule 3, Part 7, para. 29(3).*
[24] R. Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), pp. 124 – 125.
[25] R. Sandberg and N. Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 Cambridge Law Journal 302, p. 306.
[26] Sandberg, above n. 24,p. 125.
[27] *Ibid*.
[28] *EqA 2010*: Explanatory Notes, para. 996.

2(1). For example, in the Australian decision of *Cobaw Community Health Services Ltd. v. Christian Youth Camps Ltd.*,[29] a Christian youth camp wished to deny access to its adventure resort facilities (which it otherwise provided without restriction to any religious or secular groups) on grounds of sexual orientation. The Victorian Civil and Administrative Tribunal decided that the defendant organisation could not rely on a religious exception regarding sexual orientation and provision of facilities in the *Equal Opportunity Act 1995* as it was not a 'body established for religious purposes':[30] there was no religious component to its conduct as an organisation.[31]

A particular restriction on this religious exception is the fact that, as under the *SO Regs 2007*,[32] the *EqA 2010* precludes use of it when a discriminatory act on the basis of sexual orientation is done on behalf of a public authority[33] and under the terms of a contract between the organisation and the public authority.[34] The role of public authorities in situations of sexual orientation discrimination will be returned to in chapter nine when commenting on the application of reasonable accommodation models to cases where religion has clashed with sexual orientation. In relation to organisations which contract to provide services on behalf of a public body, the *EqA 2010* Explanatory Notes explain that a religious organisation which has a contract with a local authority to provide meals to elderly and other vulnerable people within the community on behalf of the local authority cannot discriminate because of sexual orientation.[35]

Restriction on the use of this religious exception to those organisations relating to religion or belief which are not public authorities has deep practical implications. It appears that, whilst the state is prepared to legislate to allow exceptions based on religion or belief from much heralded and lauded anti-discrimination provisions, it is not prepared to be associated with these types of exceptions in connection with

[29] [2010] VCAT 1613.
[30] per Justice Hampel, at paras 252 – 254.
[31] *Ibid*., paras 243 – 248.
[32] Regulation 14(8)(b).
[33] *Schedule 23, para 2(10)(a)*.
[34] *Ibid., para 2(10)(b)*.
[35] *EqA 2010*: Explanatory Notes, para. 996. This is similar to the issue of provision of adoption services to same-sex couples by Catholic adoption agencies that arose in *Catholic Care (Diocese of Leeds) v. Charity Commissioner for England and Wales* [2011] UKFTT B1 (General Regulatory Chamber). This case is considered in chapter 6, section 2.1 and chapter 12, section 3.3.3.

services carried out by religious bodies when they are linked back to the state itself. There are undoubtedly political motivations in not wishing public money to be used or seen to be used to support discrimination on grounds of sexual orientation and especially not through a legitimate religious exception drafted by Parliament to its very own anti-discrimination legislation. In facilitating religious liberty through this exception the state simultaneously seeks to distance itself from this where it may prove too controversial.

A final issue under this anti-discrimination heading relates to the fact that the *EqA 2010* now permits civil partnerships to take place on religious premises.[36] However, there is a religious exception within this provision to the effect that 'nothing in [the] Act places an obligation on religious organisations to host civil partnerships if they do not wish to do so'.[37] After some delay this exception has now come into effect: *s. 202* of the *EqA 2010* has enabled removal of the ban in the *Civil Partnership Act 2004* on civil partnerships taking place on religious premises meaning the religious exception is now in effect. The ban itself was lifted on the 5th December 2011[38] by the *Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011*.[39] This evidently provides greater religious liberty on grounds of sexual orientation for same-sex couples where affirmation of such unions is permitted by the religious owners of relevant premises. At the same time it affords flexibility for religious liberty in exempting religious groups from the use of their premises for such activities.

4. RELIGION OR BELIEF DISCRIMINATION

Previously, the *Equality Act 2006* (*EqA 2006*) contained a variety of religious exceptions from religion or belief discrimination. The most relevant concerned 'organisations relating to religion or belief':[40] this is continued under the *EqA 2010*[41] although not applying to organisations that are commercial.[42] Under the *EqA 2010*

[36] *S. 202*, with the definition of religious premises found in *s. 202(4)(3C)*.
[37] S. *202(4)(3A)*.
[38] See: <http://www.homeoffice.gov.uk/equalities/lgbt/>, accessed 21st August 2011.
[39] SI 2011/2661.
[40] *S. 57*.
[41] *Schedule 23, para. 2*.
[42] *Ibid., para. 2(2).*

such organisations have to have as their purpose the same aims as those of organisations relating to religion or belief seeking exceptions from sexual orientation discrimination.[43] Under the *EqA 2006* an additional requirement was included whereby the organisation had to 'improve relations, or maintain good relations, between persons of different religions or beliefs'.[44] The *EqA 2010* maintains this[45] although its wording may be slightly more generous to organisations of religion or belief in that the requirement now is to merely to '*foster* or maintain good relations between persons of different religions or beliefs'.[46] As with the religious exception in sexual orientation discrimination under the *EqA 2010* both organisations and ministers may restrict the provision of goods and services on grounds of religion or belief.

The exception in the *EqA 2006* could be successfully claimed only if the basis of an organisation's claim was either 'by reason of or on the grounds of the purpose of the organisation',[47] or 'in order to avoid causing offence, on the grounds of the religion of belief to which the organisation relates, to persons of that religion'.[48] These alternative tests were notably different in scope from those which had to be established by religious bodies in successfully claiming religious exceptions in sex and sexual orientation discrimination. For example, the 'purpose' of an organisation was apt to broader interpretation. This test is simplified further by the *EqA 2010*: it is now defined as 'because of the purpose of the organisation'.[49] The second alternative test is 'to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief'.[50] It is presumed this will have to be interpreted with a degree of subjectivity concerning what 'persons of that religion or belief' would find offensive which is likely to create problems of definition for the courts. There are few safeguards in place to prevent the test of 'avoid causing offence, on the grounds of the religion or belief to which the organisation relates, to persons of that religion or belief', from being interpreted potentially generously when operation of the exception reaches the domestic courts.

[43] *Ibid., para. 2(1).*
[44] *S. 57(1)(e).*
[45] *Schedule 23, para. 2(1)(e).*
[46] *Ibid* (emphasis added).
[47] *S. 57(5)(a).*
[48] *S. 57(5)(b).*
[49] *Schedule 23, para. 6(a).*
[50] *Ibid., para 6(b).*

The *EqA 2010* contains further religious exceptions. For example, charities may require members, or persons wishing to become members, to make a statement which asserts or implies membership or acceptance of a religion or belief.[51] Pursuant to this, charities may also provide benefits, including the provision of goods and services, only to persons of a particular religion or belief.[52] Moreover, there also exist religious exceptions for schools in the goods and services provision context. The *EqA 2006* provided that it was not unlawful for an educational institution, established or conducted for the purpose of providing education relating to, or within the framework of, a specified religion or belief, to restrict the provision of goods or services.[53] This is repeated in the *EqA 2010* although there is a restriction of the types of relevant provisions. These are expressly confined to matters such as curriculum, admission and acts of worship.[54] Furthermore, both schools with a religious character[55] and institutions with a religious ethos[56] are exempt from their otherwise respective duties not to discriminate on, amongst other grounds, religion or belief in admissions.

5. CONCLUSION

Overall, these exceptions are both narrow and 'the same in substance as the old law'.[57] Arguably, as with the exceptions in employment, 'it is likely that the narrowness of the exceptions will be continued to be stressed until the exceptions narrow to the extent that they cease to exist'.[58] Others have argued that the restricted nature of the exceptions should be expected. For example, Roberts has contended that 'it was clear from the outset ... that the Government intended the exception for religious organisations to be as narrow as possible'.[59] This may prove to be overly negative given that attention in this chapter has been drawn to some of the ways in

[51] *S. 193(5)*. The charitable instrument must allow for this: *s. 193(1)(a)*.
[52] *S. 193(5)*.
[53] *S. 59(1)(a)*.
[54] *Schedule 3, para. 11*.
[55] *Schedule 11, Part 2, para. 5(1)*.
[56] *Schedule 12, Part 2, para. 5(1)*.
[57] R. Sandberg, 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, p. 178.
[58] *Ibid*., p. 179.
[59] P. Roberts, 'Religion and Discrimination: balancing interests within the anti-discrimination framework' in N. Doe and R. Sandberg (eds.) *Law and Religion: New Horizons* (Leuven: Peeters, 2010), p. 86 (Roberts argues this in relation to religious exceptions to sexual orientation discrimination, although it is arguably true of the religious exceptions to sex and religion or belief discrimination too).

which religious exceptions in goods and services may be broader than at first blush (it may also be noted that they do not contain a proportionality requirement)[60]. Nevertheless, irrespective of how the narrowly or broadly the exceptions may eventually be interpreted, there is no escaping the haphazard nature of the definitions, tests and concepts used to draft them. The circumstances in which an exception can be used are highly limited – their use effectively being restricted, as in employment, to religious bodies as opposed to individuals – meaning they serve little practical use in more everyday situations when those with a religious faith may seek particular individual treatment.

[60] This is not required under EU law in relation to exceptions in goods and services provision given that EU law has not yet pronounced on the scope of exceptions in this area.

CHAPTER 6: REASONABLE ACCOMMODATION AND THE UNITED KINGDOM

1. INTRODUCTION

The exceptions explored in chapters four and five pose two chief drawbacks for religious liberty. Firstly, they only apply in very limited practical situations – admittedly, one advantage of this is that they do facilitate certainty of law: the exceptions are defined in advance and afford clarity of expectation on when the opprobrium of the law will be avoided. Secondly, their parameters are heavily policed by a collection of tightly defined tests and requirements that are often vague, inconsistent and arbitrary. This narrows their practical utility yet further.

Restrictiveness was certainly to be expected. In chapter three it was emphasised that the decision to grant religious exceptions involved not only philosophical dilemmas but also, more significantly, a sensitive proportionality balance juggling different interests (including whether religion was deserving of special treatment). Even where that balance fell in favour of religious immunity, the exception could only ever provide minimal practical protection in breadth and depth from anti-discrimination law. In that sense, the fact exceptions exist at all may be seen as a useful addition to religion law and a victory for religious liberty as 'discrimination law does make some concession to religious groups and religious employees whose religious beliefs clash with obligations placed on them'.[1] Nonetheless, future judicial interpretation of the exceptions in anti-discrimination law is likely to continue the conservative trends already observed, particularly in relation to exceptions for religions. Indeed, 'the only guidance to be derived from the cases to date is that the exceptions are to be interpreted narrowly'.[2] It is ominous that in November 2009 the European Commission sent a reasoned opinion to the United Kingdom (UK) government 'asserting that exceptions for religious employers under UK law were broader than those permitted under the EC Directive [2000/78/EC]'.[3] This would suggest that more narrowing of the exceptions (in employment at least) is possible although 'to

[1] R. Sandberg: *Law and Religion* (Cambridge: Cambridge University Press, 2011), p. 129
[2] *Ibid*.
[3] *Ibid*., pp. 118 – 119.

date, this opinion has not been followed by infringement proceedings against the UK'.[4]

2. OUTSIDE THE RELIGIOUS EXCEPTIONS

It might be ventured that religion receives appropriate, and indeed sufficient, legal recognition at the anti-discrimination level. This is enjoyed via a combination of protection from religious discrimination (be it direct or indirect) and exceptions from various forms of anti-discrimination law. The former act as a basic guarantee to affirm the religious liberty of individuals in a range of everyday circumstances; the latter exist to afford bodies, religious and sometimes otherwise, a privileged right of discrimination in certain specified situations.

However, this straightforward characterisation masks a number of religious liberty challenges. It was said in chapter three that the inter-connected notions of human dignity, autonomy and equality[5] provided a popular setting in which to conceive of religion law, including religious exceptions and the enhanced degree of protection they provide. Nevertheless, in the case-study in Part II it was said that the extra immunity from anti-discrimination rules those exceptions afford is considerably restricted. This was in terms of both practical application and the exceptions' intended beneficiaries – they are clearly intended for use by religious *bodies*.

As a result, it may be asked whether an argument can be formulated for further special protection of religious interests in anti-discrimination law (in the vein of an exception). Such an argument could be based on recent case law where *individual* divergence from the norm has revealed gaps in protection of religion in particularly common situations. Such a shift in emphasis back to – necessarily – more individual protection might be contested by some,[6] although it has already been established that

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[4] A. Donald et al, *Equality and Human Rights Commission* (EHRC) *Research Report 84: religion or belief, equality and human rights in England and Wales*, p. 32. Available at: <http://www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf>, accessed 24th August 2012, p. 96.

[5] Discussed in chapter 2, section 2.

[6] A focus on the individual is seen as undesirable from the perspective of organised religions given that it may diminish the autonomy of such groups. In response to criticisms by Julian Rivers that arguments for religious interests being based on individual rights is merely 'a modern development in thinking about religious rights', Vickers suggests that '[t]his may well be the case, but in order to

legal protection of religion as based on dignity, autonomy and equality may apply equally at either the collective or individual levels. This is supported by Vickers who submits that 'religious interests ... contain a collective dimension, even though the recognition of religious interests ... [is] cast in terms of individual rights, based on the principles of individual autonomy, dignity and equality';[7] Khaitan also notes how dignity 'is seen sometimes as an individualistic ideal, and at other times as a communitarian one'.[8]

Of course, in calculating whether further special protection is needed, the anti-discrimination law jurisprudence on religion needs to be evaluated to ascertain how far there exists any protection gap at the individual level which necessitates more accommodation of religious interests. By way of introduction, it can be said that the past few years have witnessed a rise in the number of unsuccessful anti-discrimination judgments affecting religious interests across employment and the provision of goods and services (these spheres comprise the main discrimination contexts in which religious battles have recently been fought). Given the sheer volume of Employment Tribunal decisions, the focus in this chapter and those that follow will be on relevant high-profile decisions adjudicated in the Employment Appeal Tribunal (EAT) or above.[9] The emphasis, as in the whole thesis, will be on *religious* (that is, theistic) protection issues.[10]

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suggest that the new thinking is misguided, further debate is needed to explain why religion is protected at all in modern times': L. Vickers, 'Twin Approaches to Secularism: organised religion and society' (2012) 32 Oxford Journal of Legal Studies 197, p. 202. This is revisited in chapter 12, section 1.

[7] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), pp. 42 – 43.

[8] T. Khaitan, 'Dignity as an Expressive Norm: neither vacuous nor a panacea' (2012) 32 Oxford Journal of Legal Studies 1, p. 14.

[9] The exception is *Chaplin v. Royal Devon and Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009 which is included for discussion as the claimant is joined with the appellant in *Eweida v. British Airways PLC* [2010] EWCA Civ 80 in an application currently pending before the European Court of Human Rights: *Eweida and Chaplin v. UK* [2011] ECHR 738.

[10] Other cases raise interesting issues regarding whether individual *atheist* believers should be excepted from rules. See, for example, *R (on the application of the National Secular Society) v. Bideford Town Council* [2012] EWHC 175 (Admin) and an unsuccessful challenge on indirect discrimination grounds by an atheist town councillor to the saying of prayers as an integral part of town council meetings.

2.1 Domestic anti-discrimination law and the protection of religion[11]

Unsuccessful cases of religious discrimination in *employment* have featured three types of claim. The first involves a clash between an employee's religion and the extent to which that employee is able to fulfil their workplace duties according to their beliefs about sexual orientation, such cases including *McClintock v. Department of Constitutional Affairs* (*McClintock*),[12] *Ladele v. London Borough of Islington* (*Ladele*)[13] and *McFarlane v. Relate Avon Ltd*. (*McFarlane*).[14] The second concerns a balance between the employee's religion and the wish to modify personal appearance through the wearing of religious clothing or symbols at work, such modification conflicting with an employer's uniform policy. These cases comprise *Azmi v. Kirklees Metropolitan Council* (*Azmi*),[15] *Harris v. NKL Automative Ltd*. (*Harris*),[16] *Eweida v. British Airways PLC* (*Eweida*)[17] and *Chaplin v. Royal Devon and Exeter Hospital NHS Foundation Trust* (*Chaplin*).[18] Finally, the third type of claim relates to the conflict between an employee's need to attend religious observance ceremonies and their scheduled work duties, the relevant domestic discrimination judgment being the unsuccessful EAT decision in *Cherfi v. G4S Security Services* (*Cherfi*).[19] Prior to the domestic introduction of laws on religious discrimination there is also the decision in *Copsey v. WWB Devon Clays Ltd.* (*Copsey*),[20] an unfair dismissal case which also considered the employee's right to freedom of religion under *Article 9*.

Unsuccessful discrimination cases with religious elements in the sphere of *goods and services provision* have chiefly involved a clash between religious service providers and whether they can restrict such services to prospective service users on grounds of sexual orientation. These cases include *Hall and Preddy v. Bull and Bull* (*Bull*)[21]

[11] All employment cases sign-posted here are discussed at length in chapters 9 – 11. For the sake of brevity, the facts of these claims are discussed later in those chapters.
[12] [2008] IRLR 29.
[13] [2009] EWCA Civ 1357.
[14] [2010] EWCA Civ B1.
[15] [2007] IRLR 484.
[16] [2007] UKEAT 0134_07_0310.
[17] See above n. 9.
[18] *Ibid*.
[19] [2011] EqLR 825.
[20] [2005] EWCA Civ 932.
[21] [2012] EWCA Civ 83.

(provision of a double room in a Christian bed and breakfast), *R (Johns) v. Derby City Council* (*Johns*)[22] (provision by a Christian couple of fostering services) and the protracted battle in *Catholic Care v. Charity Commission for England and Wales* (*Catholic Care*)[23] (provision by a Catholic adoption agency of adoption services).

Of the unsuccessful religious discrimination claims in employment, all raised matters of indirect rather than direct discrimination, although some claimants unsuccessfully argued direct discrimination.[24] The exception is *Copsey* which was heard before domestic provisions on religious discrimination had come into force. Of the unsuccessful cases in goods and services provision, the legal mechanisms used were often more varied given the range of claims brought either *by* or *against* religious providers. In *Bull*, direct discrimination on grounds of sexual orientation was upheld[25] against the religious service providers, with the EAT indicating that indirect discrimination on the same grounds would also have existed.[26] *Johns* raised issues of direct and indirect religious discrimination and a breach of *Article 9* of the *European Convention on Human Rights*. None were successful.[27] The issue in *Catholic Care* was whether the claimant charity could change its objects under *s. 64* of the *Charities Act 1993* so as to accord with *s. 193* of the *Equality Act 2010* (*EqA 2010*). This was an attempt to circumvent *Schedule 23, para. 2(10)* of the *EqA 2010* so that it could register itself as a charity serving only heterosexual people. Under the *EqA 2010* a charity will not necessarily contravene the Act by restricting the provision of benefits to persons who share a protected characteristic[28] where this is 'a proportionate means of achieving a legitimate end',[29]or 'for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic'.[30] Some of the key ways in which the courts' reasoning has restricted religious interests in all the cases outlined above will now briefly be explored.

[22] [2011] EWHC 375 (Admin).
[23] [2011] UKFTT B1 (General Regulatory Chamber). Catholic Care has now been given permission to appeal this decision to the Upper Tribunal (Tax and Chancery Chamber).
[24] See *McClintock, Ladele, McFarlane* (chapter 9), *Azmi, Harris* (chapter 10) and *Cherfi* (chapter 11).
[25] In the Court of Appeal, per Hooper LJ at para. 57.
[26] per Judge Rutherford at para. 53.
[27] per Munby LJ at paras 107 – 109.
[28] *S. 193(1).*
[29] *S. 193(2)(a).*
[30] *S. 193(2)(b).*

2.1.1 Issues common to employment

The limitations of *Article 9* jurisprudence have increasingly encouraged employees to frame cases as religious discrimination claims. In a recent report, Donald et al noted that '[t]he Equality Act 2010 (and its predecessors) has come to be viewed by legal practitioners as a firmer basis for pursuing claims relating to religion or belief'.[31] Rivers similarly claims: '[e]quality law is now beginning to take over from the Human Rights Act 1998 as the larger cause of increased litigation'.[32] One reason for this is that in freedom of religion claims the courts are clearly unsympathetic to the exercise of religion in employment due to the now established view that the religious adherent voluntarily places themselves in that specific situation. This 'applies where someone has voluntarily submitted themselves to a system of norms, usually by means of a contract. This voluntary submission creates a "specific situation" which limits the claimant's right'.[33] The operation of this rule reflects the fact that the courts now take a narrow interpretation of 'interference' under *Article 9(1)*,[34] this being evident in cases heard at both the domestic and Strasbourg levels.[35] The specific situation rule is also found in cases heard at these levels concerning religious manifestation in schools and universities.[36] Despite the fact that this has encouraged claimants to pursue religious discrimination routes instead, the 'specific situation' rule now influences judges in domestic religious discrimination claims in employment, leading Sandberg to conclude that '[t]he jurisprudence in these two areas is no longer separated'.[37] Indeed, commentators have noted the operation of the

[31] Donald et al, above n. 4, p. 32.
[32] J. Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecclesiastical Law Journal 371, p. 382.
[33] R. Sandberg, 'Laws and Religion: unravelling *McFarlane v. Relate Avon Limited*' (2010) 12 Ecclesiastical Law Journal 361, n. 27, p. 365.
[34] For discussion of the doctrine of 'non-interference' under *Article 9(1)*, see, for example, R. Sandberg, 'The Changing Position of Religious Minorities in English Law: the legacy of Begum' in R. Grillo et al (eds.), *Legal Practice and Cultural Diversity* (Aldershot: Ashgate, 2009), pp. 270 – 276 and J. Dingemans, 'The Need for a Principled Approach to Religious Freedoms' (2010) 12 Ecclesiastical Law Journal 371, pp. 375 – 378.
[35] See, for example, Mummery LJ in *Copsey* at paras. 31 – 39 and at the Strasbourg level see, for example, *Kalaç v Turkey* (1997) 27 EHRR 552 at para. 27.
[36] See, for example, Lord Bingham in *R (on the application of Begum) v. Denbigh High School* (*Begum*) [2006] UKHL 15, at paras. 22 – 25, Deputy Judge Supperstone QC in *R (on the application of Playfoot) v. Millais School Governing Body* (*Playfoot*) [2007] EWHC 1698 (Admin) at paras. 25 – 32 and Silber J. in *R (on the application of X) v. Headteacher of Y School* (*X and Y*) [2007] EWHC 298 (Admin) at paras. 29 – 35. At the Strasbourg level see, for example, *Sahin v Turkey* (2007) 44 EHRR 5 at para. 105 (Grand Chamber).
[37] Sandberg, above n. 1, p. 117.

rule in many of the unsuccessful employment cases highlighted above, for example *Azmi*[38] and both *Ladele* and *McFarlane*.[39] Vickers has argued that such a right to resign should 'remain the residual protection, rather than the starting (and swift ending) point for the provision of protection'.[40]

Religious discrimination judgments in employment have also restricted religious liberty in other ways. For instance, in *Eweida* the claimant's indirect discrimination claim against her employer for prohibiting her from wearing a crucifix above her work uniform failed. This was due to the fact that indirect discrimination requires that a provision 'puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it'.[41] It was held that she was the *only* employee who had complained of the prohibition and that there was no evidence that any other persons had been placed at a disadvantage. Despite the fact that for the time being '[a] careless expansion of the concept of indirect discrimination may unfairly burden defendants and lead to the filing of bogus claims',[42] the case raises important questions about *individual* religious liberty under indirect discrimination. As there was no identified group disadvantage there was no need to look at proportionality. The same conclusion as to lack of group disadvantage was found in *Chaplin*, citing the reasoning in *Eweida*.[43] The logic of the decisions on group disadvantage poses a particular problem for individual religious interests, particularly in circumstances where indirect discrimination is the only realistic claim route option. Notwithstanding such comparator-based challenges, some have argued that it is possible – however strained – to interpret the use of the conditional 'would apply; would put' as affording individual disadvantage where other (hypothetical) persons of the same view, were there to be any, would also be disadvantaged.[44] Unfortunately, for those who are

[38] M. Hill and R. Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] Public Law 488, pp. 503 – 504.
[39] Sandberg, above n. 33, p. 365.
[40] Vickers, above n. 7, pp. 52 – 53.
[41] *S. 19, EqA 2010*.
[42] N. Hatzis, 'Personal Religious Belief in the Workplace: how not to define indirect discrimination' (2011) 74 Modern Law Review 287, p. 305.
[43] At para. 28 of the judgment.
[44] L. Vickers, 'Religious Discrimination in the Workplace: an emerging hierarchy?' (2010) 12 Ecclesiastical Law Journal 280, p. 288 – 289.

unable to establish group disadvantage this argument has not found favour with the domestic judiciary.[45]

2.1.2 Issues common to employment and provision of goods and services

Within the spheres of employment *and* the provision of goods and services it has been perceived that religion or belief comes below sexual orientation in the protection 'hierarchy'. This has been discerned from a number of judgments,[46] indicating that whilst recognised characteristics may be equally protected in principle (it might be said that the existence of religious exceptions disrupts this equilibrium) it is as a result of the courts' attempts to balance competing rights within discrimination claims that the hierarchy has been formed and subsequently entrenched. Such a hierarchy is a product of discrimination law juridification:[47] '[i]n this area, courts have shown an even stronger bifurcation between an essentialising view of sexuality and a choice-model of religion that has rendered irrelevant the concerns of those with tender consciences about complicity in behaviour they consider immoral'.[48]Whilst clashes between religion and other protected characteristics (for example, disability[49]) have yet to come before the courts, it may be asked whether religion or belief as a protected characteristic legally viewed as 'non-innate' and 'chosen'[50] will ever be placed above other protected characteristics?

[45] For example, see comments by Sedley LJ in *Eweida*: paras. 16 – 17.

[46] This trend has also emerged in *Article 9* jurisprudence: for example, in *Genderdoc-M v. Moldova* [2012] ECHR 1000 the European Court of Human Rights rejected the argument of the respondent government that the refusal to allow the applicant, an NGO whose object was to support the LGBT community, to hold a demonstration outside Parliament in May 2005 to encourage the adoption of laws to protect sexual minorities from discrimination was justified as having the legitimate aim of protecting the sensibilities of the Moldovan Orthodox Christian population (who would not tolerate same -sex relationships). Moldova's actions violated *Article 11*and *Article 14* taken in conjunction with *Article 11*. For a similar case with the same outcome see *Alekseyev v. Russia* [2010] ECHR 1562.

[47]Whilst it is claimed that the hierarchy under discussion has gestated in the courts through interpretation of discrimination law doctrine, it should be noted that others have debated the normative question of how to construct such a hierarchy of rights at the *legislative* level. For example, Howard draws attention to the perception of such a hierarchy in the European Union where discrimination due to 'sex, racial or ethnic origin, religion or belief and sexual orientation should be considered suspect grounds, but disability and age should not': E. Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13 Maastricht Journal of European and Comparative Law 445, pp. 469 – 470.

[48] Rivers, above n. 32, p. 390.

[49] For brief discussion see chapter 7, section 4.2.

[50] The law views religion as 'chosen' and therefore non-innate. See the comments of Sedley LJ in *Eweida* to the effect that whilst all the protected characteristics are 'objective characteristics of individuals; religion and belief are matters of choice alone' (para. 40). See also the attitude of the courts towards a baby's (or very young child's) capacity to be religious. For example, in *An NHS*

This perhaps highlights an emerging imperative for religion or belief to be protected differently in anti-discrimination law. Vickers contends that the reasoning for the emergence of the hierarchy needs to be explicitly explained by the courts: currently it is not.[51]

In employment this development has become notorious, as highlighted by both *Ladele* and *McFarlane*. During proceedings in *McFarlane*, a witness statement was provided by Lord Carey of Clifton, former Archbishop of Canterbury, arguing that the case should be decided before 'a specially constituted Court of Appeal of five Lords Justices who have a proven sensibility to religious issues'. This was precipitated by the fact that 'both the EAT in *McFarlane* and the Court of Appeal in *Ladele* failed "to conduct the balancing exercise" between the two competing claims of religious discrimination and sexual orientation discrimination'.[52] This has led to Sandberg drawing the conclusion that in employment cases where religion and sexual orientation clash, '[t]here seems to be no [legal] recognition that equality policy protects discrimination on grounds of religion as well as on grounds of sexual orientation,'[53] whilst in relation to both employment *and* goods and services provision it is similarly noted that '[t]he law offers very little, if any, accommodation of [religious] views'.[54] Sandberg illustrates the emergence of this protection imbalance in goods and services provision by noting the decision in *Bull*. Significantly, in relation to indirect sexual orientation discrimination:

> the judgment of the court ... does not mention the grounds upon which the discrimination could be justified and suggests that it would be difficult to identify such grounds, noting that, in contrast, it would be 'easy to imagine examples of such cases' in the sphere of religious discrimination. The judgment suggests that it is more difficult to justify indirect discrimination on grounds of sexual orientation than it is to justify such discrimination on grounds of religion'.[55]

Trust v. MB [2006] EWHC 507 (Fam), Holman J. stated at para. 50 that a child, 'must himself be incapable, by reason of his age, of any religious belief'. Holman J. reinforced this point in *The NHS Trust v. A* [2007] EWHC 1696 (Fam) at para. 41.

[51] Vickers, above n. 44, pp. 301 – 303.

[52] Sandberg, above n. 33, pp. 363 – 364.

[53] R. Sandberg, 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, p. 172. This is also alluded to by Hambler in some employment scenarious: A. Hambler, 'A Private Matter? Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace' (2008) 3 Religion and Human Rights 111, p. 130.

[54] Sandberg, above n. 53, p. 173.

[55] *Ibid*., pp. 172 – 173, quoting the Bristol County Court in *Bull* at para. 52.

The developing impression in anti-discrimination law is that the jurisprudence does not adequately support those with faith convictions concerning beliefs surrounding issues of sexual orientation. In the sphere of employment this means that the ultimate option of last resort – the right to resign – is frequently the only realistic option. This point is made by Hambler, albeit only in relation to *public* officials such the claimants in *McClintock* and *Ladele*.[56] Indeed, the need to think more creatively about accommodation options in such cases has been emphasised elsewhere by Hambler:

> where the main source of ethical opposition to a particular practice is drawn from a particular faith standpoint, and where the employer is rich in resources, then it is surely not too great a burden to expect the employer to at least consider the possibility of a religious objection and act accordingly? In [McClintock] ... it would have meant the employer giving greater consideration to [the claimant's] request for a suitable 'accommodation'.[57]

Vickers has submitted that 'it may be inevitable that a hierarchy will be created as between different grounds of equality.'[58] although it is important to recognise that 'further thought needs to be given to where religion should sit on the spectrum and why'.[59] Malik counsels against this, stating that 'where there is a religion and sexuality conflict, it is important to take an approach that does not create a hierarchy between rights or equality grounds'.[60]

3. REASONABLE ACCOMMODATION

The cases alluded to above illuminate problematic trends in religious discrimination adjudication. Whilst individual believers obviously cannot and do not expect *carte blanche* dispensation from either workplace expectations or laws governing the provision of goods and services, the decisions indicate the rather hostile way in which the courts have interpreted the rules on anti-discrimination law against

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[56] A. Hambler, 'A No-Win Situation for Public Officials with Faith Convictions' (2010) 12 Ecclesiastical Law Journal 3, pp. 7 and 15; Hambler, above n. 53, p. 121.
[57] Hambler, above n. 53, p. 120.
[58] Vickers, above n. 44, p. 302.
[59] *Ibid*.
[60] M. Malik, 'Religious Freedom, Free Speech and Equality: conflict or cohesion?' (2011) 17 Res Publica 21, p. 38.

religious individuals. In employment claims, the difficulties lie in interpretation of the tests in indirect discrimination, be it at the initial stage of disadvantage or the second stage of justification. Two separate factors that have limited religious success in these indirect discrimination cases have been the specific situation rule and the need, as an individual, to be able to show group disadvantage. Meanwhile, in both employment and goods and services provision the limiting factor has been the perceived creation of a hierarchy between religion or belief and sexual orientation. Across all the cases, three main areas of clash can be categorised: religion and issues of sexual orientation;[61] religion and employer dress codes; and religion and employer work schedules. These three sites of clash should not entail as quick a surrender of dignity, autonomy and equality as the courts' decisions might indicate. In particular, the idea of human dignity 'demands a core level of respect for the person, which may include respect for their religious interests. This core respect is not undermined by a person doing as he is bid',[62] for example by voluntarily either undertaking employment or offering to provide goods or services to the public. These areas of clash are revisited across chapters nine to eleven.

3.1 A new religious exception system in anti-discrimination law

A solution to this state of affairs is the domestic introduction of reasonable accommodation, a doctrine common in other jurisdictions. Such a concept has the potential to better address individual religious interests in anti-discrimination law: this is via a more sophisticated reconciling of competing positions. Indeed, reasonable accommodation joins with direct and indirect discrimination in forming part of anti-discrimination law[63] (and is therefore grounded in one of the main pillars of religion law). However, it can also be viewed as an attempt to afford additional special protection to religion on top of these two anti-discrimination claim routes – akin to the role of the exceptions discussed in Part II. Moon has commented that 'the requirement of accommodation may rest on the view that there is something special

[61] This characterisation is intended to highlight simply that in the relevant cases religious believers had faith convictions which directly or indirectly related back to human sexual orientation.
[62] Vickers, above n. 7, p. 51.
[63] For an illustration see discussion in section 3.2.1 below of reasonable adjustments in domestic disability discrimination law. In addition, see commentary in chapters 7 and 8 on reasonable accommodation of religion in Canada and the United States, respectively.

or significant about religious beliefs that they are deeply rooted'.[64] To this extent, it has been said that reasonable accommodation connotes 'modification or adjustment'[65] – this being in the spirit of an exception. Consolidating this idea, it has been reasoned that 'where the controversial measure seems the best way to achieve a certain legitimate objective, the adjustment of that measure by means of an exception may be the only way to eliminate the discriminatory character without compromising the measure's purpose. From this perspective, reasonable accommodation can be interpreted as a specific response, in the form of an exception, to an indirect discrimination'.[66] The remainder of this thesis in Parts III to V shall expose reasonable accommodation's value at a practical and policy level in balancing the religious liberty of individuals versus another's legitimate aim. This will entail application of the reasonable accommodation doctrine to some of the cases pinpointed above.[67]

3.2 Models of reasonable accommodation

Attention can now turn to the specifics of how and where the doctrine protects religious interests in anti-discrimination law. The two most identifiable and classic models of reasonable accommodation for religion exist in the anti-discrimination laws of Canada and the United States (US). Academic research on comparative methods of religious protection in anti-discrimination law regularly references these examples,[68] whilst they have also been cited during discussion in the domestic courts on matters of religious liberty.[69] The Canadian and US models will be critiqued in chapters seven and eight, respectively, before being applied to the domestic cases in Part IV. In applying these models it will be important to recall the historical, political and social contexts of those jurisdictions so that any comparison is not misleading. Of course, comparative perspectives are of value 'notwithstanding the different

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[64] R. Moon, 'Introduction: law and religious pluralism in Canada' in R. Moon (ed.), *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008), p. 8.
[65] E. Bribosia, J. Ringelheim and I. Rorive, 'Reasonable Accommodation for Religious Minorities: a promising concept for European antidiscrimination law?' (2010) 17 (2) Maastricht Journal of European and Comparative Law 137, p. 138.
[66] *Ibid*., p. 139.
[67] These cases, and the reasons for choosing them, are outlined below in section 4.
[68] For example, see Bribosia et al, above n. 65 (pp. 138 – 150), Vickers, above n. 7 (pp. 180 – 206) and E. Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Abingdon: Routledge, 2012) (pp. 129 – 134).
[69] For example, see *Copsey* and discussion by Rix LJ of the Canadian system: paras. 67 – 69.

social contexts. When considering difficulties such as how to balance conflicting rights, the experience of other jurisdictions can be helpful'.[70]

3.2.1 Reasonable adjustments and disability in the United Kingdom

The concept of making reasonable accommodation is not entirely foreign to UK anti-discrimination legislation. From its inception in 1995, the law dealing with *disability*[71] discrimination has contained a particular head of unlawful discrimination in the form of failure to provide 'reasonable adjustments'.[72] This is the only protected characteristic to which reasonable adjustments is expressly applied at the domestic level, save for limited examples in relation to pregnancy and maternity.[73] The *Disability Discrimination Act 1995* (*DDA*) introduced a duty to make reasonable adjustments in, for example, employment and the provision of goods and services, although the scope of the duty differed slightly across these contexts. The most relevant claim routes now constitute discrimination 'arising from disability' and the duty to make reasonable adjustments, both found in the *EqA 2010*.[74] The former may be defended by the employer demonstrating that the treatment was a proportionate means of achieving a legitimate aim.[75] Although these are both free-standing causes of action[76] they are inter-connected in that the former will fail if the employer has failed to make adjustments judged to be reasonable.

In employment, the duty to make reasonable adjustments is reactive, not proactive: an employer need not, for example, make physical adjustments to the workplace if it

[70] Vickers, above n. 7, p. 179.
[71] For background commentary on the domestic system see A. Lawson, *Disability and Equality Law in Britain: the role of reasonable adjustment* (Oxford: Hart, 2008), pp. 5 – 13.
[72] The idea is the same regardless of the difference in terminology: D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (Oxford: Hart, 2007), p. 696. Directive 2000/78/EC (employment equality), 27 November 2000, [2000] OJ L303/16, uses the phrase 'reasonable accommodation': *Article 5*
[73] See, for example, the *Management of Health and Safety at Work Regulations 1999* SI 1999/3242: risk assessment for new or expectant mothers regarding health and safety (*Regulation 16(1)*) and, if health and safety risks cannot be avoided, having working conditions or hours of work changed (*Regulation 16(2)*). See also the *Employment Rights Act 1996* allowing employees time off work to receive ante-natal care (*s. 55(1)*).
[74] *See ss. 15* and *20 – 22*, respectively. The *DDA* provided for 'disability related discrimination': *s. 3A(1)(a)*.
[75] *S. 15(1)(b)*.
[76] This was confirmed under the *DDA* in *Clark v. TGD Ltd t/a Novacold* [1999] ICR 951 per Mummery LJ at para. 967. See also Lawson, above n. 71, pp. 146 and 182.

currently has no disabled employees.[77] Moreover, it only arises if the employee knows, or could be reasonably expected to know that an employee is disabled.[78] The *EqA 2010* provides that the duty encompasses taking such steps as is reasonable to address three requirements[79]: i) where a provision, criterion or practice[80] of A's puts a disabled person at a substantial disadvantage[81] in relation to a relevant matter in comparison[82] with persons who are not disabled; ii) where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; and, iii) where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. In order to trigger the duty the disabled employee must establish that one of the three *s. 20* requirements applies and that a particular, identifiable, adjustment would have assisted.[83] It is then for the employer to defend its failure to comply with the duty, for example by showing that the adjustment would not be reasonable or that the adjustment would not have avoided the disadvantage.[84] Although an employer is under no separate to duty to consult the employee to establish whether reasonable adjustments might be possible, [85] a failure to do so will not help its defence.[86]

The *EqA 2010* does not specify the kind of adjustments which may be made, although the Equality and Human Rights Commission's (EHRC) *Equality Act 2010: Code of Practice (Employment)* (*Code of Practice: Employment*)[87] replicates the kind

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[77] B. Doyle et al, *Equality and Discrimination: the new law* (Bristol: Jordan, 2010), p. 187. Contrast this with the position in relation to goods and services provision: see below, p. 94.
[78] *Schedule 8, para. 20*.
[79] See *ss. 20(3) – (5)*.
[80] It is suggested that these be given a 'generous construction': M. Connolly, *Discrimination Law* (London: Sweet & Maxwell, 1st edition, 2006), p. 326. Lawson, above n. 71, also avers that these 'will be interpreted ... generously': p. 72. She further comments that they will 'inevitably encourage the trend towards expansiveness in this area': p. 91.
[81] Substantial means more than minor or trivial: *EqA 2010, s. 212(1)*.
[82] As to how the comparison is to be made see *Fareham College Corporation v. Walters* [2009] IRLR 991.
[83] *Project Management Institute v. Latif* (*Latif*) [2007] IRLR 579; *HM Prison Service v. Johnson* [2007] IRLR 951.
[84] *British Gas Services Ltd v. McCaull* (*McCaull*) [2001] IRLR 60, EAT.
[85] *Tarbuck v Sainsburys* [2006] IRLR 664
[86] *Latif*. See also the Equality and Human Rights Commission's (EHRC) *Equality Act 2010: Code of Practice (Employment)*, para. 6.32.
[87] Available at:
<http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf>, accessed 24th August 2012.

of examples which previously appeared in the *DDA*.[88] These include reallocation of duties, transferring the disabled person to an existing vacancy; altering hours of work; assigning the disabled person to a different place of work or training; or allowing home working.[89] While the nature of adjustments might differ in religious discrimination, the disability model is instructive if only because it reveals '[s]ome of the accommodations ... may be suitable for individuals who request an accommodation in order to allow them to practise their religion (where the law requires such accommodations)'.[90]

The duty is restricted by the test of reasonableness[91] which is judged objectively.[92] Although the onus is on the employer to decide what is 'reasonable,' suggestions by the worker should be considered.[93] The *Code of Practice: Employment* mentions as relevant: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment; and the type and size of the employer.[94] The *Code of Practice: Employment* also provides that it is unlikely to be a defence to argue that an adjustment was unreasonable because staff were obstructive or unhelpful when the employer tried to implement it. An employer would at least need to be able to show that they took such behaviour seriously and dealt with it appropriately.[95] Reasonableness requires the adjustment to be both effective and not unduly onerous for the employer although on occasions the duty has been applied very generously in favour of employees.[96]

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[88] *DDA, s. 18(B)(2).*
[89] These and other factors relating to possible adjustments are included at paras. 6.32 – 6.35.
[90] Schiek et al, above n. 72, p. 683.
[91] Previously included in *s. 18(B)(1).*
[92] Connolly, above n. 80, p. 330 and Lawson, above n. 71, p. 82. See also *McCaull* [2001] IRLR 60.
[93] Connolly, above n. 80, p. 330. See also *Smith v. Churchills Stairlifts* [2006] IRLR 41 and *Archibald v. Fife Council* (*Archibald*) [2004] UKHL 32.
[94] Para. 6.28
[95] Para. 6.35.
[96] In *Archibald* the House of Lords held that a reasonable adjustment included transferring a disabled employee to a less physically demanding role even if it was at a higher pay grade: Baroness Hale: para. 53.

The duty to make reasonable adjustments applies also to the provision of goods and services.[97] There are some differences from the employment scheme, in particular the fact that the duty is ultimately anticipatory[98] but the general approach is the same as in employment and the EHRC has produced a guide outlining similar adjustments and criteria for 'reasonableness': *Equality Act 2010: Code of Practice (Services, Public Functions and Associations).*[99]

Reasonable adjustments might seem to offer a useful comparison with reasonable accommodation of religion. The legitimacy of applying it to religion has certainly been recognized: '[r]easonable adjustment (or accommodation) duties require duty-bearers to recognise that individuals with certain characteristics (such as ... a particular religious belief) might be placed at a disadvantage by the application to them of conventional requirements or systems'.[100] However, there are aspects of disability discrimination which mark it out as different from other protected characteristic of anti-discrimination law. The reasonable adjustments duty is asymmetrical:[101] favourable treatment afforded to a disabled employee cannot be used as the basis for a claim by a disgruntled able-bodied employee. This is significant as religious discrimination is symmetrical: it protects both religion and belief and a lack of religion and belief.[102] Of course, this does not present a barrier to reasonable accommodation of religion in Canada or the US. Nonetheless, the singular approach to reasonable adjustments for disability recognises that it is different from other protected characteristics: 'formal guarantees of equal treatment without the provision of special support and access mechanisms for disabled persons will not be sufficient to achieve genuine equality of opportunity ... reasonable accommodation requirements are essential to address the exclusion of disabled persons'.[103] There is a recognition that in order to achieve equality for those with disabilities there are times when they must be treated differently (that is, more

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[97] *EqA 2010, s. 29* and *Schedule 2*. Under the *EqA 2010* provision of services is defined to include provision of goods and facilities: *s. 31(2)*. See also the *EqA 2010*: Explanatory Notes, p. 30.
[98] *EqA 2010, Schedule 2, para. 2(2)*; *EqA 2010*: Explanatory Notes, para. 684; Doyle et al, above n. 77, p. 86.
[99] Available at: <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf>, accessed 24th August 2012.
[100] Lawson, above n. 71, p. 1.
[101] *Archibald*.
[102] For reference to the definition of religion or belief, see chapter 3, sections 2.2 and 2.3.
[103] N. Bamforth, M. Malik, and C. O'Cinneide, *Discrimination Law: theory and context* (London: Sweet & Maxwell, 2008), p. 1072; p. 1076.

favourably) in order to realise the social goal of fuller participation in the labour market and society more generally. As Baroness Hale has observed, disability discrimination 'does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment'.[104]

As such, there should be caution in directly applying the reasonable adjustments model to religion. It has been designed with disability as a characteristic in mind. To that extent, 'where legal systems do establish an accommodation requirement to benefit individuals other than people with disabilities, evidence suggests that the standard required is frequently lower than that required for disability-related accommodations, meaning that it is far easier to justify a failure to make an accommodation'.[105]Arguably, therefore, the special nature of disability discrimination means that the reasonable adjustments analogy cannot necessarily be transferred in a straightforward way to the cases explored in Part IV. Nevertheless, reasonable adjustment issues will be footnoted during application of the Canadian and US models where they present useful points of comparison.

3.3 Locating reasonable accommodation in anti-discrimination law

It is necessary to discern a firm basis for applying reasonable accommodation to domestic situations of religion and discrimination. This will aid in understanding the wider legal impact of applying the comparative models at the domestic level.

The doctrine is usually found in anti-discrimination law and is viewed as an alternative option to a claim in direct or indirect discrimination. There are good reasons for protecting discrimination against individuals, the disadvantageous effects of which are often harmful and unfair:[106] central amongst these reasons is the concept of equality, already noted[107] as a principle (intertwined with human dignity and autonomy) upon which legal protection of religion can be based. In discussing

[104] *Archibald* at para. 47.
[105] Schiek et al, above n. 72, p. 672.
[106] M. Connolly, *Discrimination Law* (London: Sweet & Maxwell, 2nd edition, 2011), p. 4.
[107] See chapter 2, section 2.

equality, and critiquing formal equality (the notion that all classes of individual receive the same equal treatment), Connolly notes that 'in cases involving religion claimants will often be seeking *different* rather than equal treatment'.[108] Different treatment as the basis of a claim lies behind the operation of indirect discrimination; the same is true for reasonable accommodation. However, this is more subtle in relation to the latter. Whilst indirect discrimination uses this differentiation in determining an outcome (as based on a comparator test) this is not the case with reasonable accommodation. It has no such comparator test, focusing solely on any omission to provide a reasonable accommodation in the first place. Consequently, any resulting equality of opportunity is reached in contrasting ways: 'reasonable accommodation discrimination typically emerges in response to the failure to make an adaptation to ensure equal opportunities and commonly does not follow from differentiation on a forbidden or seemingly neutral ground'.[109] Nevertheless, there must be an initial particular characteristic of which religion or belief is one, with Schiek et al reasoning that '[t]he obligation to make a reasonable accommodation is based on the recognition that, on occasions, the interaction between an individual's inherent characteristic ... and the physical or social environment can result in the inability to perform a particular function or job in the conventional manner'.[110]

This moves the debate in the direction of substantive equality. Whilst the term 'equality' is contested,[111] commentators have been able to agree that substantive equality connotes the idea that 'equality does not need to include the 'same' treatment, but may instead involve different groups being able to pursue their version of the good life'.[112] At a basic level, this underlies indirect discrimination which 'is more concerned with the *effects* of any behaviour, rather than the nature of the behaviour itself',[113] revealing an emphasis on 'the detrimental impact of rules on less powerful groups'.[114] Consequently, 'equality law must be concerned with both

[108] *Ibid*., p. 6 (original emphasis).
[109] L. Waddington and A. Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination' (2002) 18 International Journal of Comparative Labour Law and Industrial Relations 403, p. 426.
[110] Schiek et al, above n. 72, p. 631.
[111] As noted by Vickers, above n. 7, who writes that the term 'has a variety of meanings': pp. 75 – 76.
[112] *Ibid*., p. 76.
[113] Connolly, above n. 106, p. 155.
[114] K. Swinton, 'Accommodating Equality in the Unionized Workplace' (1995) 33 Osgoode Hall Law Journal 703, p. 707.

individuals and groups'.[115] Reasonable accommodation clearly centres its attention on detrimental impact at the level of the individual. However, it sidelines the group to which the individual belongs meaning that it does not seek to ensure equality of opportunity for *all* – only the person seeking accommodation. This affirms the view that it is 'generally framed in terms of an individual right ... [meaning] that individuals, pertaining to a covered group, are entitled to require that an accommodation is made which takes account of their specific needs'.[116] Accordingly, 'it allows for an individualised approach to providing protection',[117] which might better target the religious protection gaps already identified in domestic indirect discrimination cases. As well as being based on equality, reasonable accommodation has also been seen as a way of specifically enhancing human dignity. This is perhaps unremarkable given that dignity can underpin the religious interests of individuals[118] with which reasonable accommodation is exclusively concerned. Moon has argued that reasonable accommodation 'underpins dignity, and in so doing it implies a need to be ready to adapt to the diverse situations of people from different backgrounds'.[119]

The above signifies that it is possible to arrive at a broadly coherent theoretical and conceptual understanding of reasonable accommodation. It provides individualised protection benefits which find a basis in dignity and (substantive) equality. At a more doctrinal level, it provides an additional discrimination claim route which takes account of individual differences and investigates modifications to help support those differences. Whilst it is susceptible to a proportionality analysis (similar to indirect discrimination), a key difference with reasonable accommodation is that 'disadvantage is not necessarily experienced by all or most members of a particular group, but is ... experienced on the individual level, depending on both individual and environmental factors.[120] This buttresses its individual-centric nature. The emphasis is ultimately on proportionality to undertake the work in determining whether an individual should be accommodated. As will be seen in chapters seven

[115] *Ibid*.
[116] Waddington and Hendriks, above n. 109, p. 414.
[117] Vickers, above n. 7, p. 223.
[118] In addition to that of groups.
[119] G. Moon, 'Dignity Discourse in Discrimination Law: a better route to equality?' (2006) 6 European Human Rights Law Review 610, p. 647.
[120] Waddington and Hendriks, above n. 109, p. 427.

and eight, proportionality in reasonable accommodation is often guided by imposition of a set standard of review and, additionally, prescription of identifiable and concrete factors which help guide courts in reaching a decision. This distinguishes it from indirect discrimination.

4. CONCLUSION

Reasonable accommodation offers a new form of religious 'exception' to a wide array of situations. Such additional protection may be predicated on the basis that religion in some circumstances deserves special treatment. This coheres with the principles of human dignity, autonomy and equality which already apply to religion law and the religious exceptions assessed in Part II; these principles are equally consistent with either a collective or individually orientated focus on religious liberty. Recent domestic case law concerning religion in the spheres of employment and goods and services provision highlights the various jurisprudential deficiencies of indirect discrimination: this has resulted in the characterisation of three areas of clash to which comparative models of reasonable accommodation can be applied. Reasonable accommodation's focus on the individual, and the precise and attuned way in which it explores ways of achieving equality of opportunity for the individual, makes it an attractive alternative solution to indirect discrimination.

As a consequence of its distinct doctrinal make-up, reasonable accommodation places great prominence on proportionality as the main filtering device, balancing whether, and if so how far, a practical accommodation can be made in the face of a legitimate aim. Proportionality will be the prime focus in Part IV when applying the comparative models explored in chapters seven and eight. The cases to which the models will be applied will be those outlined above in the context of employment. As will be seen, the comparative models are not as yet developed in the provision of goods and services, although the possible effect of reasonable accommodation on the cases outlined above in this field will be briefly considered in chapter nine.[121] Where domestic cases have been argued both at first instance and on appeal, decisions at all levels will be considered. This is in order to take maximum advantage of the

[121] These cases are also addressed in chapter 12 when drawing together themes from reasonable accommodation emerging from the chapters in Part IV.

domestic treatment of the facts in all decisions. Of course, reasonable accommodation could also be applied to unsuccessful *Article 9* cases; however, given that the doctrine has been predominately conceived of as a device in anti-discrimination law, and given that this thesis is concerned with special treatment of religion in anti-discrimination law, the emphasis remains on the anti-discrimination field.

CHAPTER 7: REASONABLE ACCOMMODATION OF RELIGION IN CANADA

1. INTRODUCTION

Reasonable accommodation plays a critical role in helping Canadian courts determine religious issues.[1] Its existence has enabled judges to fine-tune ways in which a balance may be struck between the interests of the religious individual and other parties. The rule 'essentially allows an individual who is detrimentally affected by an otherwise neutral norm the possibility to require, as a matter of law, to be accommodated. This accommodation ... essentially consists in the bending of an existing norm or in the creation of a particularized regime for the claimant (whether through an exemption or through a specific permission to do something)'.[2] Whilst the aim of reasonable accommodation is to accord an individual remedy, 'the individual decision has a clear impact on others in similar situations'.[3] Indeed, it expects that 'a consideration of the relationship between those different persons' rights and freedoms is required. Accommodation encompasses the adjustment of a rule, practice, condition or requirement so as to take into account the specific needs of an individual or group'.[4] Adjustment 'does not require that a regulation or statute be abrogated, rather that its discriminatory effects be mitigated'.[5] In this chapter the substantive law on reasonable accommodation in Canada will be traced after a brief exploration of legal protection for religion in Canada – in particular, non-discrimination on grounds of religion.

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[1] Its development in relation to religion has also been of particular interest to Canadian campaigners for disability rights. See L. Vanhala, 'Twenty-Five Years of Disabilty Equality? Interpreting Disability Rights in the Supreme Court of Canada', (2010) 39 Common Law World Review 27, pp. 31 – 33.

[2] J-F. Gaudreault–DesBiens, 'Religious Challenges to the Secularized Identity of an Insecure Polity: a tentative sociology of Québec's "reasonable accommodation" debate', in R. Grillo et al (eds.) *Legal Practice and Cultural Diversity* (Ashgate: Aldershot, 2009), pp. 151 – 152.

[3] G. Commandé, 'Discrimination and Reasonable Accommodation: insights for a (non) zero sum game' (2010) 2 Opinio Juris, p. 13: <http://www.lider-lab.sssup.it/lider/en/component/docman/cat_view/101-opinio-juris-in-comparatione/107-volumi-opinio-juris.html>, accessed 21st August 2012.

[4] G. Moon, 'From Equal Treatment to Appropriate Treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom?' [2006] European Human Rights Law Review 695, p. 709 (emphasis added).

[5] G. Bouchard & C. Taylor, *Building the Future: a time for reconciliation* (Publication of the Québec Government, Québec, 2008), p. 24.

2. LAW AND RELIGION IN CANADA

The laws protecting religion in Canada are varied and complex. Religious interests are protected under anti-discrimination provisions and the right to freedom of religion,[6] although this protection exists in different forms across Canada's legal system at both the federal and provincial levels. This means that whilst laws protecting religious freedom and religious discrimination exist at the federal level, individual provinces also operate separate and distinct legal provisions relating to these guarantees,[7] the consequence being that '[t]he wording of the various provisions differs'.[8] The doctrine of reasonable accommodation predominately operates in religious discrimination[9] claims (as opposed to freedom of religion claims), although any differences in the various provincial discrimination codes are insignificant given that these laws follow the same basic model whatever the province, making little difference to the outcome of a case.[10] To that end, relevant decisions of Canada's Supreme Court and lower courts will be considered below, taking into account similar federal or provincial religion laws where necessary.

2.1 Religious discrimination mechanisms in Canada

In bringing a reasonable accommodation claim, the appropriate anti-discrimination mechanism must be identified and followed. Discrimination on the basis of religion, together with other protected grounds, is protected as a constitutional right under the *Canadian Charter of Rights and Freedoms 1982* (the *Charter*).[11] This right, along with all others contained in the *Charter*, 'operates to limit all provincial and national legislation'[12] where it has a discriminatory effect on an individual. However, it is limited by the language of *s. 1* which guarantees the rights contained therein 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a

[6] As discussed below in section 2.1.
[7] As outlined by L. Vickers, 'Approaching Religious Discrimination at Work: lessons from Canada', (2004) 20 International Journal of Comparative Labour Law and Industrial Relations 177, at p. 188.
[8] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 196.
[9] The more familiar label 'discrimination law' will be used here even though in Canada reasonable accommodation and discrimination are generally referred to under the broader label of 'equality law'.
[10] *Ibid*.
[11] *S. 15(1)*.
[12] Moon, above n. 4, p. 697.

free and democratic society'. This check, which also applies to the other rights contained in the *Charter*,[13] is unremarkable: it provides the standard point at which a court can determine how far non-discrimination can be guaranteed. However, the right in *s. 15(1)* is clearly limited to actions against the state itself: it 'does not apply to private law'[14] and may only be invoked against the actions of the Canadian government, its entities and agents. It 'aims to prevent governments from enforcing laws or policies, absent a compelling justification, that have the purpose or effect of coercing individuals to abandon sincerely held religious beliefs or practices'.[15]

This means that further provisions are required to protect against discrimination in private situations. Such protection is provided by the *Canadian Human Rights Act 1985* (*CHRA*) on the grounds of, amongst others, religion.[16] This applies in the spheres of employment[17] and the provision of goods and services[18]. Nevertheless, the *CHRA* 'has a limited application to federal institutions and federally governed institutions such as the federal government, banks, airlines, [schools] and the Canadian armed forces'.[19] As a result, its application is confined to 'private parties operating under federal law'.[20] Indeed, where private individuals wish to pursue religious discrimination claims against other private individuals in the areas of employment, private education and goods and services, those parties will be subject to the relevant discrimination provisions – or 'sister statutes'[21] of the *CHRA* – which apply in the province or territory in which they are located. These 'statutory provisions on religious discrimination in all Canadian jurisdictions make it illegal for ... private actors to erect religious barriers to equal access to employment, housing, or services, unless the actor responsible ... can demonstrate that it was not possible to accommodate religious beliefs or practices'.[22] This is reinforced by the fact that 'each province has a Human Rights Act and/or Charter that specifically enacts

[13] For example, freedom of religion as contained in *s. 2*.
[14] Commandé, above n. 3, p. 19.
[15] B. Ryder, 'The Canadian Conception of Equal Religious Citizenship', in R. Moon (ed.), *Law and Religious Pluralism in Canada* (University of British Columbia Press: Vancouver, 2008), p. 87.
[16] *S. 3(1)*.
[17] *S. 7*.
[18] *S. 5*.
[19] Moon, above n. 4,p. 697.
[20] Commandé, above n. 3, p.19.
[21] C. Cheng, 'Re-evaluating Reasonable Accommodation: adapting the Canadian proof structure to achieve the ADA's equal opportunity goal' (2009 – 2010) 12 University of Pennsylvania Journal of Business Law 581, p. 596.
[22] Ryder, in Moon, above n. 13, p. 87.

[discrimination] law. There are slightly different provisions from province to province'.[23] On a procedural point, 'the discrimination decisions of provincial courts are subject to appeal to the Supreme Court of Canada;'[24] moreover, 'all specific Charters from the different provinces must abide by [the *Charter's*] … principles as they emerge from case law'.[25] These various claim routes are outlined for contextual purposes only; it is not necessary to apply them to the domestic cases considered in chapters nine to eleven.

3. ASSESSING DISCRIMINATION IN CANADA

Where an individual wishes to pursue a discrimination claim in Canada on the basis of religion (or any other protected characteristic) there is no need to distinguish between direct and indirect discrimination. After *British Columbia (Public Service Employee Relations Comm) v. BCGEU* (known as the '*Meiorin*' case in which a female fire-fighter won a sex discrimination claim and the right to be reasonably accommodated in fitness tests which favoured men)[26] a single 'unified' approach to determining *prima facie* discrimination now exists.[27] In relation to religion this includes investigation of whether there is an indentified religious belief, the extent to which this is sincere and how far that belief is the basis for the claim. This indicates that 'the Canadian courts have taken a fairly subjective approach when determining a person's religion, allowing self-determination to individuals and groups in terms of their religious identity'.[28]

4. THE REASONABLE ACCOMMODATION DUTY

The Canadian reasonable accommodation duty 'is an idea familiar ... in the context of employment'.[29] To be sure, '[r]easonable accommodation arose in the context of

[23] Moon, above n. 4, p. 697.
[24] Vickers, above n. 8, p. 196.
[25] Commandé, above n. 3, p. 19.
[26] [1999] 3 SCR 3.
[27] per McLachlin J at para 54.
[28] Vickers, above n. 8, p. 196. The sincerity test has been criticised for its inability to contemplate more 'lived' religious experiences and being susceptible to vague and inconsistent application: L. G. Beaman, 'Defining Religion: the promise and the peril of legal interpretation' in Moon, above n. 13, pp. 200 – 209. Nevertheless, it appears the test applies to any claim featuring a religious belief: *Syndicat Northcrest v. Amselem* [2004] 2 SCR 551, per Iacobucci J at paras 42 – 43.
[29] D. Schneiderman, 'Associational Rights, Religion and the *Charter*' in Moon, above n. 13, p. 67.

employment law as a way to articulate the necessary standard to be used by employers in dealing with requests for exemption from particular work requirements. These requests for exemption usually arose in relation to religious beliefs'.[30] Nevertheless, the concept has also been transferred to other discrimination areas in Canada, notably goods and services provision [31] although it will be seen that the test has developed almost exclusively in employment.[32]

Where discrimination on a protected ground, including religion, is *prima facie* found, it is necessary to investigate whether the discriminatory act constitutes a bona fide occupational requirement or whether it may be subject to a general justification in favour of the discrimination. In relation to both of these:

> [s]ome codes additionally impose a duty on the employer to accommodate religious difference … In those provinces which do not have this additional duty, however, the duty is imported through the question of whether the occupational requirement is bona fide: if no reasonable accommodation has been made then an occupational requirement will not be bona fide, and so will not provide an exception to the non-discrimination rule. Similarly, where a general 'reasonable and justifiable' defence is used, the question of whether there was an attempt to accommodate can be relevant to the question of justification.[33]

Consequently, it can be seen that the doctrine of reasonable accommodation is incorporated as part of the test for assessing the legitimacy of the type of discrimination. To this extent it has been observed that:

> [u]nder Canadian law, the notion of reasonable accommodation is conceived of as a derivation of the equality principle and more specifically of the prohibition of indirect discrimination, namely the discrimination resulting from the prejudicial impact of a facially neutral provision, practice or policy. The duty of accommodation, construed as a corollary of the prohibition of indirect discrimination, is the duty for the author of a provision, practice or policy, which *de facto* penalizes an individual on the basis of a prohibited ground of discrimination, to take into account as far as possible the specific

[30] L. G. Beaman, '"It Was All Slightly Unreal": what's wrong with tolerance and accommodation in the adjudication of religious freedom?' (2011) 23 Canadian Journal of Women and the Law 442, p. 443.
[31] See below section 4.2.
[32] See below section 4.1.
[33] Vickers, above n. 8, p. 196.

> needs of that individual and to protect him or her from the discriminatory effects of such provision, practice or policy. [34]

The duty may be categorised as free-standing – once a bona fide occupational requirement has been identified – or, alternatively, read as forming part of the bona fide occupational requirement test itself. If no bona fide occupational requirement issue is identified then the duty of reasonable accommodation will become germane to a general justification defence. This test of reasonable accommodation may be codified in law. For example, at the federal level, the *CHRA* requires that any bona fide occupational requirement[35] or bona fide justification[36] must be subject to a reasonable accommodation consideration.[37] Moreover, some statutes at the provincial level also make reference to the concept of 'reasonableness' when assessing justification: see, for example, *s. 11* of the *Alberta Human Rights, Citizenship and Multiculturalism Act, RSA 2000* in relation to employment[38] and *s. 8(1)* of the *British Columbia Human Rights Code, RSBC 1996*, in relation to the provision of accommodation, services and facilities.[39]

Even where reasonable accommodation has not been explicitly codified, the Canadian common law has 'read in' an 'overarching duty to accommodate'[40] – as is clear from *Meiorin*:

> [a]n employer may justify the impugned standard by establishing on the balance of probabilities:
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; and,

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[34] E. Bribosia, J. Ringelheim and I. Rorive, 'Reasonable Accommodation for Religious Minorities: a promising concept for European antidiscrimination law' (2010) 17 (2) Maastricht Journal of European and Comparative Law 137, p. 145.
[35] *S. 15(1)(a)*.
[36] *S. 15(1)(g)*.
[37] *S. 15(2)*.
[38] 'A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances'.
[39] 'A person must not, without a bona fide and reasonable justification:
(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or;
(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public,
because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons'.
[40] Vickers, above n. 8, p. 197.

> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and,
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[41]

As a result, 'the duty can be understood to form part of the common law'.[42] In any event, whether part of the common law or statute, the courts in Canada have made much use of reasonable accommodation to determine how a discriminatory situation should be resolved. Indeed, '[g]uidance from the courts has developed [the] concept extensively.'[43]

4.1 The duty in employment

Where discrimination on a protected ground is found, the test of reasonable accommodation requires demonstration that such accommodation would impose 'undue hardship' on the discriminator. This requirement is contained at the federal level in the *CHRA*[44] – as already highlighted the *Charter* does not make reference to the test of reasonable accommodation in relation to discrimination rights. At common law it emerged in the mid-1980s in *Ontario Human Rights Commission (O'Malley) v. Simpson Sears* (*O'Malley*),[45] a case where the Canadian Supreme Court found that an employer had not sufficiently accommodated a religious employee whose religion forbade her from working between sundown on Fridays and sundown on Saturdays.

Before undue hardship can be explored it is necessary to set out the factors an employer may cite in relation to which an accommodation would cause undue hardship. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (*Alberta*)[46] provides guidance on what factors will be legitimate in establishing

[41] *Ibid*.
[42] *Ibid*., p. 196.
[43] Moon, above n. 4, p. 709.
[44] *S. 15(2)*.
[45] [1985] 2 SCR 536, per McIntyre J. at para. 23.
[46] [1990] 2 SCR 489.

undue hardship. The case concerned a dairy worker who did not wish to work on Easter Monday. The court required the worker's employers to reasonably accommodate the request and in doing so set out 'a non-exhaustive list of criteria to be considered,'[47] noting that it was 'not ... necessary to provide a comprehensive definition of what constitutes undue hardship'.[48] This list[49] focuses on reasons for resisting an accommodation request (either in full or part) and is applicable throughout Canadian discrimination law across all protected characteristics. Of course, the specific facts of a claim are likely to determine how far the criteria in *Alberta* are useful – it has been said that 'it is up to the organisation to prove the *contextual* unreasonableness of the demand'.[50]

Reasons cited in support of undue hardship have to be proportionate, as noted by Vickers. [51] Moreover, in isolation, the phrase 'undue hardship' does little to illuminate the actual boundary at which a balance can be found.[52] Helpfully, later cases have more clearly defined the parameters of 'undue hardship', outlining a strict standard for employers. In *Meiorin*, 'the Court held that to show that a requirement was necessary, an employer had to show that the accommodation of the individual in question was *impossible* without imposing undue hardship on the employer'.[53] This demonstrates that Canadian courts have interpreted the undue hardship test so as to impose a very high expectation on employers that they will attempt to accommodate in some way; conversely, the test may be seen to be generous to employees. It has been declared that 'employers ... must demonstrate that they have made every effort to accommodate an employee and that it would be impossible to modify or eliminate a particular requirement without incurring undue hardship'.[54]

The high threshold for undue hardship requires that, aside from interrogating the employer's legitimate reasons in responding to an accommodation claim, sharp focus is also placed on how each of these relate to the *employee's* circumstances in the workplace – in particular, the nature of their job, the extent of responsibilities aligned

[47] Moon, above n. 4, p. 710.
[48] per Wilson J at p. 520.
[49] See below sections 4.1.1 – 4.1.6.
[50] Gaudreault–DesBiens, above n. 2, p. 152 (emphasis added).
[51] This is reinforced by Vickers, above n. 7, p. 189.
[52] Moon, above n. 4, p. 710.
[53] *Ibid*., p. 711 (emphasis added). See also McLachlin J at para. 72 of *Meiorin*.
[54] Moon, above n. 4,p. 710.

to that job, the possible terms of any accommodation and how these might impact upon the employer's environment. To this extent, 'the decision on what accommodation is reasonable and what hardship is undue ... requires a balancing of interests and is based on a proportionality test'.[55] This sets up an intriguing if not precarious equilibrium between the employee's arguments for a practical accommodation in their circumstances and the legitimate reasons (which might involve a mixture practice or policy) of the employer in addressing accommodation. The context and facts of a case will be critical when determining the point at which undue hardship and impossibility will be found. Whilst it is true that the Canadian courts put the onus on both parties to compromise,[56] the employee is also encouraged to aid in the search for a solution and accept offers that may fall short of full accommodation.[57] The significance of this for comparative purposes is that the high threshold of impossibility permits, if not *requires*, a highly attuned analysis, necessitating a detailed and forensic assessment of all the issues, including not only those relating to the employer but also those which might affect the employee. This necessitates a more complete interrogation of all accommodation *options* comprising those which either fully or partially meet the employee's request(s).

Of course, in some cases the facts will inevitably raise separate matters which fall *outside* the non-exhaustive *Alberta* list.[58] This was confirmed in *Chambly (Commission Scolaire Regionale) v. Bergevin* (*Chambly*)[59] where it was said that '[t]hese factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situation presented in each case'.[60] Consequently, it is clear that the list in *Alberta*, 'must be adapted to the contexts in which accommodation requests are made',[61] suggesting that whilst the reasonable accommodation case law is of indicative use, the context of a given discrimination dispute will be critical in looking at the totality of factors that must be considered

[55] E. Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Abingdon: Routledge, 2012), p. 132.
[56] Vickers, above n. 7, p. 193.
[57] per Sopinka J in *Central Okanagan School District Number 23 v. Renaud* (*Renaud*) [1992] 2 SCR 970 at p. 994.
[58] Indeed, this was acknowledged in *Alberta* by Wilson J at p. 521.
[59] [1994] 2 SCR 525.
[60] per Cory J at p. 546. This is reinforced by Gaudreault–DesBiens, above n. 2, p. 152.
[61] Gaudreault–DesBiens, above n. 2, p. 152.

outside the *Alberta* criteria and sign-posted accordingly. The express *Alberta* criteria[62] are as follows:

4.1.1 Financial cost to the employer

Predictably, financial impact upon an employer is one of the usual determiners in assessing undue hardship. Here, the courts have taken a case-by-case approach depending on the facts and context. Some requests have required the employer to bear the full financial burden where their actions are perceived as wholly unreasonable. For example, in *Chambly* a school's requirement that Jewish staff use unpaid leave to celebrate Yom Kippur amounted to religious discrimination and an accompanying failure of reasonable accommodation. This was particularly because the absence would only be on an annual basis; moreover, no evidence had been adduced by the school to show that accommodating this holiday request and paying staff to take it would amount to undue hardship. It was contended that '[t]here was no proof presented by the respondent School Board, that to pay the salaries of the Jewish teachers would impose an unreasonable financial burden upon it'.[63] However, it was stated that 'if the religious beliefs of a teacher required his or her absence every Friday throughout the year, then it might well be impossible for the employer to reasonably accommodate that teacher's religious beliefs and requirements'.[64] This signifies that, in relation to employee absence from work, employers will only be liable for the full cost where employee absences are sporadic.

In relation to more regular absences, the existence of a reasonable accommodation requirement does 'not require that religious adherence be cost-free for the employee'.[65] This was the case in *O'Malley* which concerned a worker who was Seventh Day Adventist requesting absence from work from sunset on Friday to sunset on Saturday. Here, the court ruled[66] that in situations like this, and even more so where an employer has gone to sufficient lengths to accommodate an employee, 'it is not unreasonable for some cost to be put on the employee, who may be faced

[62] As outlined by Wilson J at p. 521.
[63] per Cory J at p. 549.
[64] *Ibid*., at p. 31.
[65] Vickers, above n. 8, p. 199.
[66] per McIntyre J. at para. 28.

with the option of choosing employment of full religious observance'[67] (it should be noted that, on the basis that the employer in *O'Malley* had made no effort to accommodate, it was found that the duty to accommodate had not been satisfied). Nevertheless, based on the approach in *O'Malley* this would once more be context-specific depending on the regularity and level of financial inconvenience the employer would suffer, with the balance favouring the religious employee.

4.1.2 Disruption of a collective agreement

Where there is a multi-party agreement across employer, employees and any relevant union, this will not necessarily frustrate any determination of the best mode of accommodation for a particular employee. This is clear from *Central Okanagan School District Number 23 v. Renaud* (*Renaud*)[68] which held that 'a collective agreement could not automatically stand in the way of a necessary accommodation'.[69] It was said that, '[o]n the employer's part this may involve flexibility'.[70] This can be interpreted as meaning that even where a union to which an employee belongs does not support a call for accommodation – perhaps because it has itself sanctioned the work practice the employee complains about – there may still be a requirement of accommodation on the employer and the union. Notably, a union may be required to modify a rule with an employer 'by participating in the formulation of the work rule that has the discriminatory effect [in the first place]'.[71] However, this will not of course be absolute: '[s]ubstantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business'.[72]

4.1.3 Problems of morale for other employees

How far should an employer be required to reasonably accommodate an employee where this may adversely affect the morale of that employer's workforce? In *Renaud*

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[67] Vickers, above n. 8, pp. 199 – 200.
[68] [1992] 2 SCR 970.
[69] K. Swinton, 'Accommodating Equality in the Unionized Workplace' (1995) 33 Osgoode Hall LJ 703, p. 717.
[70] Vickers, above n. 7, p. 192.
[71] per Sopinka J at p. 973.
[72] *Ibid*., at p. 972.

a religious employee refused to work on days he designated as religious by virtue of the religion he followed. He was subsequently dismissed. Part of the employer's case was that to accommodate such requests would be unpopular with other staff members. However, the court rejected this and advised that 'such considerations should be applied with caution. The fact that an accommodation may be unpopular with others in the workplace is not sufficient *of itself* to amount to undue hardship … [T]o decide otherwise would enable an employer to contract out of its human rights obligations as long as other employees are '*ad idem*' with the employer on the issue'.[73] Whilst the court left open the idea that the perspective of the disadvantaged groups is not the only relevant one,[74] it appears that a high threshold will be applied to instances of reasonable accommodation where the morale of other workers is concerned. This impression is buttressed by Sopinka J's comments that '[t]he employer must establish that actual interference with the rights of other employees, which is not trivial but *substantial*, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society'.[75] This reflects the fact that other workers' opinions on the virtue of the religious accommodation request should not be an automatic bar to accommodation success; far from it, employee opinions will only be taken into account where there is a large proportion of the workforce who complain that their *rights* whilst at work will be affected by accommodation.

4.1.4 The inter-changeability of workforce and facilities

In relation to this factor the courts have positioned the balance more evenly as between employer and employee. In *Moore v. British Columbia (Ministry of Social Services)* (*Moore*)[76] a Roman Catholic religious employee refused to perform elements of her job on conscientious grounds. She worked as a Financial Aid Worker for the Ministry of Social Services in the Province of British Columbia, her responsibilities including the determination of individuals' eligibility for benefits.

[73] Vickers, above n. 8, p. 199 (added emphasis and original emphasis, respectively). This will be the case where the attitudes of other workers are inconsistent with human rights ideas, particularly in order to preserve a collective agreement which is discriminatory in its effects on an individual employee on religious grounds. Concerns that other workers' rights will be affected must be 'well grounded': per Sopinka J in *Renaud* at p. 972.
[74] Swinton, at n. 70, p. 722.
[75] At p. 985.
[76] (1992) 17 CHRR D/426.

She decided to refuse financial assistance to a female who required an abortion, her decision having been made behind the scenes for religious reasons. She was subsequently dismissed. Her refusal could be construed as constructing an indirect clash between religion and another protected discrimination characteristic, specifically sex (given that only females have abortions). [77] However, the British Columbia Council of Human Rights was not of the view that such a clash should preclude an accommodation where this was possible at a practical level for the employer. As with *O'Malley*, it was found that, because no steps had been taken to reasonably accommodate her, Moore had suffered religious discrimination. Indeed, other workers could have been reassigned to cover the employee's refusal at no extra inconvenience and without an increase in the work load of other employees.[78] Vickers also notes this in commenting that 'requests of the type refused by [the employee] were relatively infrequent, and other workers could have been asked to deal with them'[79] whilst, similarly, Lafferty emphasises that:

> it would not have created undue hardship on either the employer or ... fellow employees to re-assign any files that would require [the employee] to make decisions contrary to her religious beliefs. If [she] had been the *only* employee able to approve an application for abortion, it is less clear that she would have been able to maintain both her exclusive religious belief and her employment at the expense of the inclusiveness necessary to serve the public and meet public expectations.[80]

The decision of the court in *Moore* was replicated in *Jones v. Eisler* [81] where an employee who was a Jehovah's Witness was dismissed because he refused to be involved with a Christmas display for religious reasons. There had been a total failure of reasonable accommodation as the employer had made no efforts to address the employee's complaint.

Although the basis for these decisions lies in the fact that no steps whatsoever were taken to accommodate the employees, Vickers has further remarked that in future

[77] This sort of situation is similar to the circumstances of cases considered in chapter 9 where it is argued that, at the very least, the appellants' religious objections to certain work duties indirectly clashed with issues surrounding the sexual orientation of others. As with *Moore*, the merits of a practical accommodation are discussed in those cases.
[78] per British Columbia Council of Human Rights, at para 68.
[79] Vickers, above n. 7, p. 193.
[80] L. Lafferty, 'Religion, Sexual Orientation and the State: can public officials refuse to perform same-sex marriage?' (2007) 85 Canadian Bar Review 287, p. 306.
[81] [2001] BCHRTD No. 1.

cases it might be useful and helpful for employer and religious employee to arrive at an arrangement as to what obligations such an employee may or may not be happy to do. Given that in *Moore*, the 'failure [of the employee] to disclose her religious bias at the outset did not ... go to the merits of the case, only to remedy',[82] Vickers has observed that the judgment 'does not place much responsibility on the employee to avoid the problem of clashes between religious scruple and compliance with the employer's reasonable job requirements … [I]t may well be that in some cases the onus will pass to the employee not to undertake work which he or she is unable fully to perform on religious grounds'.[83] This has been affirmed by others who have remarked that '[i]ndividual employees also have the obligation to inform their employer and union of their special accommodation needs'.[84] Likewise, where an arrangement not to undertake a particular obligation is formalised between employer and religious employee it may be the case that a one-off request to perform that obligation would be reasonable depending on the employer's reasons for the one-off request. In such a situation it may be the court's view that for the religious employee to refuse to undertake the one-off obligation would impose undue hardship on the employer: for example, during unusually busy period of business. Conversely, where a religious employee makes a one-off request, it is unlikely to be viewed as undue hardship on the employer to fully accommodate that request. In *Alberta* it was submitted that '[i]f the employer could cope with an employee's being sick or away on vacation on Mondays, it could surely accommodate a similarly isolated absence of an employee due to religious obligation'.[85]

The cooperation of other employees is often needed when an employee requires an accommodation by way of a timetabling change. If the putative accommodation were to affect their spirit or morale they may well refuse in order to frustrate that particular accommodation. However, the employer must at least 'canvass this possibility'[86] to establish real proof of undue hardship. In relation to the knock-on effects of any accommodation of a religious employee on other workers, Swinton has underscored the need to recall that 'it is not just the employer or the abstract "enterprise" being

[82] Lafferty, above n. 81, p. 306.
[83] Vickers, above n. 8, p. 200.
[84] M. Cornish and H. Simand, 'Religious Accommodation in the Workplace' (1992) 1 Canadian Labour Law Journal 166, p. 168.
[85] per Wilson J at p. 521.
[86] per Sopinka J in *Renaud* at p. 989.

asked to accommodate, but the other employees whose contractual rights and expectations are detrimentally affected'.[87] It is not obvious that this should extend to taking into account the opinions of other workers on the religious accommodation request when asking for cooperation in swapping duties. To do so, as seems consistent with the Canadian approach, might operate harshly in some situations and lead to circumstances where other employees could be maliciously uncooperative. Hambler has commented on the potential inappropriateness of taking into account other employees' views, arguing that 'sympathy for minority positions cannot be guaranteed from other employees, particularly if there is likely to be some inconvenience for members of the majority, however minor, in making adjustments in the workplace'.[88] Vickers highlights that, in relation to this matter, '[i]t remains to be seen whether the discontent of other workers will be a factor that allows employers to justify refusing to give priority to religious staff'.[89]

4.1.5 The size of the employer

This is a factor which relates not only to the financial burden an employer should bear in reasonably accommodating an individual but also the practical challenges they may face in making suitable accommodation.[90] It is submitted that where an employer's organisation is larger this is likely to reduce the financial and practical burdens shouldered in the search for reasonable accommodation although, as with the other criteria considered here, this could depend on the facts of any individual case. To the extent that the size of the employer has an effect on the practical difficulties faced in accommodating an employee, there is also a clear link back to the previous criterion concerning the inter-changeability of the workforce and facilities.

[87] Swinton, above n. 70, p. 722.
[88] A. Hambler, 'A Private Matter? Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace' (2008) 3 Religion and Human Rights 111, p. 117.
[89] Vickers, above n. 8, p. 160.
[90] As opined by Wilson J in *Alberta* at p. 521.

4.1.6 Where safety is in issue, both the magnitude of the risk and the identity of those who bear it

Under this requirement the favourable balance in favour of the employee's right to be accommodated – as set against the level of undue hardship created for the employer – has been inverted. In *Bhinder v. Canadian National Railway* (*Bhinder*),[91] a case assessing a Sikh worker's refusal to wear a hard hat at work in his maintenance job in order that he could wear his turban, a majority of the Supreme Court found that the hard-hat requirement was a bona fide occupational requirement and that his religious dress did not need to be accommodated: to do so would impose undue hardship on the employer. Notably, it was said by Dickson CJ for the minority that an accommodation would not have had any deleterious effect on the public or the application of the employer's safety policy regarding other employees.[92] The majority's decision in *Bhinder*, which seemed to provide a defence for many workplace rules that imposed serious burdens on protected groups,[93] was mirrored in *Pannu v. Skeena Cellulose Inc*[94] where a no-beard rule imposed on a Sikh employee for health and safety reasons was upheld. His work required him to wear a close-fitting mask. It was found that 'the failure to adapt a rule to accommodate a Sikh employee was not discriminatory as health and safety concerns prevail over religious interests'.[95] These decisions are in contrast to the freedom of religion judgment in *Multani v. Commission scolaire Marguerite-Bourgeoys*[96] by the Canadian Supreme Court where there was no contravention of health and safety rules in allowing a boy to wear his kirpan at school.[97]

4.2 The duty in goods and services provision

The factors listed relate to the employment sphere; as such, they do not appear transferable to the field of goods and services provision. Nevertheless, whilst

[91] [1985] 2 SCR 561. The employee also submitted a case to the United Nations Human Rights Committee (UNHRCee) under the Optional Protocol to the *International Covenant of Civil and Political Rights 1966*: *Bhinder v. Canada* (Communication No. 208/1986). The UNHRCee found no violation: para 7.
[92] At para 22.
[93] Swinton, above n. 70, p. 714.
[94] (2000) 38 CHRR D/494.
[95] Vickers, above n. 8, p. 201.
[96] [2006] 1 SCR 256.
[97] See also below section 4.3.

reasonable accommodation case law in Canada has been limited to employment there is evidence to suggest that should religious discrimination be pursued in goods and services provision then the test of undue hardship might be applied.[98] A key indication as to this stems from the fact that the *Meiorin* test, requiring impossibility as to undue hardship, has now been imported into goods and services provision across all protected characteristics. This was indicated in *British Columbia (Superintendant of Motor Vehicles) v. British Columbia (Council of Human Rights)* (the '*Grismer*' case),[99] a disability discrimination matter concerning a partially sighted individual's challenge to the revocation of his driving licence. The Canadian Supreme Court stated that '[t]here is more than one way to establish that the necessary level of accommodation has not been provided,'[100] and went on to find that the threshold of undue hardship where goods and services provision is concerned – as in the employment sphere – is considerably high, imposing a substantial burden on the relevant provider to accommodate the service user.[101] The Supreme Court held that where a service user requires accommodation by a service provider, the service provider will have to demonstrate a bona fide justification. This means it will have to show:

> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed; and,
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.[102]

However, the final hurdle is still the test of undue hardship which remains set at a high level in the spirit of *Meiorin*.

In the absence of religious discrimination cases in goods and services provision, there are freedom of religion decisions which provide some assistance as to the balance between accommodation and undue hardship. In support of this it has been

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[98] However, this has not been set out in such a schematic way as in *Alberta*; rather, individual decisions have established guidance in a sporadic fashion as the jurisprudence has developed.
[99] [1999] 3 SCR 868.
[100] per McLachlin J. at para. 22.
[101] See, for example, McLachlin J at para 32: see generally McLachlin J at paras 23 – 45.
[102] *Ibid*, at para 20.

said that 'religious freedoms and religious equality rights are *allied* in advancing the right of religious persons to participate equally in Canadian society without abandoning the tenets of their faith. The core idea is that society must accommodate individuals' freedom to hold and express religious beliefs and engage in religious practices unless doing so would interfere with the rights of others or with compelling social interests'.[103] Indeed, regarding this overlap Beaman has argued that the language of limits in *s. 1* of the *Charter* has a number of different forms, including an assessment of the need for reasonable accommodation.[104]

These cases are charted here for illustrative purposes to show that, whilst a reasonable accommodation analysis was not used, the idea of 'reasonable accommodation' appears in the courts' reasoning in religious freedom cases[105] relating to goods and services provision. For example, in *Scott Brockie and Imaging Excellence Inc v. Ray Brillinger (No. 2)* (*Brockie*),[106] the owner refused to print stationery for a local lesbian and gay group as he felt this violated his right to freedom of religion. Whilst the service *provider* in *Brockie* invoked his right to religious freedom and not religious discrimination (this contrasting with *Grismer* where a disabled service *user* pursued a discrimination claim), the court still seemed to view the ultimate question of prescribed limits through the lens of reasonable accommodation. This clash of rights was resolved by the court requiring the service provider to actually provide the service in question: however, it 'reasonably accommodated' him to the extent that he would not be required to print any material which could reasonably be considered to be in direct conflict with his core beliefs. As such, this required him to provide basic printing services to the group, for example producing ordinary materials such as envelopes and letterheads. Had the test for undue hardship been applied the same view could be taken that it was not impossible to accommodate the service provider even where this would have meant

[103] Ryder, in Moon, above n. 13, p. 87 (emphasis added).
[104] Beaman, in Moon, above n. 13, p. 209.
[105] See also the approach in *Owens v. Saskatchewan Human Rights Commission* [2006] SJ No. 221 where a religious advertisement condemning homosexual practices, 'did not express the kind of detestation, calumny and vilification necessary to breach the provisions of the [Human Rights Code]. By saying that only the most vile sorts of statements are prohibited, the [Saskatchewan Court of Appeal] opened up considerable territory for some illiberal religious people to speak their minds, even in public': A. Esau, 'Living By Different Laws: legal pluralism, freedom of religion and illiberal religious groups' in Moon (ed.), pp. 119 – 120.
[106] (2002) 43 CHRR D/90.

compromising part of the service offered. Moon draws attention to similar cases regarding service providers, notably instances where Muslim taxi or bus drivers have withheld their services from blind people where such provision of such a service might necessitate close or physical contact with a guide dog, Islam forbidding proximity with canines. [107] However, in these situations the religious service provider's risk of contact with a dog was weighed as less important than the interests of a blind service user's needs.[108] It is difficult to reconcile these decisions with *Brockie* on one particular view: that it might be argued as 'impossible' to accommodate a service provider where their refusal (based on religious conviction) to provide the service required cannot be reasonably accommodated without effectively removing the service completely.[109]

Notably, the language of reasonable accommodation was not used in *Syndicat Northcrest v. Amselem*,[110] another freedom of religion claim. This was based on *s. 2* of the *Charter* in relation to Jews who wished to erect temporary succahs[111] on balconies of residential buildings they partly owned, the co-owners of the building claiming this contravened their own property rights. The case had originated in Québec under the *Québec Charter of Human Rights and Freedoms*, an instrument applying only to private law relationships, and, whilst the Canadian government was not involved in what was essentially a private dispute, the *Charter* itself was invoked as providing the appropriate test for freedom of religion at the level of the Supreme Court. Here, the majority performed a straightforward analysis of *s. 2* as balanced against the *s. 1* test of 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. It was found (without recourse to any

[107] See Moon, above n. 4, p. 718, although no case-law is cited in support. However, at the domestic level see online media reports of Muslim bus drivers: for example, <http://www.dailymail.co.uk/news/article-1295749/Muslim-bus-drivers-refuse-let-guide-dogs-board.html>, accessed 21st August 2012.
[108] Moon, above n. 4, p. 718.
[109] This position pre-supposes that it would *not* be reasonable to allow such religious service providers to either refuse to provide the service *altogether* so that, for example, a blind individual was required to obtain transport services elsewhere (from a different bus or taxi provider), or *effectively* remove the service, for example by offering transport to a blind individual provided that individual was not accompanied by their guide dog. The service provider in *Brockie* also effectively removed the service that the service users had sought, notwithstanding the favourable outcome of the case for the service provider. It is submitted that the disability cases to which Moon refers represent the preferred approach. See chapter 12, section 3.3.3 for further discussion as to why *Brockie* should not be followed at the domestic level.
[110] [2004] 2 SCR 551.
[111] Temporary hut shelters constructed for use during the week-long Jewish festival of Sukkot.

notion of reasonable accommodation) that the appellants' freedom of religion would only have minimally impacted on the respondent's property rights.[112] Moreover, whilst disagreeing with the majority on this balance, the minority went further in declaring that reasonable accommodation was irrelevant to a *Charter* analysis.[113]

In a significant development, the Canadian Supreme Court has recently confirmed its rejection of the possibility of reasonable accommodation having any role to play in analysis of *s. 1 Charter* limits where the circumstances are analogous to the discrimination spheres – at least so far in relation to freedom of religion. In *Alberta v. Hutterian Brethren of Wilson Colony* (*Hutterian Brethren*)[114] members of a religious community who believed they could not consent to being photographed were forced to have their photographs on driving licences (the provision of such licences being a service provided by the government). As service users they claimed a violation of their freedom of religion under *s. 2* of the *Charter*. However, in relation to reasonable accommodation it was said by a majority of the Canadian Supreme Court that 'a distinction must be maintained between the reasonable accommodation analysis undertaken when applying [discrimination] laws, and the s. 1 justification analysis that applies to a claim that a law infringes the Charter'.[115] Beaman has identified this as an attempt 'to rectify some of the confusion caused by the use of a reasonable accommodation framework with a section 1 [analysis].[116] The Supreme Court was clear that:

> minimal impairment [the test in *s. 1* of the *Charter*] and reasonable accommodation are conceptually distinct … Whilst the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the Charter infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisaged.[117]

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[112] per Iacobucci J at paras 84 – 90.
[113] per Bastarache J at paras 154 and 170 and Binnie J at para 197.
[114] [2009] 2 SCR 567.
[115] per McLachlin CJ, at para. 66. Notably, the minority were silent on the role of reasonable accommodation in freedom of religion claims.
[116] Beaman, above n. 30, p. 447, n. 17.
[117] per McLachlin CJ at paras 68 and 69. The limits of reasonable accommodation in freedom of religion claims are also highlighted in Bribosia, Ringelheim and Rorive, above n. 34, p. 146 – 150. In particular, further remarks are made as to how the restrictions on reasonable accommodation outlined in *Hutterian Brethren* contrast to the potential use of reasonable accommodation in *Article 9*: see pp.

Whilst McLachlin CJ for the majority was determined to remove any vestige of reasonable accommodation from the tests of justification and proportionality under *s. 1* of the *Charter*, passages of her judgment ironically seem reminiscent of the undue hardship approach.[118] In particular, when discussing the minimal impairment test under *s. 1* she referred to the fact that, if compelled to provide an exemption for the Hutterites, the government would place security seriously at risk. Indeed '*[a]ll* other options would significantly increase the risk of identity theft using driver's [sic] licences',[119] perhaps indicating that, even if the case had been pursued as a religious discrimination matter, it might have been impossible for the Hutterites to be reasonably accommodated as per *Grismer*. This signifies that in Canada the ability of litigants to use reasonable accommodation in future cases concerning religion will be limited to claims argued under discrimination law, in particular employment disputes (it will be recalled that the application of reasonable accommodation in religious provision of goods and services is currently untested). This is notwithstanding the ability to equally frame the claims as freedom of religion issues in some circumstances.[120] Of course, where the dispute is between two private parties a discrimination route will have to be taken in which case reasonable accommodation may become a live issue irrespective of which side is bringing the case.

4.3 A duty in other areas?

In the sphere of education the Canadian Supreme Court has found that reasonable accommodation and undue hardship do have a role to play in regulating disputes: as with goods and services this has been in relation to religious freedom and not religious discrimination. Reasonable accommodation was found to be relevant in *Multani*, a case pursued as a freedom of religion claim under *s. 2* of the *Charter* as

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150 – 156. Note also Vickers' comments in relation to some *Article 9* cases such as *Ahmad v. UK* [1981] 4 EHRR 126 and *Stedman v. UK* [1997] 23 EHRR CD 168 where she draws attention in freedom of religion claims to reasoning that both rejects and accepts the notion of accommodation, respectively: above n. 7, p. 186.

[118] This is rather surprising given her contention that '"undue hardship", a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. In the [discrimination] context, hardship is seen as undue if it would threaten the viability of the enterprise which is being asked to accommodate the right. The degree of hardship is often capable of expression in monetary terms. By contrast, it is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective': at para 70.

[119] *Ibid*., at para. 62.

[120] As noted by Bribosia, Ringelheim and Rorive, above n. 34, p. 147.

balanced against the limits of *s. 1*. Thus, 'it [was] not strictly speaking a "reasonable accommodation" case'.[121] Significantly, *Multani* was decided before *Hutterian Brethren* and its rule against invocation of reasonable accommodation in freedom of religion cases: as such *Multani* should be treated with caution on the issue of reasonable accommodation.

Multani concerned a Sikh schoolboy who wished to be permitted to take his kirpan to school. In balancing the limits of *s. 1* with the right to religious freedom in *s. 2*, the court declared the school should reasonably accommodate this request despite the school's severe reservations about acceding to the request on, amongst others, health and safety grounds. For the majority, Charron J. said that the reasonable accommodation test was very similar in essence to the *s. 1* reasonable limits test:

> [t]he correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it … [T]he analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test.[122]

The majority found that undue hardship would not be caused to the school by accommodating the request. They considered the issue of maintaining safety standards in the school and contended that this could be satisfied by the schoolboy wearing the kirpan under his clothes, covered and sealed into the lining of those clothes. This would entail no burden on the school unless another student attempted to restrain the pupil in question and go to the necessary lengths required to remove the knife.[123] In any event, if other students wished to perpetrate acts of violence against each other or staff members then other dangerous articles such as scissors, pencils and baseball bats were far more easily accessible.[124] Additionally, the argument that other students would feel threatened by a pupil armed in this way causing undue hardship on the running of the school was also dismissed. It was unlikely other students would feel threatened by someone who carried a knife sewn

[121] Gaudreault–DesBiens, above n. 2, p. 157.
[122] per Charron J. in *Multani* at para. 53.
[123] As described by Charron J. in *Multani* at para. 58.
[124] *Ibid*.

into their clothes that was not directly accessible.[125] Indeed, such an arrangement would be unlikely to pose a threat of danger or harm to those other pupils.[126]

Overall, the Supreme Court's view was that the kirpan should not, in fact, be considered a weapon when it is properly worn by a member of the Sikh faith who recognizes it as having real religious value; rather, it is above all else a religious symbol with the *characteristics* of a weapon and thus not a weapon in the conventional sense.[127] A common theme perceived to be running through the arguments of the school was that the kirpan was a symbol of violence: this at best ignored and at worst misrepresented the kirpan's religious function. Such an approach is one frequently employed by those seeking to minimize or reject a religious tradition, using language that displaces or disrespects the practices of the religious group in question.[128]

Interestingly, this decision shows the appropriateness of the courts' case-by-case approach to reasonable accommodation, albeit in a religious freedom decision. Where there are no set tests in determining undue hardship, unlike those outlined in *Alberta* for employment, it becomes critical to use the specific facts and circumstances when assessing the validity of whether the totality of such arguments amounts to an overall impression of undue hardship.

5. CONCLUSION

Reasonable accommodation and undue hardship have been extremely important in helping the Canadian courts determine certain religious issues. The application of a reasonable accommodation duty in discrimination means that '[e]mployers ... can be required to tolerate some level of inconvenience or expense',[129] although these levels of inconvenience or expense can fluctuate on the facts. The test has mainly been developed in relation to discrimination in employment; further indications as to what

[125] *Ibid*., at paras. 68 and 69.
[126] This mirrors the attitude of the minority in *Bhinder* towards the health and safety of others as posed by an employee's religious manifestation.
[127] M. Baker, 'Security and the Sacred: examining Canada's legal response to the clash of public safety and religious freedom' (2010) 13 Touro International Law Review 1, p. 22.
[128] Beaman, in Moon, above n. 13, p. 210.
[129] Vickers, above n. 7, p. 193.

may amount to undue hardship have also germinated in goods and services provision and elsewhere, albeit in relation to freedom of religion analyses. Undoubtedly, the doctrine is far more advanced in employment and to this extent it is readily transferable to the UK legal system regarding religious discrimination in employment given the tried and tested ways in which it has been used in a variety of conflicts. After *Grismer*, it also applies to goods and services: '[w]hereas the principle developments [have] occurred in the employment context, reasonable accommodation equally applies to the public supply of goods and services – in particular in education and health'.[130] However, the utility of this extension is tempered by the fact there exists a paucity of reasonable accommodation jurisprudence available at the Canadian level in relation to religious discrimination in the provision of goods and services and education.

Adoption of the Canadian reasonable accommodation doctrine would act as a more sophisticated filter on discrimination issues in domestic law. Indeed, it would explicitly force judges to consider in greater detail how proportionate it might be for a religious individual to be accommodated. Of course, the Canadian context should be emphasised: the development of reasonable accommodation in Canada has taken place in a country well renowned for its commitment to multiculturalism, tolerance and diversity. Moreover, whilst *Alberta* has set out clear criteria for reasonable accommodation cases, the subsequent case law in interpreting those criteria has not always been thoroughly clear. Indeed, it has been said 'that the outcome of cases depends to a large extent on the ideological approach of the court rather than the technical wording';[131] further, 'the highly contextual and casuistic nature of the inquiry pursued by courts adjudicating upon disputes concerning the application of the doctrine has inevitably left some questions unanswered'.[132]

In recommending the use of Canadian reasonable accommodation in domestic discrimination law, it needs to be reinforced that the test of undue hardship forms part of a different discrimination system to the direct and indirect approach which

[130] Bribosia, Ringelheim and Rorive, above n. 34, p. 146.
[131] Vickers, above n. 7, p. 189.
[132] Gaudreault–DesBiens, above n. 2, p. 152. Certainly, there appears to be no clear guidance on dealing with situations where an individual's religion or belief clashes with issues of sexual orientation. On this, see the domestic cases considered in chapter 9.

exists in the UK. Notwithstanding this, Moon comments that the Canadian process of reasoning 'certainly provides a useful methodology for testing the extent to which an occupational or service requirement is appropriate and necessary ... it appears to produce demonstrably acceptable, workable progressive solutions'.[133] Indeed, 'despite constitutional and legislative differences, it remains instructive to consider Canadian case law as it may provide guidance on how to tackle the difficult questions of principle that are common to both the UK and Canada. Such questions include … how far employers should be required to accommodate religious practice'.[134]With respect to the continuing development of reasonable accommodation in employment, and whether this will begin to permeate through to discrimination claims in education and goods and services provision, this may require more time to take shape: it appears that 'the doctrine is a never-ending work in progress'.[135]

[133] *Ibid*., p. 721.
[134] Vickers, above n. 7, p. 190.
[135] Gaudreault–DesBiens, above n. 2, p. 152.

CHAPTER 8: REASONABLE ACCOMMODATION OF RELIGION IN THE UNITED STATES

1. INTRODUCTION

1.1 Law and religion in the United States

In the United States (US) there exists a range of federal and local statutes protecting individuals from religious discrimination and which also separately guarantee freedom of religion. In relation to discrimination law in the US, 'many individual states have their own human rights laws which cover discrimination. In effect, there are hundreds of courts making decisions on cases involving religion, under many *different* local provisions'.[1] In employment it has been claimed that '[a]ll 50 states ... statutorily prohibit religious discrimination ... in their respective fair employment practice laws. Many municipalities likewise have ordinances that prohibit discrimination on the basis of religion'.[2] Given the differences in the protection of religious discrimination between local state laws and federal laws, the focus in this chapter will be on the legal protection at the federal level, in particular the use and application of reasonable accommodation in the relevant religious discrimination provisions.

Aside from combatting religious discrimination, the US has a long history of guaranteeing freedom of religion at a constitutional level. This is noteworthy given that freedom of religion cases in the US also use the language of 'accommodation'. These claims may be pursued courtesy of the First Amendment to the US Constitution which provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'.[3] The decisions of the Supreme Court in *Cantwell v. Connecticut*[4] and *Everson v. Board of Education of Ewing Township*[5] extended, respectively, both the non-establishment and free

[1] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 180 (emphasis added).
[2] E. Kelly, 'Accommodating Religious Expression in the Workplace' (2008) 20 Employee Responsibilities and Rights Journal 45, pp. 47 – 48.
[3] US Constitution, Amendment 1.
[4] 310 US 296 (1940).
[5] 330 US 1 (1947).

exercise guarantees from the federal level to the state level. They provided the opportunity for greater religious recourse against government and state violations of religious freedom. Decisions dealt with under the free exercise guarantee have frequently addressed laws of general application which:

> are not directed at religion *per se*, but are designed to deal with some secular problem that incidentally affects religious practices. The issue is whether the individual's interest in the free exercise of religion requires that the law give way (so that the individual gains an exemption from a governmental requirement or prohibition), or the state's interest in universal compliance prevails over the individual's religious interest'.[6]

The legal test for determining this has evolved into the requirement that, where a religious right is found to be interfered with, only a compelling state interest that could not have been advanced by less restrictive means is capable of justifiably limiting religious freedom. The burden of proof as between religion and the state in such free exercise claims has been summarised as 'creat[ing] a presumption in favour of the religious adherent ... the presumptions [being] rebuttable by the state's proof of a compelling interest'.[7]

This 'compelling state interest' position, also referred to as the 'strict scrutiny approach',[8] was outlined in *Sherbert v. Verner*[9] (*Sherbert*) and later applied in *Wisconsin v. Yoder*[10] (*Yoder*). *Sherbert* concerned a religious employee's refusal to work on a Saturday, their dismissal from work and subsequent state claim for unemployment benefits, whereas *Yoder* concerned the right of Amish parents to withdraw their children for religious reasons from school. In both these cases religion prevailed, highlighting that the 'compelling state interest' test 'placed free exercise claimants in a very strong bargaining position when working out accommodations

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[6] R. Weaver, 'The Free Exercise Clause of the United States Constitution' in P. Radan, D. Meyerson and R. Croucher (eds.), *Law and Religion: God, the state and the common law* (London: Routledge, 2005), p. 60 (emphasis added).
[7] C. Cookson, *Regulating Religion, the Courts and the Free Exercise Clause* (Oxford: Oxford University Press, 2001), p. 30.
[8] M. Hamilton, *God vs. the Gavel: religion and the rule of law* (Cambridge: Cambridge University Press, 2005), p. 216.
[9] 374 US 398 (1963), per Brennan J. at p. 403.
[10] 406 US 205 (1972), per Burger C.J. at p. 221.

when government programmes burdened their religious practices'.[11] In *Sherbert*, it was conceded by the state that its reason for refusing to pay unemployment benefits was predominately due to the fact that fraudulent claims based on fabricated religious impediment *might* have been made,[12] albeit with no evidence to support this contention. Ultimately, this unsubstantiated concern was found to be an insufficiently compelling state interest, with the court also finding that – in any event – the state could have pursued a policy less restrictive of religious rights looking at, for example, good causes for not working on a specific day.[13] In *Yoder*, the state was simply unable to establish that its requirement that all children must attend school until the age of sixteen could not be carried out in a way which was less restrictive of Amish beliefs. Such beliefs preferred the removal of children from school before sixteen due to Amish feeling that 'high-school years should be used to acquire Amish attitudes favouring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife'.[14] The court held there was no evidence that an Amish exception would adversely affect the objectives of the state in protecting the best interests of Amish children.[15]

The compelling state interest approach has been further developed in later cases. These tests and their developments are considered briefly below[16] in relation to their overlap with reasonable accommodation in US religious discrimination jurisprudence.

1.2 Religious discrimination mechanisms in the United States[17]

Application of the reasonable accommodation doctrine is expressly required in US anti-discrimination law. Whilst it exists in disability discrimination law,[18] with the

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[11] W. C. Durham JR. and R. Smith, 'Religion and the State in the United States at the Turn of the Twenty-First Century' in S. Ferrari and R. Cristofori (eds.) *Law and Religion in the 21st Century: relations between states and religious communities* (Farnham: Ashgate, 2010), p. 81.
[12] per Brennan J. at p. 407.
[13] *Ibid*.
[14] Weaver in Radan, Meyerson and Croucher, above n. 6, p. 63.
[15] per Burger C.J. at pp. 231 – 232.
[16] See also below section 4.
[17] As with Canadian discrimination law in chapter 7, the various claim routes discussed here are included for contextual purposes only. It is not proposed to apply them to the domestic cases considered in chapters 9 – 11 which will focus solely on the duty of reasonable accommodation.
[18] See, for example, employment: *Americans with Disabilities Act 1990, Title V, s. 501*.

US leading the way in allowing for reasonable accommodation of disabled individuals,[19] it has played an even more significant role in religious discrimination. Indeed, 'the concept was first applied in the context of religious discrimination under US law.'[20]Gaudreault-DesBiens notes that '[t]he origins of [reasonable accommodation] can be traced back to a series of American labour statutes and cases of the 1970s'.[21] At the federal level *Title VII* of the *Civil Rights Act 1964* (*CRA 1964*) protects against religious discrimination, together with other characteristics, across all states in employment.[22] It has been interpreted as covering 'all employers with over 15 employees, those employed by the state and local government as well as private sector employers'.[23] Further to this, an amendment made to *Title VII* by the US Congress and contained in the *Equal Employment Opportunity Act 1972*[24] now provides that both public and private employers[25] must be able to 'reasonably accommodate an employee's or prospective employee's religious observance or practice',[26] signifying that most types of employers are now obliged to consider how far a religious employee must be reasonably accommodated. This amendment was seen as particularly necessary given the Supreme Court's reluctance to deal accommodation of religious employees. This was evident from *Dewey v. Reynolds Metals Co.*,[27] a decision concerning an employee who objected to working on Sundays for religious reasons and whose request for reasonable accommodation was refused by his employer and the Court of Appeals. It was also clear from *Riley v. Bendix Corp*.[28] (regarding an employee who similarly wanted time off work for

[19] A. Lawson, *Disability and Equality Law in Britain: the role of reasonable adjustment* (Oxford: Hart, 2008), p. 5.
[20] D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart, 2007), p. 630.
[21] J-F. Gaudreault–DesBiens, 'Religious Challenges to the Secularized Identity of an Insecure Polity: a tentative sociology of Québec's "reasonable accommodation" debate', in R. Grillo et al (eds.) *Legal Practice and Cultural Diversity* (Ashgate: Aldershot, 2009), p. 152. See also E. Bribosia, J. Ringelheim and I. Rorive, 'Reasonable Accommodation for Religious Minorities: a promising concept for European antidiscrimination law' (2010) 17 (2) Maastricht Journal of European and Comparative Law 137, p. 139.
[22] *S. 701*.
[23] Vickers, above n. 1, p. 180.
[24] *S. 2(7).*
[25] See interpretation by E. Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Abingdon: Routledge, 2012), p. 129.
[26] *S. 701(j).*
[27] 429 F.2d 324 (Sixth Circuit, 1970).
[28] See the District Court level decision (330 F.Supp. 583 (1971)) which was overturned a year later after the 1972 Amendment by the Court of Appeals: 464 F.2d 1113 (Fifth Circuit, 1972).

religious reasons) where the District Court (Florida, Orlando Division) adopted the same stance in refusing accommodation.

There is no authority in the US supporting the extension of reasonable accommodation into other recognised areas such as goods and services provision. [29] Of course, there exist legal provisions in the US protecting against religious discrimination in the provision of goods and services, although these contain no reasonable accommodation duty either in relation to a religious service *user* who is discriminated against by a provider of goods or services or a religious service *provider* who wishes to refuse provision of a specific service to a particular user. Such legal provisions include the *Civil Rights Act 1968*[30] which precludes discrimination in the sale, rental, and financing of housing based on, amongst other protected characteristics, religion. Elsewhere, other parts of the *CRA 1964* are notable for their efforts in addressing religious discrimination outside employment. For example, *Title II* provides that there shall be no discrimination based on, amongst other characteristics, religion in the provision of goods, services, facilities, and privileges, advantages, and accommodations provided by any place of public accommodation[31] (for example establishments providing lodgings to transient guests,[32] those engaged in selling food for consumption on the premises such as restaurants,[33] and any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment[34]). In addition, *Title III* prohibits state and municipal governments from denying access to public facilities on, amongst other grounds, religion when those public facilities are owned, operated or managed by or on behalf of any State or subdivision thereof.[35] Beyond goods and services provision, *Title IV* precludes discrimination on the basis of religion, and other protected characteristics, in the provision of public education operated by the state. These education provisions, similar to the laws regulating provision of goods and services, contain no reasonable accommodation duty. *Title IV* covers education

[29] As such, there will be no US reasonable accommodation analysis applied to the cases considered in this thesis which fall outside the area of employment.
[30] Also known at the *Fair Housing Act*.
[31] See *ss. 201(a) – (b)*.
[32] *S. 201(b)(1)*.
[33] *S. 201(b)(2)*.
[34] *S. 201(b)(3)*.
[35] *S. 301(a)*.

in elementary schools through to secondary schools and higher education.[36] Religious discrimination protection outside employment enables a claim to be fought against either the state or private individuals. This matches the protection afforded in employment.

2. ASSESSING DISCRIMINATION IN THE UNITED STATES

As the operation of reasonable accommodation in the US is most developed with respect to employment matters in religious discrimination, the following analysis is necessarily limited to the doctrine's interaction with religion in employment.

Where an employee brings a case against their employers based on a protected characteristic, such a claim may cover either direct[37] or disparate impact (indirect) discrimination. Disparate impact discrimination originally emerged as a common law development[38] although it is now codified by the *CRA 1964, Title VII, s. 703(k)* as amended by the *Civil Rights Act 1991*. Whilst disparate impact discrimination can be defended – it may be justified where the employer can demonstrate that 'an employment practice is required by business necessity'[39] – no defence exists to a claim of direct discrimination. These discrimination routes are similar to those available for all protected characteristics in the UK, although they differ somewhat from the more streamlined approach in Canada.

3. THE REASONABLE ACCOMMODATION DUTY

The use of reasonable accommodation to aid assessment of religious discrimination claims in employment in the US is long-standing. It pre-dates its use in Canada, and, indeed, anywhere: '[t]he term 'reasonable accommodation' was born in the United States and was first used in connection with a duty to accommodate the religious beliefs of employees'.[40] This is further reinforced by the observation that 'the concept of reasonable accommodation appeared and evolved in United States' law

[36] *S. 401*; *S. 401(c)*.
[37] *CRA 1964, Title VII, s. 703(a)(1)*.
[38] See *Griggs v. Duke Power Company* 401 US 424 (1971) and comments by Burger C.J., pp. 430 – 434.
[39] *CRA 1964, Title VII, s. 703(k)(2)*, as amended by the *Civil Rights Act 1991*.
[40] Lawson, above n. 19, p. 5.

from the 1970s, and in Canadian law from the 1980s onward'.[41] The 1972 US Congress amendment introducing an employer duty of reasonable accommodation to *CRA 1964, Title VII*, was felt necessary 'if staff were to be protected in their rights to practise their religion',[42] although the duty had arguably been operating at common law in any event. As a result of common law developments and the 1972 codification there is consequently a rich seam of reasonable accommodation case law in religious discrimination in the US addressing the scope of the employer reasonable accommodation duty.[43]

Reasonable accommodation as a duty on employers has come to replace the use of disparate impact discrimination in religious discrimination claims by employees,[44] meaning that '[w]here an employee fails to meet a requirement imposed by an employer, this is treated as a question of whether the employer should accommodate the employee, rather than as a matter of indirect discrimination'.[45] This categorisation, which appears to force disparate impact religious discrimination cases down a reasonable accommodation route has been criticised by some commentators.[46] A particular objection is that reasonable accommodation allows employers (who may be biased against the employee's religion – and therefore non-neutral) to provide a low-level unsatisfactory accommodation which masks the prejudice that would otherwise have become evident and illegal in a disparate impact claim. Whilst this has resulted in the suggestion that the two claim route be blended into an alternative 'disparate accommodation' option claim, the focus here is on the courts' interpretation of reasonable accommodation.[47]

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[41] Bribosia, Ringelheim and Rorive, above n. 21, p. 139.
[42] Vickers, above n. 1, p. 185.
[43] For discussion of this case law, see below section 3.1.
[44] This was confirmed in *EEOC v. Sambo's of Georgia* 530 F.Supp 86 (1981) after the 1972 creation by the US Congress of the reasonable accommodation duty in religious discrimination in employment, amending *CRA 1964, Title VII* (see above, fn. 11). In the US District Court (Georgia, Atlanta Division) Moye CJ stated at p. 93 that 'Congress, in passing s. 701(j), did not feel that the disparate impact doctrine applied to cases of religious discrimination. Had the disparate impact doctrine applied to cases of religious discrimination, s. 701(j) would have been unnecessary'.
[45] Vickers, above n. 1. p. 183.
[46] In particular, see R. Corrada, 'Towards an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases' (2009) University of Cincinnati Law Review 1411.
[47] The issue is alluded to in chapter 12 when considering the insertion of a reasonable accommodation duty for religion or belief into domestic law.

Before the employer's duty of reasonable accommodation can be addressed it must first be determined whether a bona fide occupational requirement exists which prevents the employer from having to reasonably accommodate the religious employee in the first place. Given that the duty of reasonable accommodation is codified in *CRA 1964, Title VII*, it is not necessary to import the reasonable accommodation test into the bona fide occupational requirement assessment.

3.1 The duty in employment

Where religious discrimination is in issue and the religious employee wishes to claim a failure of the employer's duty to reasonably accommodate, then the *CRA 1964, Title VII, s. 701(j)* sets out the relevant test. The religious observances and practices, as well as beliefs, of employees or prospective employees must be reasonably accommodated by an employer unless that employer can demonstrate that to do so would amount to undue hardship on the conduct of the employer's business.[48] Clearly, this duty is not absolute. Where an employee believes that their employer did not reasonably accommodate their religion, there exists a burden of proof on the employee to first establish that their beliefs meet the definition of 'religion' outlined in *CRA 1964, Title VII, s. 701(j)* which includes all aspects of religious observance and practice as well as belief. This was originally developed to mean belief in a supreme being but not political, sociological or philosophical views;[49] more recently, this has been expanded to ethical or moral beliefs of conscience,[50] and vegetarianism.[51] The employee's religious belief and corresponding manifestation must be communicated to the employer so that the employer is put on notice of the employee's requirement to be reasonably accommodated.[52] These steps have been summarised as requiring that:

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[48] *S. 701(j).*
[49] *United States v. Seeger* 380 US 163 (1965), per Clark J. at p. 165.
[50] *Welsh v. United States* 398 US 333 (1970), per Black J. at p. 340.
[51] *Anderson v. Orange County Transit Authority* (EEOC, San Diego, No. 345960598, 8/20/96, unreported).
[52] *Chalmers v. Tulon Company of Richmond* 101 F.3d 1012 (Fourth Circuit, 1996), per Motz CJ in the Court of Appeals at pp. 1019 – 1021 and *Van Koten v. Family Health Management Inc*. 955 F.Supp. 898 (1997), per Mahoney MJ in the District Court (Illinois, Western Division) at pp. 904 – 905 and affirmed by the Court of Appeals at 134 F.3d 375 (Seventh Circuit, 1998).

> [a]n employee alleging a violation of the reasonable accommodation principle must prove that a religious command in which (s)he genuinely believes conflicts with an employment regulation, that (s)he informed the employer of this situation, and that (s)he was sanctioned for not observing such regulation. At this point the employer in turn has to show that (s)he offered a reasonable accommodation which would allow the employee to follow the commands of his or her religion, or that any reasonable accommodation would have led to an undue hardship on the employer's business.[53]

The requirement that an employee should establish a *sincere* (or 'genuine') religious command via belief or practice (or 'manifestation') before then arguing for reasonable accommodation has drawn academic attention in its own right,[54] particularly because of the generous and relaxed way in which the US courts have been prepared to assess sincerity[55] (this matching the same approach to sincerity in Canada). Indeed, the courts have given '"great weight" to the plaintiff's own characterisation of [their] beliefs'[56] and it is believed that '[i]n nearly all instances, the courts will reject efforts to denominate an individual's personal beliefs as non-religious'.[57] In this way, where 'a plaintiff testifies that [their] beliefs are sincerely held, that ordinarily ends the matter'.[58]

Nevertheless, these steps still have to be filtered through the reasonable accommodation test. Here, the Equal Employment Opportunity Commission (EEOC) makes it clear that undue hardship, and a refusal to accommodate, may be influenced by legitimate employer reasons which concern whether the accommodation sought 'is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work'.[59] Of course, where none of these factors are compromised then full accommodation may well be required; conversely, if one of more of these factors is compromised then no accommodation may be required. Alternatively, some form of modified accommodations may be

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[53] Bribosia, Ringelheim and Rorive, above n. 21, p. 140, interpreting the decision of the Supreme Court in *Trans World Airlines v. Hardison* 432 US 63 (1977).
[54] See, notably, J. Prenkert and J. Magid, 'A Hobson's Choice Model for Religious Accommodation' (2006) 43 American Business Law Journal 467.
[55] *Ibid*., pp. 476 – 480.
[56] R. Gregory, *Encountering Religion in the Workplace: the legal rights and responsibilities of workers and employers* (Ithaca: Cornell University Press, 2011), p. 17.
[57] *Ibid*., p. 19.
[58] *Ibid*., p. 21.
[59] See the EEOC website: <http://www.eeoc.gov/laws/types/religion.cfm>, accessed 22nd August 2012.

suggested. An accommodation offer, whether constituting full or alternative accommodation, may amount to flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures.[60]

Whilst the employer factors under the US scheme seem reminiscent of the Canadian approach in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (*Alberta*)[61] it is submitted that the US factors seem rather redundant. This is because, unlike Canada where there exists a stringent approach to proportionality under undue hardship (which requires careful balancing of the employer's legitimate reasons against the employee's accommodation claim), in the US the standard of undue hardship has been set at so *low* a level that the legitimate factors cited by the employer are rendered somewhat irrelevant. The level of undue hardship above which employers are not obliged to provide accommodation has been set at the level of a *de minimis* – more than minimal[62] – obligation. This seems a fairly nominal burden which Sonné has explained as meaning that undue hardship will be established where accommodation 'would cost the employer something beyond inconvenience'.[63] Indeed, Howard describes it as 'not very onerous for employers'.[64] Cromwell has gone further and suggested that *de minimis* may mean merely 'trifling',[65] indicating perhaps a lower threshold. Given that the standard of undue hardship is set at such a minimal level, it appears that factors affecting both employer and employee will be of less prominence in US reasonable accommodation analyses than in Canada, apart from in the most flagrant cases of religious discrimination. Vickers has formed a similar view, stating that 'despite the suggestion from the wording of the duty and the EEOC's guidelines that religion should be accommodated unless there is undue hardship, the interpretation of the duty to accommodate has been somewhat restrictive, leaving employers with a most slender

[60] *Ibid*.
[61] [1990] 2 SCR 489.
[62] 'Minimal' is the word used by the EEOC on its website when describing the limit of undue hardship.
[63] J. Sonné, 'The Perils of Universal Accommodation: the workplace Religious Freedom Act of 2003 and the affirmative action of 147,096,000 souls' (2003 – 2004) 79 Notre Dame Law Review 1023, pp. 1043 – 1044.
[64] Howard, above n. 25, p. 130.
[65] J. Cromwell, 'Cultural Discrimination: the reasonable accommodation of religion in the workplace' (1997) 10 Employee Responsibilities and Rights Journal 155, p. 159.

of duties to accommodate'.[66] Arguably, the *de minimis* test neuters the effect of the EEOC guidelines meaning it 'substantially weakens the potential protections offered by the duty of reasonable accommodation'. [67] This is liable to result in superficial analyses of reasonable accommodation claims.

Legal authority for the *de minimis* threshold is found in two seminal US cases on reasonable accommodation of religious employees, notably *Trans World Airlines v. Hardison* (*Hardison*)[68] and *Ansonia Board of Education v. Philbrook* (*Ansonia*).[69] Both effectively held that 'if an accommodation is to be required, there must be no more than *de minimis* cost, either in terms of financial cost or in terms of disruption or administrative inconvenience'.[70] For example, in *Hardison* the employee requested that he be placed on a four-day week so as to avoid work at times of religious significance to him. He was offered alternative accommodations but rejected these. In applying the *de minimis* standard the Supreme Court noted the relevance of cost but was able to swiftly dismiss it based on the *de minimis* standard. Extra costs on the employer may have arisen from switching staff to cover the absence, resulting in reduction in productivity in their original department, or employing a new and additional member of staff. It was said that requiring the employer 'to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion'.[71] Whilst the minority questioned the utility of a *de minimis* standard which appears to defeat reasonable accommodation (in relation to the criterion of cost) where there is the danger of *any* expense being borne by the employer,[72] this was evidently acceptable to the majority[73] meaning 'from that point onward the courts [did not need to] grant even the most minor accommodation to religious observers to enable them to follow their religious beliefs and practices'.[74]

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[66] Vickers, above n. 1, p. 186.
[67] A. Hambler, 'A Private Matter: Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace' (2008) 3 Religion and Human Rights 111, p. 117, n. 27.
[68] 432 US 63 (1977).
[69] 479 US 60 (1986).
[70] Vickers, above n. 1, p. 186 (emphasis added). See also *Hardison*, per White J at p. 84 and *Ansonia*, per Rehnquist CJ at p. 67.
[71] per White J. at p. 84.
[72] It was said at n. 6 of Marshall J's dissenting judgment that *de minimis* may be being interpreted as 'whenever any cost is incurred by the employer, no matter how slight'.
[73] The issue of 'economic' hardship is explored further below: see sections 3.1.1 and 3.1.2.
[74] Gregory, above n. 56, p. 186.

Undue hardship as defined in such a way is liable to impoverished analyses of acutely fact-sensitive circumstances, closer assessment of which may better determine the accommodation balance. The low undue hardship test in the US contrasts starkly with the impossibility standard of undue hardship in Canada. On the face of it, the US conception of undue hardship appears unlikely to further expand religious liberty in the workplace, an issue which is exacerbated by the fact that – as will be seen – the US courts have interpreted the undue hardship test vaguely, haphazardly and inconsistently when assessing reasonable accommodation claims.

3.1.1 Outside the scope of undue hardship: spiritual hardship

At one point it appeared that the undue hardship test should relate only to economic hardship: it should not correspond to anything else. This included a rejection of spiritual hardship as held in *EEOC v. Townley Engineering and Manufacturing Company* (*Townley Engineering*)[75] where the defendant company was a faith-based Christian business. Part of its activities included a weekly devotional service during work time which was mandatory for all employees. An atheist employee claimed that the compulsory nature of this requirement was a failure of reasonable accommodation which could have been met by excusing him from attendance at the services. The employer resisted the accommodation request, arguing that to excuse attendance would cause 'spiritual hardship' by having a 'chilling' effect on the spiritual purpose of it as a company.

The idea that a *de minimis* cost under the undue hardship test could incorporate the idea of spiritual hardship alongside the more usually cited economic hardship, was emphatically rejected by the Court of Appeals. It was said that a company's contention that its religious purposes would be 'chilled' if spiritual hardship was not considered a form of undue hardship was 'irrelevant if it has no effect on its economic well-being',[76] ruling out the use of non-economic harm to justify a refusal to accommodate religion.[77] There was evidence in *Townley Engineering* that the employer had tried to accommodate the employee by offering to transfer him to

[75] 859 F.2d 610 (Ninth Circuit, 1988).
[76] per Sneed J. at para. 25.
[77] Vickers, above n. 1, p. 186.

another manufacturing plant, although it appears that the employee was not obliged to accept any such accommodation given that the type of undue hardship otherwise claimed by his employer in relation to his request was not recognized by the court. Indeed, this accommodation was not accepted by the employee. Nevertheless, the idea that only economic hardship would suffice should any employer attempt to rely on undue hardship was favoured: indeed, the court spoke of the need to promote 'economic efficiency'.[78] The decision in *Townley Engineering* seems correct regarding spiritual hardship; had the court counted such hardship as capable of being 'undue' it may have been asked whether it was appropriate for a corporate entity to cite its beliefs where the focus should have been on the reasonable accommodation of the individual employee's beliefs. Moreover, it would have constituted rather an abstract notion of undue hardship and led to one set of beliefs appearing to trump another set in the undue hardship analysis.

3.1.2 Inside the scope of undue hardship: economic hardship

It is clear that economic hardship on an employer can satisfy the *de minimis* threshold for undue hardship. Whether all that is needed is the *slightest* economic hardship is to be judged on the facts – essentially the circumstances of the employer as based on the evidence,[79] although given the low level at which undue hardship is set it is submitted that an employer's circumstances will not have to be especially unique, unusual or indeed restrictive to clear the *de minimis* hurdle. Whilst an employer may not have to demonstrate much to cross the threshold for establishing economic hardship, it must be the case that there is *some* evidence of cost stemming from any accommodation. In *Protos v. Volkswagen of America Inc*.[80] it was found by the Court of Appeals that where an employee had asked to be excused from working on Saturdays for religious reasons there was 'no economic loss because ... the "efficiency, production, quality and morale" of the ... department remained in

[78] per Sneed J. at para 24.
[79] This was the position as held by Farris J. in the Court of Appeals at p. 1243 in *Tooley v. Martin-Marietta Corp*. 648 F.2d 1239 (Ninth Circuit, 1981).
[80] 797 F.2d 129 (Third Circuit, 1986).

tact'[81]on the facts. Ultimately, the employer had not demonstrated that there would be any cost associated with accommodation.[82]

3.1.3 Inside the scope of undue hardship: automatic non-economic hardship

Undue hardship may also amount to a *non-economic* burden, providing employers with greater protection against being required to reasonably accommodate religious employees. Some forms of non-economic hardship appear to be treated so seriously by the US courts that, where they exist, the courts will be generally be satisfied (on a *de minimis* standard) that undue hardship would be suffered by the employer were they required to accommodate the employee. The employer does not need to have engaged with or responded to the request for accommodation – it merely has to show that to have acceded to the request would have crossed the *de minimis* threshold. This was tacitly acknowledged post-*Townley Engineering* in *Hardison* where the Supreme Court, whilst finding that economic hardship was present on the facts, also argued that non-economic 'costs' could satisfy the undue hardship test.[83] Here, the matter was whether the employer could be required to violate the seniority provisions of a collective bargaining agreement[84] in order to ensure that the religious employee would not have to work on Saturdays. It was said that requiring the employer to violate such an agreement would amount to undue hardship,[85] the decision on this point meaning that 'courts since *Hardison* have ruled that employers are not required, and perhaps not even permitted, to accommodate an employee when the accommodation would require the violation of a collectively-bargained seniority system'.[86]

The idea of legal infringement amounting to a non-economic burden was followed in *United States v. Board of Education for the School District of Philadelphia* (*Philadelphia*)[87] where it was held by the US Court of Appeals that undue hardship could be found if a school board was required to reasonably accommodate a religious

[81] Gregory, above n. 56, p. 202.
[82] per Adams CJ at para 22.
[83] per White J., at pp. 79 – 83.
[84] *Ibid*., at p. 67.
[85] *Ibid*., p. 78.
[86] K. Engle, 'The Persistence of Neutrality: the failure of the religious accommodation provision to redeem Title VII' (1997) 76 Texas Law Review 317, p. 395.
[87] 911 F.2d 882 (Third Circuit, 1990).

employee by contravening anti-religious dress laws.[88] Where reasonable accommodation of an employee's religion would require the employer to contravene the law it is to be expected that the courts will favour the employer. Indeed, individual religious discrimination claims do not appear the most appropriate forum in which to argue the merits of generally applicable (neutral) laws which impact upon religion. It can also be seen that contravention of employer health and safety policies in the name of reasonable religious accommodation should, prima facie, constitute a legitimate non-economic hardship as in, for example, *EEOC v. Kelly Services Inc*. (*Kelly Services Inc.*)[89]

More recently, however, other types of non-economic hardship have been found to operate outside the spheres of legal restrictions and health and safety, in particular those based on self-determined employer codes or policies relating to expected employee standards of behaviour and dress. For example, in *Webb v. City of Philadelphia* (*Webb*)[90] a police officer's request for reasonable accommodation concerning the wearing of religious clothing with her uniform was found to impose an undue burden upon her employer. The Court of Appeals agreed with the employer's contention that any effect of the reasonable accommodation on 'the perception of its impartiality by citizens of all races and religions whom the police are charged to serve and protect'[91] would have amounted to a non-economic hardship given the employer's commitment – without exception – to values such as religious neutrality. Whilst no attempt at accommodation had been made the effect of the religious neutrality policy would have meant accommodation for the employee passed the *de minimis* undue hardship threshold.[92]

Clearly, the courts have been active in expanding the types of non-economic hardship that can be cited by an employer; however, the bar has been set low regarding how those forms of non-economic employer hardship will, at a *de minimis* level, usually block a religious employee's reasonable accommodation claim.

[88] per Stapleton CJ at paras 34 – 35 and 38 (the anti-religious dress law in question being the Pennsylvania *Garb Statute 1895*, Public Law No. 282 which precluded teachers from wearing religious clothing in schools).
[89] 598 F.3d 1022 (Eighth Circuit, 2010), per Smith CJ in the Court of Appeals at pp. 1032 – 1033.
[90] 562 F.3d 256 (Third Circuit, 2009).
[91] per Scirica CJ, at p. 261.
[92] *Ibid*., at p. 262.

Assuming accommodation would not have *automatically* led to non-economic hardship, other factors which *tend* to either refute or suggest non-economic hardship may be present.

3.1.4 Inside the scope of undue hardship: factors refuting non-economic hardship?

Outside the rather arbitrary sets of circumstances considered in section 3.1.3, should employers offer *no* attempt at accommodation and no *explanation* for the lack of accommodation then, provided the accommodation would not have led to undue hardship, they will be unable to defend an employee's claim of reasonable accommodation. Indeed, 'the statutory burden to accommodate rests with the employer'.[93] This rule is the same for all religious discrimination cases raising the question of reasonable accommodation as established by *EEOC v. Ithaca Industries* (*Ithaca Industries*)[94] which decided that '[o]nly if no attempt is made to accommodate will the employer be found to have failed in its duty'.[95] The case concerned a religious employee who refused to work on Sundays, with the Court of Appeals finding that no attempts at accommodations were made for reasons of religion.[96] This may be distinguished from *Webb* on the basis that in *Ithaca Industries* there was no evidence from the employer that its lack of engagement with the accommodation request could be explained by the fact it *already* pursued a policy of religious neutrality in requiring all employees to work on Sundays, thereby – as in *Webb* – making its response clear from the outset. Similarly, unlike *Kelly Services Inc.* there was no health and safety provision at stake, or – unlike *Hardison* or *Philadelphia* – no legal provision that would have been contravened by making an accommodation offer.

The principle that a *total* lack of employer engagement with accommodation fails the accommodation duty, meaning that undue hardship is not satisfied, was reaffirmed in

[93] Gregory, above n. 56, p. 189. This has been outlined in *Toledo v. Nobel-Sysco Inc*. 892 F.2d 1481 (Tenth Circuit, 1989), per Seymour CJ at para 27. The case also determined that a settlement offer to halt religious discrimination litigation did not constitute an attempt at accommodation: per Seymour CJ at para 33.
[94] 849 F.2d 403 (Ninth Circuit, 1978).
[95] Vickers, above n. 1, p. 188.
[96] per Hall J., at para. 15.

Buonanno v. AT&T Broadband LLC (*Buonanno*).[97] Here, an employee had refused to sign his employer's diversity statement which he believed required him to confirm that he was supportive of – or valued – homosexuality, a form of sexuality which he claimed was incompatible with his religious view that homosexuality itself was a sin. There was evidence that '[h]e was prepared to sign an alternative statement agreeing to value the fact that there are differences between people (as opposed to valuing the difference themselves)',[98] although the employer acceded to none of the employee's suggested ways of accommodation and suggested none of its own. As a result, the District Court (Colorado) found that the employer had failed to offer the employee any accommodation whatsoever (it 'steadfastly insisting that he had to agree with the ambiguous [diversity] policy'[99]) and concluded, notwithstanding the legitimate aim of the policy,[100] there had therefore been a straightforward failure to accommodate the employee's religious beliefs[101] with no evidence that to do so would have resulted in undue hardship at a *de minimis* level. The decision in *Buonanno* may be likened to that in *Ithaca Industries* where there was also no good reason for the employer's lack of engagement with the accommodation request. Moreover, it may be distinguished from *Webb* where the policy seemed more clearly defined with a clear public relations purpose.

As established, a total lack of accommodation and an inability to demonstrate undue hardship will fail the reasonable accommodation duty, notwithstanding circumstances such as those in *Webb*, *Kelly Services Inc.*, *Hardison* and *Philadelphia*. Notably, in *all* cases, undue hardship will also not be found where an employer tries to defend a reasonable accommodation claim based on *hypothetical* difficulties which are unaccompanied by supporting evidence. This means there is an expectation that:

> an employer make some attempt at accommodation. Although only de minimis hardship is required, it must at least be real hardship, not merely hypothetical. This means that the employer cannot rely, for example, on the fact that other staff might become unhappy, but must show that they *will* be.

[97] 313 F.Supp. 2d 1069 (D. Colorado, 2004).
[98] Vickers, above n. 1, p. 190.
[99] per Krieger DJ at p. 1082.
[100] *Ibid*.
[101] *Ibid*.

> In effect, the duty of reasonable accommodation puts the onus on the employer to show that they have thought about trying to accommodate and have actual reasons why to do so would be difficult.[102]

The rejection of hypothetical hardship has been confirmed in the jurisprudence with it being commented in *Tooley v. Martin—Marietta Corp.*[103] that '[a] claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of actual imposition on co-workers or disruption of the work routine'.[104] This rule was applied in *EEOC v. Alamo Rent-A-Car* (*Alamo*)[105] where it assisted an employee to successfully argue before the District Court (Arizona) that dismissal from her job in a car rental office was based on hypothetical difficulties raised by her employer relating to perceived undue hardship. The employer had asserted that the employee's wish, as a Muslim, to wear the headscarf would have amounted to a definite burden based on an impermissible deviation from its carefully cultivated image with customers. The court was scornful of this claim, contending that there was 'no material factual basis for Alamo's conclusions about the cost of "any deviation" from the uniform policy'[106] and that the employer had '[failed] to support its assertion of undue burden with anything other than speculation, which [was] not a basis to establish a genuine issue of material fact'.[107] Once again, *Webb* may be distinguished given that the religious neutrality policy was clearly defined and could have been viewed as more legitimate given that it assisted a public body maintaining perceptions of impartiality.

Whilst *Alamo* clearly sanctions the rule against hypothetical undue hardship, it is clear that the definition of 'real hardship' has become diluted. In *Cloutier v. Costco* (*Costco*)[108] the Court of Appeals decided that an employee who belonged to the 'Church of Body Modification' and who wished to wear facial jewellery at work in contravention of her employer's 'no facial jewellery' dress code did not need to be reasonably accommodated. Such reasonable accommodation would have amounted

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[102] Vickers, above n. 1, p. 187 (emphasis added).
[103] See above n. 79.
[104] per Farris J. at p. 1243. This reinforces the earlier finding of the legitimacy of this approach in *Burns v. Southern Pac. Transp. Co*. 589 F.2d 403 (9th Cir.1978) where it was commented that 'undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief', per Hufstedler J. at para. 11.
[105] 432 F.Supp. 2d 1006 (D. Arizona, 2006).
[106] per Silver J. at p. 1015.
[107] *Ibid*.
[108] 390 F.3d 126 (First Circuit, 2004).

to undue hardship ‘because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the "neat, clean and professional image" that it aims to cultivate. Such a business determination is within its discretion’.[109] It is clear that ‘Costco had a legitimate aim in presenting a workforce that was reasonably professional in appearance ... Clearly, exemption from the dress code would have thwarted the company’s business goals’.[110] Presumably, the court in *Costco* was persuaded that the existence of the dress code *itself* – which was contained in a handbook – was sufficient evidence to support its clams of hardship.[111] Indeed, it was simply accepted as purely ‘axiomatic’ that there was a link between the dress code and business efficacy.[112] This chimes with the low standard of undue hardship that the *de minimis* test affords.

Whilst it may seem clear that supporting evidence from an employer should help demonstrate why undue hardship would be present[113] (even if the *de minimis* standard seemingly allows any form of evidence, however flimsy), this is undermined by the fact that occasionally the US courts have allowed hypothetical hardship to count as undue *without* such supporting evidence. In *Hardison*, the Supreme Court jettisoned the notion that undue hardship could not be hypothetical by finding that accommodating an employee who wished to avoid working for religious reasons from sunset on Friday to sunset on Saturday would have amounted to undue hardship. The decision referred in various parts to the possible effects on other employees amounting to hypothetical hardship, albeit without any firm evidence supporting the likely negative effects on those other employees.[114] Indeed, Vickers has confirmed that ‘in *Hardison* the Supreme Court did allow TWA to rely

[109] per Lipez J., at p. 136.
[110] Gregory, above n. 56, p. 207.
[111] per Lipez J at p. 135.
[112] *Ibid*.
[113] Supporting evidence has been found to demonstrate undue hardship in other situations, notably where an employer can show that there are real health and safety concerns. See, for example, *Kalsi v. New York City Transit Authority* 62 F.Supp.2d 745 (1998) where there was evidence that an employer required employees working in a mine to wear hard hats to help avoid electric shocks or electrocution from overhead wires. The employee, a Sikh who wore a turban, wished to be excused from the hard-hat rule. His request to be accommodated was refused because of the health and safety evidence via an expert’s report: per Gleeson DJ at pp. 759 – 760.
[114] See, for example, comments per White J. at pp. 84 – 85.

on hypothetical hardship'.[115] It may be noted that *Hardison* pre-dates *Alamo*: it is possible that, in future, the courts will follow *Alamo* and find that employer claims of hypothetical reasonable accommodation difficulties without evidence (although after *Costco* the threshold for 'evidence' appears low) will not surmount the *de minimis* hurdle.

3.1.5 Inside the scope of undue hardship: factors suggesting non-economic hardship?

Where an employer does engage with an accommodation request it may either try and show that the request would require undue hardship (in which case the employee may pre-empt this by suggesting their own accommodations)[116] or offer alternative accommodations. In relation to alternative accommodations offered by the employer to the employee, the courts have found that the burden on the employee to accept is strict: to refuse and still expect to be accommodated would be unreasonable because it would impose undue hardship on the employer.[117] In *Bruff v. North Mississipi Health Service* (*Bruff*),[118] a counsellor with religious beliefs that persuaded her that homosexuality was immoral requested that her employers accommodate this by no longer requiring her to counsel homosexual people on sexual matters. When it became clear that this would have inevitably required shifting responsibilities between the remaining counsellors – something which would have been highly awkward thereby causing undue hardship on her employer[119] – she was asked whether she would consider transferring to a section of the counselling service performing pastoral or Christian counselling.[120] The employee refused this accommodation due to the fact that the employer charged with running that section was a liberal Christian and unlikely to tolerate the employee's conservative values.[121] Whilst the Court of Appeals accepted the employer's contention that to have

[115] Vickers, above n. 1, p. 187, n. 41.
[116] Such situations are considered below in section 3.1.5.
[117] This has been noted by Engle, above n. 86, p. 397.
[118] 244 F.3d 495 (Fifth Circuit, 2001).
[119] In relation to this it has been commented that, '[w]here the employer is able to accommodate a worker's religious beliefs only by undertaking an action that adversely affects one or more other employees, the courts most often rule that such an action involves more than a *de minimis* cost to the employer, thus constituting undue hardship': Gregory, above n. 56, p. 201.
[120] per Politz J. at p. 497.
[121] *Ibid*., at p. 498.

accommodated further in this case would have amounted to undue hardship, it is debatable whether any of the hardships claimed by the employer (for example 'determining specific patient care issues in advance')[122] would have amounted to much more than minimal undue hardship. Additionally, it was suggested that the request would have led to other forms of undue hardship given the potential for uneven distribution of work among colleagues had the employee been accommodated.[123] Of course, this may also be debatable given that determining patient care issues ahead of counselling (so that an even spread of work was produced) might not necessarily have been found to have been an insurmountable task had the issue been investigated by the court in more detail.

Bruff establishes that where an accommodation is offered to the employee the onus is normally on them to accept it even where it may be undesirable. This is to be expected given the *de minimis* standard, although cases like *Bruff* do question the appropriateness of the *de minimis* threshold where unrealistic, impractical or unhelpful alternative accommodations are offered by the employer. Nevertheless, 'the employee is required to make a good-faith attempt to satisfy her needs through the means offered by the employer'.[124] Of course, accommodation offers made to the employee must be on the basis of an attempt to accommodate for *religious* reasons, and not merely other incidental reasons. For example, in *Proctor v. Consolidated Freightways*[125] the employer's accommodation offers to the employee concerning Saturday working were not found by the Court of Appeals to have been made for religious reasons. Indeed, it transpired that all employees had been similarly accommodated.[126] Moreover, the claimant had been told by superiors that they had been under no obligation to offer her an accommodation[127] due to her religion.

It may be said that the *de minimis* test quite correctly helps identify the threshold of hardship needed; to require further accommodation would sometimes place the employer under an intolerable strain. This may be seen from *Shelton v. University of*

[122] *Ibid*., at p. 497.
[123] *Ibid*., at p. 497.
[124] Gregory, above n. 56, p. 186.
[125] 795 F.2d 1472 (Ninth Circuit, 1986).
[126] per Alarcon CJ at para 23.
[127] *Ibid*., at paras 23 and 28.

Medicine and Dentistry of New Jersey (*Shelton*)[128] where the employee, a staff nurse who was also a member of the Pentecostal faith, refused to participate in abortion procedures. Whilst this was accommodated in the trading of assignments with other nurses, the employee was required a number of times at short notice to treat patients in emergencies; such treatment would have included the termination of pregnancies. On one particular occasion the patient that the employee refused to treat was '"standing in a pool of blood" [and] diagnosed with placenta previa. The hospital employer claim[ed] that [the] refusal to assist delayed the emergency procedure for thirty minutes'.[129] Additional accommodations were proposed by the employer including transferring to other nursing positions, all of which were rejected by the employee. The Court of Appeals determined that requiring the employer to accommodate even further may have seriously and fundamentally compromised its efforts to treat patients in emergencies, amounting to undue hardship – particularly given the numerous steps that had been taken to reasonably accommodate the employee with which she had failed to cooperate.[130] However, it is important to treat the facts of cases on their merits. As can be seen from the similar results in cases like *Bruff* and *Shelton* of differing accommodation circumstances, the *de minimis* test is perhaps too unsophisticated and blunt a device in deciding whether alternative accommodations suggested by the employer are fair and whether any reasonable accommodation claimed by the employee would constitute undue hardship on an employer.

The *de minimis* rule for determining undue hardship has also operated in instances where an employer may not have proposed suggestions but instead tried to show that an employee's *own* suggestions would have required undue hardship. As with *Shelton* and employer accommodation offers, the *de minimis* rule here can arguably work satisfactorily to prevent unreasonable accommodation due to likely undue hardship. For example, in *Peterson v. Hewlett Packard* (*Peterson*)[131] the employee displayed bible verses denouncing homosexuality in response to posters celebrating the diverse make-up of the employer's workforce which was supported by the employer's diversity policy. Once again, the Court of Appeals indicated that to have

[128] 223 F.3d 220 (Third Circuit, 2000).
[129] per Scirica J. at para. 7.
[130] *Ibid*., at para. 37.
[131] 358 F.3d 599 (Ninth Circuit, 2004).

allowed accommodation, which would effectively have meant sacrificing the diversity programme, would have seriously and fundamentally contravened the employer's efforts in respecting and treating individuals with dignity. This would have amounted to undue hardship, particularly given that the only accommodation suggested by the employee was an insistence that the employer remove all the offending posters celebrating the company's diversity policy.[132] This may be regarded as the right outcome for the case, as supported by Ruan who declares that 'there is a line at which an employee's religious expression crosses over into harassment'.[133] The outcome in *Peterson* was reflected in an earlier Court of Appeals case, *Virts v. Consolidated Freightways* (*Virts*),[134] where all the employee's proposals 'would have required [the employer] to violate the seniority provision of its collective bargaining agreement'.[135] Evidently, where an employee's proposals are scrutinised it is required that they would not put a more than minimal burden on the employer.

In contrast to *Peterson* and *Virts*, circumstances of more measured and realistic employee accommodation requests which provide the employer with a potentially workable solution have been accepted by the courts. This may be seen from *Buonanno*, discussed earlier, where the employee refused to sign his employer's diversity statement which would have affirmed that he valued differences amongst people including differences in sexuality. There was no evidence raised in the case that he would discriminate or behave offensively to non-heterosexual colleagues[136] and indeed 'he was prepared to sign an alternative statement agreeing to value the fact that there are differences between people (as opposed to valuing the differences themselves)'.[137] As a result, the court found that the failure to reasonably accommodate did not amount to undue hardship.[138] This admits of a balancing

[132] per Reinhardt J., at para. 10.
[133] N. Ruan, 'Accommodating Respectful Religious Expression in the Workplace' (2008) 92 Marquette Law Review 1, p. 20. It is possible to distinguish *Buonanno* given that, whilst in both cases neither employer engaged with the employee's suggestion for accommodation, the accommodation sought in *Buonnao* was qualitatively different: it would not have compromised the operation of the employer's diversity policy in any clear way.
[134] 285 F.3d 508 (Sixth Circuit, 2002).
[135] Gregory, above n. 56, p. 196.
[136] per Krieger DJ at p. 1076.
[137] Vickers, above n. 1, p. 190.
[138] per Krieger DJ at pp. 1081 – 1083.

exercise between 'individual rights and the rational operation of the workplace',[139] the result of which is not necessarily determined fairly by the *de minimis* test depending on the facts of the case. However, this approach does outline that imbalances exist in the jurisprudence concerning claims for accommodation. In particular, whilst realistic employee accommodation requests are treated favourably and unrealistic ones are not, this contrasts with unrealistic employer accommodation solutions in cases such as *Bruff* where the courts have required that employees accept such difficult accommodation offers. These imbalances may lead to differing levels of success in reasonable accommodation claims depending upon whether an employee is responding to an employer's accommodation suggestions or whether an employee is in fact making their own suggestion for accommodation. Such unpredictability is unjustifiable in principle when the outcomes of cases, which themselves may have accommodation merits, could depend on whether it is the employer's or employee's offer of accommodation which the court is considering. It is submitted that the differences observed here are symptomatic of a reasonable accommodation doctrine which has been loosely defined and applied by the courts. This in turn creates the potential for contrasting results across similar cases. Without more concrete tests in place this appears unfair, arbitrary and unsatisfactory.

Unfortunately, the uncertainty which the *de minimis* test creates is continued in circumstances where an employee makes an alternative accommodation suggestion in response to one *already* offered by the employer. It has been held that where an employer makes an accommodation suggestion the employee will be required to agree to it irrespective of a separately identified accommodation option which the employee may propose. This issue came before the Supreme Court in *Ansonia* where it was held that there was no requirement that the employer offer an employee their preferred accommodation. It was said that there was no basis 'for requiring an employer to choose any particular reasonable accommodation ... Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end'.[140] Indeed, '[t]he fact that an employee can identify an alternative accommodation which he or she would prefer does not change matters: the employer is under no obligation to offer the employee the least disadvantageous

[139] Sonné, above n. 63, p. 1025.
[140] per Rehnquist CJ at p. 68.

accommodation available. There is a requirement on the employee to be flexible in accepting an accommodation if it is reasonable, even if he can identify less disadvantageous accommodations'.[141] This was mirrored in *Wilson v. US West Communications*[142] where an employee who wore a graphic badge of an aborted foetus in order to display her religious objections to abortion was required to remove it by her employer. Accommodations were suggested by the employer, all of which were rejected by the employee in favour of alternative suggestions. The employee lost the case as 'the company was not required to accept any of the accommodations ... proposed'.[143] The expectation of reasonableness appears to fall on the employee when accommodation requests between employer and employee clash, a point reinforced in other cases such as *Breech v. Alabama Power*[144] which, quoting Morgan J. in *Beadle v. Hillsborough County Sheriff's Department*,[145] highlighted that 'while an employer has a duty to make reasonable accommodations for an employee's religious beliefs, the employee has a corresponding "duty to make a good faith attempt to accommodate his religious needs through means offered by the employer"'.[146] This is acutely difficult to justify in circumstances where a reduction in pay or a demotion will not prevent a finding that the employer's original accommodation was reasonable.[147]

4. 'ACCOMMODATION' IN FREE EXERCISE OF RELIGION CLAIMS

The *de minimis* test may be compared with the approach taken to exception claims in American constitutional religious rights cases. These cases, as in Canada, are not limited to employment matters. Here, under the free exercise of religion guarantee, the courts undertake an 'accommodation' investigation where an individual claims that state or government interests in restricting religious practice should have been pursued through less restrictive means.[148] Whilst such free exercise cases do not apply the *de minimis* test from religious discrimination, the overall effect of the legal analysis is very similar: where the constitutional right to the free exercise of religion

[141] Vickers, above n. 1, p. 187.
[142] 58 F.3d 1337 (Eighth Circuit, 1995).
[143] Kelly, above n. 2, p. 53.
[144] 962 F.Supp. 1447 (US District Court, Alabama Southern Division, 1997).
[145] 29 F.3d 589 (Eleventh Circuit, 1994), at p. 593.
[146] per Vollmer J. at p. 1460.
[147] *Matthewson v. Florida Game and Freshwater Comn* 6939 F.Supp 1044 (1988).
[148] For development of this test see the discussion above of *Sherbert* and *Yoder*: section. 1.1.

is compromised by a particular legislative provision with no attempts to accommodate religion – where such attempts could have been made – then the lack of exception (or 'accommodation') may be unconstitutional. The language of 'reasonable accommodation' has even begun to be used in academic commentary with McConnell commenting that '[t]he central questions under the Religion Clauses have come to be framed in terms of "accommodation" of religion'.[149] This reinforces the view that a *total* lack of engagement with a request for (reasonable) accommodation of religion at both the constitutional and discrimination law levels is impermissible given that to conclude otherwise would render the accommodation duty practically invisible.

In *Sherbert*, 'the Court recognised for the first time that, under certain circumstances, an individual is entitled to an exception from the application of a general rule based on his freedom of religion'.[150] It was decided that an exception could be granted where the application of a rule would amount to an infringement of religious liberty which could not be justified by a compelling state interest where there were less restrictive means of pursuing this interest.[151] The test supported the granting of an exception in *Yoder* which granted Amish parents the right to withdraw their children from school at the age of 14 so as to continue their education within the religious Amish community.

However, the approaches in these two cases were rejected in *Employment Division, Department of Human Resources of Oregon v Smith* (*Smith*) [152] a 'formal neutrality' decision which refused an exception for religious use of the hallucinogenic drug 'peyote' by members of the Native American Church, a right limited by drugs laws of general applicability to all.[153] There was particular evidence in the Supreme Court's judgment that it was influenced in this decision by the fact that the generally applicable neutral law in question was a criminal law,[154] 'the Court fear[ing] that to create exemptions under such circumstances would be to allow a religious objector to

[149] M. McConnell, 'Accommodation of Religion: an update and a response to the critics' (1991 – 1992) 60 George Washington Law Review 685, p. 686.
[150] Bribosia, Ringelheim and Rorive, above n. 21, p. 143.
[151] per Brennan J., at p. 406.
[152] 494 US 872 (1990).
[153] per Scalia J. at pp. 879 – 881.
[154] *Ibid*., p. 885.

become a law unto himself'.[155] Support has been found for the formal neutrality of *Smith*, with it being said that prior to 1990 'there was a widespread fallacy that religious entities should not be answerable to any law but the most necessary'.[156] However, the decision that a law of general application should apply to all citizens without dilution via an exception has been described as a 'cavalier relegation of religious claims.'[157] This is due to the fact that the judgment's effect was to 'substantially narrow ... the range of circumstances in which burdens on the free exercise of religion would be submitted to strict constitutional scrutiny, and correspondingly expand ... the range of permissible state interference in the religious realm'.[158]

After *Smith*, it appeared that the free exercise of religion would be subordinated in instances where a generally applicable and neutral rule restricted religious freedom: this position could only be reversed by a number of minimal qualifications. These included 'hybrid' situations where free exercise claims were made in tandem with other constitutional protections such as freedom of speech and of the press,[159] and the operation of non-neutral/non-general laws[160] that 'intentionally target and discriminate against religious groups or religious activities'.[161] However, the hostile reaction to *Smith* resulted in the *Religious Freedom Restoration Act 1993* (*RFRA*) 'which established a 'right to exemption' for religious motives within the limits laid down in Sherbert'.[162] This reasserted the 'substantive neutrality' idea from *Sherbert* that justification of a compelling state interest would also involve proving that such an interest was being furthered by the least restrictive means, 'attempt[ing] a substantive change in constitutional protection'.[163] To this extent, the *RFRA* 'sought to provide the same statutory protection that the Supreme Court had previously provided as a matter of constitutional interpretation'.[164] The *RFRA*, which first

[155] Weaver in Radan, Meyerson and Croucher, above n. 6, p. 67.
[156] Hamilton, above n. 8, p. 207.
[157] Durham JR. and Smith in Ferrari and Cristofori, above n. 11, p. 81.
[158] *Ibid*.
[159] per Scalia J. at p. 881.
[160] See the judgment of Kennedy J. in *Church of Lukumi Babalu Aye, Inc v. Hialeah*: 508 US 520 (1993).
[161] Durham JR. and Smith in Ferrari and Cristofori, above n. 11, p. 83.
[162] Bribosia, Ringelheim and Rorive, above n. 21, p. 143.
[163] *Ibid*.
[164] M. McConnell, 'Religious Freedom, Separation of Powers, and the Reversal of Roles' [2001] Brigham Young University Law Review 611, p. 613.

appeared for judicial discussion in *City of Boerne v. Flores*, (*Boerne*)[165] was an important vindication of the 'compelling state interest' test, interpreted initially as restoring the position pre-*Smith* in relation to *all* interferences with the free exercise of religion. This meant that, as with cases such as *Sherbert* and *Yoder*, a religious adherent had to adduce evidence of their religion, belief and sincerity in that exercise of belief. This had to be done before proceeding to demonstrate how the restriction placed upon the free exercise of their religion was sufficient enough to require a religious exemption, so far as it overrode a compelling state interest which could not be achieved by less restrictive means.

This reassertion of the pre-*Smith* position was short-lived. *Boerne* also established that the *RFRA* did not apply to claims of religious freedom against individual states: it could only be pursued at the federal level.[166] Nevertheless, the test has since been applied in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[167] to successfully allow an exemption for a religious minority to use hoasca – a hallucinogenic tea banned under federal law – in sacramental services. This was a 'particularly vigorous interpretation of the RFRA ... [E]ven where apparently strong [federal law] claims are present, an individualised assessment of the federal interests and possible alternative means of achieving those interests is necessary'. Significantly, a large range of states have now enacted legal provisions which are more generous to religion than the position in *Smith*. Research by Durham Jr. and Smith[168] has found that thirteen states[169] have implemented their own *RFRA*-equivalent laws, whilst eleven[170] have applied a more protective standard than *Smith*, leading to the view that '[t]oday, looking back, it is becoming increasingly evident that the worst fears have not been realised. Because of strong legislative and judicial responses to *Smith* at both the federal and state levels, classic free exercise

[165] 521 US 507 (1997).
[166] per Kennedy J., at pp. 529 – 536. See also G. Sisk, 'How Traditional and Minority Religions Fare in the Courts: empirical evidence from religious liberty cases' (2005) 76 University of Colorado Law Review 1021, pp. 1032 – 1033.
[167] 546 US 418 (2006).
[168] Durham JR. and Smith in Ferrari and Cristofori, above n. 11, see fig. 6.6, p. 93.
[169] Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas.
[170] Alaska, Hawaii, Indiana, Maine, Massachussets, Michigan, Minnesota, New York, Ohio, Washington, Wisconsin.

protections insisting on strict scrutiny of burdens on religion ... have been reinvigorated'.[171]

Given the absence of a reasonable accommodation duty in the provision of goods and services, the use of accommodation language in free exercise claims is significant: it may be of use in any future attempts to draft a reasonable accommodation duty and accompanying undue hardship test in this sphere. Moreover, it may also be instructive in highlighting a more benevolent standard of undue hardship in employment cases. Indeed, the expansion of free exercise protection post-*Smith* has implications for reasonable accommodation generally. It is instructive to note Ruan's observation that:

> [n]ot since several landmark rulings of the 1970s and 1980s has the [Supreme] Court reviewed the Title VII statutory mandate that employers must accommodate religion *in the workplace* ... [W]hen the religious accommodation law is reviewed by the Court again, in order for the Court's Title VII workplace jurisprudence to be consistent with its shift toward supporting religious expression [in free exercise claims], the Court is likely to support more protection for religious workers.[172]

5. CONCLUSION

The US has opted for a restrictive approach to reasonable accommodation, guided by a narrow test for undue hardship: the restrictively defined *de minimis* standard. Unfortunately, this standard has been clumsily applied by the US courts when assessing 'reasonable accommodation' claims in employment. There are inconsistencies in the case law and difficulties in discerning clarity. To that extent, the jurisprudence may be viewed as not hard and fast but, rather, indicative. In contrast to Canadian discrimination law, it has 'severely limited employers' obligations to accommodate religious employees'.[173] The US approach also shows how 'it is possible to have a generous and broad understanding of religion for the purposes of the discrimination protection, without having to provide broad and generous levels of accommodation for the practice of such beliefs'.[174]

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[171] Durham JR. and Smith in Ferrari and Cristofori, above n. 11, see fig. 6.6, p. 84.
[172] Ruan, above n. 133, p. 1 (original emphasis).
[173] *Ibid*., p. 17.
[174] Vickers, above n. 1, p 182.

Whilst, at the very lowest level, reasonable accommodation has provided protection for religious employees where the employer makes no effort to accommodate (and cannot show that undue hardship would have been present had they accommodated), once accommodation suggestions are proposed, either by the employer or the employee, the balance seems to become more perilous for the employee. This is exactly because of the courts conception of undue hardship as embodying a *de minimis* rule – a standard already conceived of as placing a 'low evidentiary burden on employers'[175] which as a result means that courts may take little cognisance of the EEOC criteria for exploring accommodation matters (for example, cost or inter-changeability of workforce). Indeed, such criteria seem to have become rather obsolete given the focus on the extent of employer/employee cross-engagement in the accommodation dialogue. Prenkert and Magid support this perspective, submitting that the US courts have 'limited the effectiveness of the [EEOC] Guidelines' employee-friendly orientation regarding reasonable accommodation'.[176] This contributes to the fact that 'there remains concern over the interpretation of guidelines' which are used to assess reasonable accommodation of religion'[177] with other commentators such as Vickers reinforcing this by suggesting that 'the duty of accommodation is more apparent than real. It would seem that what is given with one hand via the duty of accommodation is taken away with the other via the low level of hardship needed to defeat the duty. In effect, although a duty to accommodate exists it is so easily overridden that employees' religious interests are given very little practical protection'.[178] Indeed, 'the courts [have not] relied on the included EEOC guidelines'.[179]

As a result, the US *de minimis* test for reasonable accommodation of religion is perhaps unsuited to any transfer to the domestic setting. It compares unfavourably

[175] Prenkert and Magid, above n. 54, p. 481. Their statement is in relation to the outcome in *Ansonia* which they further describe as 'a repudiation of the broad EEOC reading of reasonable accommodation found in the Guidelines'. However, it has been argued that such a conclusion regarding the utility of the EEOC guidelines can be drawn from the general spread of case law considered in this chapter. To be sure, '[m]ost courts post-*Hardison* and *Ansonia* have uncritically embraced the [Supreme] Court's stringent standard of requiring only de minimis accommodations, effectively stripping the accommodation down to a "dead letter"': Ruan, p. 17.
[176] *Ibid*., p. 484.
[177] Kelly, above n. 2, p. 55.
[178] Vickers, above n. 1, p. 187.
[179] S. Silbiger, 'Heaven Can Wait: judicial interpretation of Title VII's religious accommodation requirement since *TWA v. Hardison*' (1985) 53 Fordham Law Review 839, p. 843.

with the more structured tests for undue hardship which feature in Canada. Recent legislative attempts to incorporate into religious discrimination the undue hardship standard of US disability discrimination under the *Americans with Disabilities Act 1990* (*ADA*) have failed, the most recent being the unsuccessfully proposed *Workplace Religious Freedom Act 2007*. Such a change would have replaced the lower *de minimis* threshold 'with the much more demanding ADA "significant difficulty or expense" standard. The net result would be a greater burden on employers'.[180] It also remains to be seen how instructive the more flexible free exercise jurisprudence will be in future cases of reasonable accommodation in either employment or, if it is extended further, other spheres such as goods and services provision.

[180] Sonné, above n. 63, p. 1026.

CHAPTER 9: RELIGION AND SEXUAL ORIENTATION

1. INTRODUCTION

The Canadian and United States (US) reasonable accommodation models will now be applied to the religious discrimination cases in employment discussed in chapter six, sections 2.1 and 4. The current chapter deals with the clash between religion and issues of sexual orientation. Chapters ten and eleven, respectively, deal with the clash between religion and employer dress codes and employer work schedules. Throughout these three chapters it will be seen that the Canadian model affords a more exhaustive proportionality consideration of all relevant accommodation factors than its US counterpart. Conclusions on both this and all other relevant reasonable accommodation matters are deferred until chapter twelve.

2. *McCLINTOCK v. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS* (*McClintock*) [1]

The appellant (McClintock) was a Justice of the Peace (JP) in Sheffield and a committed practising Christian. He commenced his post in 1988 and on starting his job was required to take the Judicial Oath which obliged him to apply the law to all individuals irrespective of 'religion, creed or persuasion'.[2] Part of his duties for the Department of Constitutional Affairs (the DCA) included serving as a JP on the Family Panel, a post which he had held since 1991 and, by virtue of subsequent legislation[3] (which effected a change to his job role), might have required him to agree to place children for adoption with same-sex couples. His request to be excused from this duty by way of an administrative arrangement was refused.[4] He

[1] [2008] IRLR 29. The facts referred to in the section which follows are all taken from the judgment of Elias J. in the Employment Appeal Tribunal (EAT).
[2] This was the relevant part of the oath which the Employment Tribunal (ET) signposted at para. 12.7 of its decision: per Elias J. in the EAT at para. 4.
[3] *Section 79* of the *Civil Partnership Act 2004* (amending the *Adoption and Children Act 2002*).
[4] Interestingly, Vickers has suggested that in determining the limits of reasonable accommodation it can be appropriate to take into account whether the employee was able to make it clear early in their post that there were certain duties they were not prepared to undertake on religious grounds: L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 200. This would have been difficult for McClintock as he assumed Family Bench duties over a decade before legislation providing for same-sex adoption was passed. Whilst he did not argue this in the case it could be said he never voluntarily agreed to such an extension of his duties, particularly given that

resigned from the Family Panel, although continued to serve as a JP on the Adult Panel. He claimed, *inter alia*, direct and indirect discrimination on grounds of religion or belief.[5]

The Employment Appeal Tribunal (EAT) noted that the Employment Tribunal (ET) had found McClintock had strong views on same-sex adoption, viewing any children involved as '"guinea pigs" in a "social experiment"'.[6] Moreover, the evidence revealed that he found the existence of divided expert evidence on same-sex adoption to have implications for his legal duty to act in the best interests of the child. He claimed he would have liked advice from the DCA on how to reconcile these ethical matters. However, the ET also found that his specific religious views on the matter had not been communicated to the DCA when he requested accommodation; indeed his objections were restricted to those based on the limited research available regarding the impact of children raised in same-sex households. The EAT said this was of critical importance in the ET's rejection of the direct discrimination claim[7] as he could not have been treated less favourably on grounds of religion or belief. McClintock did not pursue the direct discrimination claim later in the EAT. The indirect discrimination claim in the EAT was rejected. The ET's reasoning was followed: McClintock had 'chose[n] not to put his objections on the basis of any religious or philosophical belief'.[8] There was no disadvantage suffered on the basis of his religion as at the time this 'was not the basis of his personal objections'.[9] It was decided that, even if McClintock had communicated his religious beliefs effectively, the indirect discrimination would have been justified as proportionate.[10] Moreover, there had been no pressure for him to resign: that had been his choice. The DCA had reminded him of his duties and obligations as a JP under the Judicial Oath.

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he commenced his post at a time when the law and social mores were very different. This is akin to the operation of the specific situation rule (see chapter 6, section 2.1.1), although under reasonable accommodation this is mitigated by the undue hardship tests of the Canadian and United States schemes.

[5] *Employment Equality (Religion or Belief) Regulations 2003*, SI 2003/1660 (*RB Regs 2003*), *Regulations 3(1)(a)* and *3(1)(b)*, respectively.

[6] per Elias J at para. 42.

[7] *Ibid*., at para. 24.

[8] *Ibid*., at para. 44.

[9] *Ibid*., at para. 38. Nevertheless, it has been argued that even where a clear religious basis for a claim is absent, 'it might not be too great a burden upon employers to speculate about whether or not there exists a religious (or philosophical) motivation for issues of conscience not explicitly stated': A. Hambler, 'A Private Matter? Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace' (2008) 3 Religion and Human Rights 111, p. 120.

[10] per Elias J. at para. 29 and paras. 48 – 59.

It is clear that McClintock should have raised his religious objections earlier on in proceedings to better prepare any indirect discrimination claim.[11] This would also have provided a basis for any reasonable accommodation query.

3. *McCLINTOCK*: APPLYING THE CANADIAN MODEL

The relevant factors in *McClintock* are discussed below. As will all domestic cases discussed across chapters nine to eleven, important decisions from Canada will be identified and applied. References to these will be in the form of either footnotes or sections from chapter seven depending on – respectively – whether an argument relates to a specific point from a case or, alternatively, a general debate which the case raises.

3.1 Financial cost to the employer / size of the employer

Cost and size can be considered together given that they are linked. It will be recalled that the standard affixed to undue hardship is very challenging for employers to surmount. That standard is one of 'impossibility' from *British Columbia (Public Service Employee Relations Comm) v. BCGEU* (the '*Meiorin*' case).[12] It is possible that there would have been some (perhaps negligible) financial cost to the DCA in accommodating McClintock. This might have come from having to make special administrative arrangements to replace him on the Family Bench with another JP and from having to pay that other JP additional subsistence expenses (although this might have been covered by a corresponding reduction in McClintock's subsistence allowance given the reduced workload which may have resulted from his accommodation). However, it might have been appropriate for such cost to have been borne by the DCA given that it had gone to no lengths to investigate or offer any possible exception.[13]

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[11] This was also an issue in *Copsey v. WWB Devon Clays Ltd* [2005] EWCA Civ 932, considered in chapter 11.
[12] [1999] 3 SCR 3.
[13] For example, see comments in relation to *Chambly (Commission Scolaire Regionale) v. Bergevin* (*Chambly*) [1994] 2 SCR 525 and *Ontario Human Rights Commission (O'Malley) v. Simpson Sears* (*O'Malley*) [1985] 2 SCR 536: chapter7 n. 68 (see also generally chapter 7, section 4.1.1).

Interestingly, the EAT said there was 'no doubt'[14] that 'an administrative exception *could* have been made, but it does not follow that there was a duty to make it'.[15] The court's use of accommodation language here is significant: although it is not currently obliged to interrogate the various ways in which potential accommodations could have been offered, it would be required to consider this more fully if a reasonable accommodation doctrine were incorporated into domestic discrimination law. In Canada, recognition of reasonable accommodation for religion means that if an accommodation *can* be made then it *is* possible to discern a duty on the employer to accommodate, particularly if the employer goes to no lengths to investigate possible exceptions or its refusal is wholly unreasonable.[16] Of course, the Canadian model does provide for equitable apportioning of financial costs for accommodations as between employee and employer,[17] although it remains critical to consider McClintock's circumstances – the fact that any excusal from serving on same-sex adoption panels might have been sporadic and infrequent could have meant that, as in *Chambly (Commission Scolaire Regionale) v. Bergevin*, the DCA would be required to meet most of the cost, unlike in *Ontario Human Rights Commission (O'Malley) v. Simpson Sears* (*O'Malley*)[18] where the accommodation was required on a more regular basis. Alternatively, costs for all involved may have been minimised by partially accommodating McClintock to the extent that, depending on practicability at the time, he was sometimes excused from sitting on same-sex adoption panels.

3.2 Problems of morale for other employees

There was no evidence that other employees' rights and morale were a legitimate concern. Given that no other JPs had come forward to express the same concerns as McClintock, it may be reasonably inferred that they did not share his objections. Whether it is possible to further infer from this that they particularly supported adoption for same-sex couples and, therefore, would have been offended by his

[14] per Elias J at para. 52.
[15] *Ibid*., at para. 42 (emphasis added).
[16] *Chambly*: see generally chapter 7, section 4.1.1. This case also requires that the DCA present *evidence* of any likely financial cost which might include a breakdown of likely expenditure which would accrue on reasonably accommodating the appellant: chapter 7 n. 64.
[17] *O'Malley*: see chapter 7 n. 68.
[18] [1985] 2 SCR 536.

stance (thereby affecting their morale) is perhaps moot. In any case, the Canadian jurisprudence[19] shows that even where employee morale has been identified as a legitimate factor this does not necessarily mean it will of itself amount to undue hardship. Problems with employee morale in the accommodation of a religious employee have to stem from *substantial*[20] interference with the *rights* at work of those employees. As McClintock was objecting to undertaking a part of his job which related to the adoption rights of gay couples it is possible that other JPs could have viewed accommodation as incompatible with equality rights, particularly if there were homosexual JPs with which McClintock worked (although this might be better understood as an affront to their dignity at work rather than interference with their equality rights at work). Any complaints from heterosexual JPs who were offended by proxy might be said to be too remote from the subject of the accommodation due to their sexual orientation. The issue of employee morale in the context of reasonable accommodation and issues of sexual orientation is considered further in section 5.2 below.

3.3 Inter-changeability of the workforce / size of the employer[21]

These two criteria can also be considered together due to the overlap between them. In relation to inter-changeability of the workforce the Canadian system has identified again that where an employer takes no steps to accommodate they will fail the reasonable accommodation duty, particularly where other workers could have been assigned.[22] The DCA made no attempt to engage with the accommodation request made by McClintock. It is difficult to predict whether this would have been different had they known about his religious convictions. As there was a total failure to

[19] *Renaud*: see chapter 7 n. 74.
[20] See chapter 7 n. 76.
[21] Under domestic law on reasonable adjustments in disability discrimination this heading would have provided a range of potential adjustments: see the Equality and Human Rights Commission's (EHRC) *Equality Act 2010: Code of Practice (Employment)* (*Code of Practice: Employment*), para. 6.33 and 'enabling the [religious] person to have some of their duties allocated to another person', 'transferr[al] within the organisation to fill an existing vacancy', having 'hours of work ... altered', or getting 'assigned to a different place of work or training'. Of course, this would have had to pass the EHRC's criteria for 'reasonableness' contained in paras. 6.28 (including practicability, disruption and cost) and 6.35 (cooperation of other workers). Reasonableness is assessed objectively: para. 6.29. The *Code of Practice: Employment* is available at: <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf>, accessed 24th August 2012.
[22] *Moore v. British Columbia (Ministry of Social Services)* (Moore) (1992) 17 CHRR D/426: see chapter 7 n. 79 (see also generally chapter 7, section 4.1.4).

respond to the accommodation request in any way it might have been difficult for the DCA to claim undue hardship on the basis of *Moore v. British Columbia (Ministry of Social Services)* (*Moore*)[23] and *Jones v. Eisler* (*Eisler*).[24] Had they investigated the possibility of accommodation it could have been the case that other JPs might have been assigned to all or some of McClintock's same-sex adoption cases, albeit at some administrative burden and cost which the DCA might have had to bear. Of course, the DCA would have had to canvass[25] other JPs' willingness to swap with McClintock and this would be dependent on not only how palatable those JPs' found McClintock's views (it seems necessary to take this into account after *Renaud*[26]) but also their own contractual arrangements and availability. Putting these matters aside, the redeployment of JPs in *McClintock* would also have depended on the number of them with suitable experience and expertise in McClintock's location, specifically Sheffield.

Of course, the danger with this solution is that an accommodation could 'impose greater burdens on others or lead to a situation whereby another pool of judges with views in another direction might have to sit and adjudicate on such cases'.[27] It is possible that this may have been mitigated or indeed negated by McClintock being prepared to assume additional duties to replace those he was accommodated from having to undertake. Accommodation might also have depended on demand for same-sex adoption applications and whether there were sufficient numbers of JPs on the Family Panel available to hear such applications in McClintock's absence. Had the DCA made an exception for him it may have been able to deal with this by requesting that he serve on same-sex adoption panels in 'one-off' cases, with any refusal by him causing undue hardship to the DCA.

On the assumption that other JPs could have been assigned to swap same-sex adoption duties with McClintock, both Vickers[28] and Lafferty[29] have argued that any potential for duty-swapping will reduce the chances of the employer being able to

[23] See above n. 22.
[24] [2001] BCHRTD No. 1.
[25] As determined in *Renaud*: see chapter 7 n. 87.
[26] See Hambler and Vickers who question this approach: chapter 7 n. 89 and n. 90, respectively.
[27] The view of the ET as highlighted by Elias J at para. 29.
[28] See chapter 7 n. 80.
[29] *Ibid*., n. 81.

establish undue hardship under the Canadian model. Indeed, in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (*Alberta*)[30] it was noted that accommodation will be particularly irresistible where an employee absence from a duty is isolated in nature[31] (as indeed it may have been in *McClintock*).

3.4 Other undue hardship factors

Following *Alberta*, suggestions could have been made as to *other* factors which could have tipped the accommodation balance McClintock's way. This is one of the benefits of the Canadian system – reasonable accommodation allows proportionate consideration and intricate assessment of *all* the circumstances to reveal any practical accommodation(s) which would not compromise the employer's legitimate aims.

3.4.1 Internal policies and external public relations

The judicial oath which McClintock had signed was a key factor in blocking his accommodation request. The ET had noted previous instances where 'judges had been allowed to recuse themselves from a general class of case because of hostility towards, or conscientious objection to applying, particular laws'.[32] These included the absences of Lord Scott from cases involving the *Hunting Act 2004* (who, in opposition to the legislation, had made speeches to that effect during debates on the *Act* in the House of Lords) and certain JPs in South Yorkshire from appearing in cases concerning miners' strikes (due to the appearance of bias and/or for administrative reasons). However, the EAT was of the view that these previously permitted exceptions were not analogous to McClintock's situation.[33] Bearing in mind the fact that he had not made his religious feelings clear, creating any accommodation for him at his whim (rather than because of a more fundamentally grounded objection) might have undermined public confidence in the judiciary. The ET commented that 'it would be invidious were judges to pick and choose which

[30] [1990] 2 SCR 489.
[31] See chapter 7 n. 86
[32] per Elias J at para.10.
[33] *Ibid*., at para. 52.

cases they were prepared to sit on. It would undermine the basis of our judicial system, one that 'warts and all' has served people well for a very long time'.[34]

Consequently, it was a matter of internal policy that meant McClintock could not be accommodated. Whilst the undermining of public confidence was based on assertion rather than fact, the link between that and upholding the judicial oath was no doubt viewed as self-evident.[35] Had he made his religious views known earlier on it is unclear whether this would have persuaded the ET or EAT otherwise. Under the Canadian model it would be necessary to determine how far, if at all, a practical accommodation would have been possible so as to not override the spirit of the judicial oath,[36] taking into account the tension with sexual orientation equality that preferential treatment for him would have created. This balance is revisited in more depth during discussion below of *Ladele v. London Borough of Islington*.

4. *McCLINTOCK*: APPLYING THE UNITED STATES MODEL

The same approach to referencing as employed under application of the Canadian model is used here, as it is across chapters nine to eleven, when discussing the US system of reasonable accommodation.

4.1 Economic hardship

It must be recalled that the US adopts a *de minimis* (more than minimal) test for undue hardship:[37] if the accommodation would require a more then minimal obligation on the part of the employer then that employer will not be required to accommodate the religious employee. It is unclear how much of a financial cost the

[34] *Ibid*., at para. 29.
[35] Domestic decisions have ruled that in some situations where the link is ambiguous there should be specific evidence. In *Noah v. Desrosiers t/a Wedge* (*Noah*) [2008] ET 2201867/07 a hair salon terminated a Muslim woman's interview for the position of assistant stylist on the basis that she wore a headscarf which concealed her own haircut. The salon was known for very modern hair styles and viewed it as legitimate that staff display their own hair cut to clients. The ET ruled that although 'there was evidence that supported the legitimacy of the general concern in relation to the Respondent's particular business, there was no specific evidence ... as to what *would* (for sure) have been the actual impact': per Judge Auerbach at para. 159 (original emphasis).
[36] Which obliged McClintock to apply the law to all individuals irrespective of 'religion, creed or persuasion'.
[37] *Trans World Airlines v. Hardison* (*Hardison*) 432 US 63 (1977) and *Ansonia Board of Education v. Philbrook* (*Ansonia*) 479 US 60 (1986). See chapter 8 n. 68 and n. 69, respectively.

DCA would have had to bear by accommodating McClintock, although it seems unlikely this would have been very high. Given that the employer's circumstances will be taken into account in deciding whether economic hardship will surmount the *de minimis* hurdle[38] more might have to be asked about the nature of the DCA's available resources in subsidising McClintock's accommodation claim. In any event, evidence would of course be required of economic hardship.[39]

4.2 Automatic non-economic hardship

Non-economic hardship may include employer policies of equality and general impartiality that employees are intended to honour in projecting such a message to the public. As the DCA was a public body, and given that McClintock in signing the judicial oath would have been aware from the outset of his duty to apply the law to all individuals irrespective of religion, creed or persuasion,[40] it is possible that the circumstances were analogous to those in *Webb v. City of Philadelphia* (*Webb*)[41] where a public employer had a well-known policy of religious neutrality. Given the fixed and familiar nature of this policy it was found in *Webb* that any obligation the public employer had to engage with the employee's accommodation request was neutralised.[42] As such, the DCA's failure to engage with McClintock's accommodation request might also have been condoned unless he could have been accommodated behind the scenes. This highlights the US courts' findings that certain arbitrary reasons[43] (of which the example in *Webb* is one) will negate any need for

[38] *Tooley v. Martin—Marietta Corp.* (*Tooley*) 648 F.2d 1239 (Ninth Circuit, 1981): see chapter 8 n. 79.
[39] For example, as in *Protos v. Volkswagen of America Inc*. (*Protos*) 797 F.2d 129 (Third Circuit, 1986): see chapter 8 n. 81 (see also generally chapter 8, section 3.1.2).
[40] See above n. 36.
[41] 562 F.3d 256 (Third Circuit, 2009). For discussion of the facts in *Webb*, see chapter 8, section 3.1.3.
[42] However, Vickers makes the argument that is it 'not clear-cut' why public-sector organisations should automatically find it less difficult to justify non-accommodation of religion. Whilst they may exist to perform a more 'secular' role than private institutions it could equally be argued that the public sector should 'reflect its community and so accommodate both sexual orientation and religion and belief': 'Religious Discrimination in the Workplace: an emerging hierarchy' (2010) 12 Ecclesiastical Law Journal 280, p. 292 and, generally, pp. 292 – 294. Rivers has gone further and said that arguments against accommodation of religion by public bodies on the basis that such bodies are publicly funded is misconceived: 'the notion that "ethics flow with money" [is] "irrational, wrong and illiberal"' (as quoted in A. Donald et al, *Equality and Human Rights Commission Research Report 84: religion or belief, equality and human rights in England and Wales*, p. 103. Available at: <http://www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf>, accessed 24th August 2012).
[43] For discussion of these reasons see chapter 8, section 3.1.3.

the employer to engage with the accommodation request other than to refuse it outright and claim that the reason automatically clears the *de minimis* hurdle.

4.3 Factors refuting or suggesting non-economic hardship?

Arbitrary reasons aside, a total lack of accommodation dialogue from employer to employee (as happened in *McClintock*) [44] will usually result in a finding of *no* undue hardship on the employer. However, this can be avoided if the employer makes a counter-offer which attempts at some sort of partial accommodation. No such counter-offers were made in *McClintock*. Nevertheless, it is still not clear on the facts of *McClintock* that an accommodation would have been required under the US model. Although there was little evidence on the facts either way, it is worth speculating briefly on the distinction between real and hypothetical hardship. The general view of the US courts is that refusal of an accommodation request must be based on the former and not the latter.[45] Whilst the DCA did not identify *either* real or hypothetical hardship, the latter was identified by the ET in respect of the various effects of an accommodation on other employees.[46] Of course, had the DCA relied on hypothetical hardship, *Tooley v. Martin—Marietta Corp.* (*Tooley*) and *EEOC v. Alamo Rent-A-Car* (*Alamo*) have ruled that this should preclude any finding of undue hardship. However, some US decisions[47] have allowed hypothetical hardship to surmount the *de minimis* hurdle for the employer although these pre-date the judgment in *Alamo*. In any event, *Cloutier v. Costco*[48] has established that the existence of employer policies of themselves (it is possible the DCA's judicial oath would count as such a policy) will establish real hardship.[49]

[44] This would have been significant under the EHRC's *Code of Practice: Employment* on reasonable adjustments which requires employers to conduct a proper assessment of what reasonable adjustments may be required (para. 6.33). Indeed, the holding of an enquiry to determine possible steps to take in potentially meeting the accommodation request has been viewed as 'good practice' in disability cases: *Cosgrove v. Caesar & Howie* [2001] IRLR 653.

[45] *Tooley* and *EEOC v. Alamo Rent-A-Car* (*Alamo*) 432 F.Supp. 2d 1006 (D. Arizona, 2006): see chapter 8 n. 104 and n. 107, respectively.

[46] For example, it is noted at para. 29 of Elias J.'s judgment in the EAT that the ET had commented that accommodation '*could* ... impose greater burdens on others or lead to a situation whereby another pool of Judges with views in another direction might have to sit and adjudicate on such issues' (emphasis added). No evidence was presented in support of the ET's view.

[47] *Hardison*: see chapter 8 n. 114.

[48] 390 F.3d 126 (First Circuit, 2004).

[49] See chapter 8 n. 111.

5. *LADELE v. LONDON BOROUGH OF ISLINGTON* (*Ladele*)[50]

The appellant (Ladele) was appointed as a registrar of births, marriages and deaths in November 2002 having worked for the respondent (Islington) since 1992. On becoming a registrar, whilst continuing to work for Islington and receiving a salary from them, she held a statutory office under *s. 6* of the *Registration Services Act 1953* which continued until December 2007. In that time she was not an employee of Islington: she was an independent office holder although she was under a duty to abide by Islington's work policies. In December 2007, by virtue of *s. 69* of the *Statistics and Registration Services Act 2007*, she gained employment status and rights as a registrar and so became a direct employee of Islington until she resigned with effect from September 2009. During her time as a registrar, albeit before she became a direct employee of Islington, the *Civil Partnership Act 2004* (*CPA*) came into force in December 2005 which afforded legal recognition to same-sex couples who became civil partners. The *Act* not only provided for the designation of civil partnership registrars[51] but also required that each registration authority ensure that there was a *sufficient* number of civil partnership registrars for its area to carry out the various functions needed regarding the posts.[52] No authorities were required to designate all existing registrars.

During summer 2004 Ladele made it clear to her employers that she would find it difficult to conduct civil partnerships due to her Christian belief that marriage was the union of a woman and man, not two people of the same sex. An exception from such duties was required whilst she continued officiating mixed-sex unions. However, Islington decided that civil partnership duties would be shared out amongst existing registrars and so they elected (although there was no legal obligation to do so) to designate *all* registrars as civil partnership registrars. This was not a procedure followed by all authorities, some of which chose not to designate all existing

[50] [2009] EWCA Civ 1357. The facts referred to in the section which follows are taken from the judgments of Elias J. in the EAT ([2009] IRLR 154), Lord Neuberger MR in the Court of Appeal (CA), the Statement of Facts in *Ladele and McFarlane v. UK* [2011] ECHR 737, the Equality and Human Rights Commission's (EHRC) submission in *Ladele and McFarlane v. UK*, the Foreign and Commonwealth Office's (FCO) Comments on the third party interventions in *Ladele and McFarlane v. UK*, 14th October 2011 and the FCO Observations of the Government of the United Kingdom in *Ladele and McFarlane v. UK*, 14th October 2011.

[51] *Section 29(1).*

[52] *Section 29(2).*

registrars. Islington made its decision and accompanying designations whilst Ladele was on sick leave between May and November 2005, this decision going against her wishes. Moreover, she was not consulted. Two other registrars had also raised objections to carrying out civil partnership ceremony duties; one left Islington's service and the other, who was a direct employee of Islington, was offered alternative employment on the same pay. This offer was accepted.

As the legislation did not necessarily have to apply to Ladele (unlike the scenario in *McClintock*) there arose the question as to what effect the designation process might have on her request to be excused from civil partnership duties. Relevant to this was the issue of how far Ladele could have avoided the clash; especially given that she could not possibly have known when she first commenced her job that in future years she would be required to conduct civil partnership ceremonies. Of particular note was the scope of Ladele's role at the time the law on same-sex civil partnerships was introduced, such a legal development being the catalyst for the revision of her role which formed the basis of her discrimination claims. When the *Civil Partnership Act 2004* came into force she was employed as a registrar of births, marriages and deaths. It could be argued that at the time she commenced her job and received her duties (putting aside the switch in employer which occurred during her tenure) she effectively agreed to conduct marriage ceremonies irrespective of the genders, mixed or otherwise, of the parties marrying. Had the legal change been to introduce a law permitting same-sex marriage this would have mirrored the issue in *McClintock* – a subsequent legal change which updated and redefined a specific concept that directly related to certain of the individual's job duties. In *McClintock* this concept was adoption, the relevant job duty being the decision-making role in adoption applications; in *Ladele* the concept was marriage, the relevant job duty being the registration of, amongst other things, marriages.

However, the relevant legal change in *Ladele* introduced a *new* concept to the operation of the appellant's job duty, that of the civil partnership (available only for same-sex couples) which for legal purposes was distinct to the concept of marriage.[53] Arguably, this change to Ladele's role was different in nature to that effected in

[53] This distinction has been debated in R. Sandberg: 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, pp. 163 – 166.

McClintock in that 'civil partnership' could never, even on an inclusive understanding of 'marriage', have been included as part of her original job description. If this is correct then it is possible the specific situation rule in relation to the subsequent legal change did not apply to Ladele as she had not voluntarily agreed to a contract of employment that included civil partnership.[54]

After raising her objections, Ladele was offered an accommodation by Islington. This was a temporary measure which would only have required her to conduct civil partnership ceremonies confined to the simple signing process, as opposed to the *full* ceremonies themselves. It is possible she was not offered the same alternative employment as the other employee because she was not a direct employee of Islington at the time. Ultimately, she refused the temporary accommodation compromise (because it would not have excused her from *all* civil partnership duties) and renewed her request for full accommodation. During this time her obligation to perform civil partnership ceremonies still stood although she was able to make informal rota swaps with other colleagues to avoid officiating at such ceremonies. Islington turned a blind eye to this practice. As a result of these circumstances, two of Ladele's colleagues who were gay complained to Islington claiming that they found her behaviour offensive and in breach of Islington's 'Dignity For All' policy: this provided, *inter alia*, that there should be equality and freedom from discrimination on grounds of, amongst others, sexual orientation for all staff and that all staff were to be treated with dignity and respect.

Ladele was the subject of a disciplinary process during summer 2007 during which it was conceded by Islington that there was no obligation to impose civil partnership duties on her and that they were also not part of her job description.[55] This process did not involve any further investigations as to other potential accommodation offers which Islington could have made. From December 2007 Ladele became a direct employee of Islington who reminded her once again that accommodating her fully would be in breach of its 'Dignity For All' policy. However, it repeated to her the

[54] R. Sandberg, 'The Implications of the Court of Appeal Decision in *Ladele* and other Case Law Developments': available at: <http://www.law.cf.ac.uk/clr/networks/Sandberg%20_%20The%20Implications%20of%20the%20Court%20of%20Appeal%20Decision%20in%20Ladele.pdf>, accessed 22nd August 2012, p. 7.

[55] It was noted at this time that Ladele was happy to carry out other certain duties for the respondent that were also not in her original job description.

temporary accommodation offer she had been made previously. Ladele refused this offer again and commenced legal proceedings against Islington. In both the EAT and Court of Appeal (CA) it was found that, *inter alia*, she had not suffered either direct[56] or indirect[57] discrimination. This went against the findings of the ET. In relation to indirect discrimination, both the EAT and CA found that disadvantage had been suffered although this was justified.[58] Ladele was refused leave to appeal to the Supreme Court and now applies to the European Court of Human Rights on, amongst other grounds, *Article 9* both separately and in conjunction with *Article 14*.[59] A decision from Strasbourg is awaited.

6. *LADELE*: APPLYING THE CANADIAN MODEL

Before any assessment of the *Alberta* factors, it is necessary to consider whether Ladele should have been put in the position of having to request an accommodation in the first place.

Ladele was designated as a civil partnership registrar whilst on sick-leave and without prior consultation. The designation implemented a substantial change to her responsibilities which, as Islington conceded, were not in fact part of her original job description.[60] Even more noteworthy, Islington was under no legal obligation to designate her as a civil partnership registrar *in the first place*: critically, they had a choice[61] to not designate her if they wished, this situation having been deemed acceptable by the Registrar General who 'had left it to each local superintendent registrar to make the appropriate arrangements'.[62] Consequently, an alternative option (in contrast to requiring Islington to accommodate her *post-designation*)

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[56] per Elias J. at para. 90 in the EAT and per Lord Neuberger MR at para. 42 in the CA. Direct discrimination was claimed under the *RB Regs 2003, Regulation 3(1)(a)*.
[57] per Elias J. at para. 117 and per Lord Neuberger MR at para. 75. Indirect discrimination was claimed under the *RB Regs 2003, Regulation 3(1)(b)*.
[58] per Elias J. in the EAT at para.s 111 – 112 and per Lord Neuberger MR in the CA at para. 52.
[59] *Ladele and McFarlane v. UK*.
[60] per Lord Neuberger MR at para. 15.
[61] This choice is made clear in para. 7 of Lord Neuberger MR's judgment where it is noted that Islington'*decide[d]* that civil partnership duties should be shared out between all the existing registrars' (emphasis added). See also comments at para. 46 of the judgment.
[62] per Elias J. at para. 4 (emphasis added).

would have been to not designate her or, once designated, to 'un-designate'[63] her so that she ceased being a civil partnership registrar. It is regrettable that in the case it 'was not fully explored ... whether it [had been] proportionate to designate [Ladele] as a civil partnership registrar in the first place'.[64] This would have necessitated a reclassification of her role and responsibilities, something which presumably would have not been 'impossible' under the Canadian scheme because there was no compulsion to designate all or even specific members of staff as registrars for civil partnerships. Of course, such 'un-designation' may have been objected to by the appellant's gay colleagues,[65] although considering the circumstances of her designation in the first place, the fact that designation was not compulsory and that un-designation may well have been a useful practical solution, it is suggested that such objections should have been dismissed.

The possibility of un-designating Ladele once she had been assigned civil partnership duties was confirmed by the decisions of other local authorities in choosing not to designate employees as civil partnership registrars if this would have presented religious conscience difficulties. This was well documented in the various stages of *Ladele* and viewed by the courts as being unproblematic. In the EAT it was said 'the evidence demonstrated that in other regions accommodation had been made to allow those with strong religious beliefs not to have to carry out civil partnership duties. The relevant registrar would not be designated for civil partnership services or else the work would be distributed to other registrars who had no concerns about performing those ceremonies'.[66] The practical value in this approach was lauded by Elias J. who commented that 'we would be sorry if pragmatic ways of seeking to accommodate beliefs were impermissible ... it may be that choosing not to designate those with strong religious objections would be a lawful way of reconciling conflicts in this highly sensitive area ... there seems to us to be some virtue in taking a pragmatic line if it is lawful'.[67] The lawfulness of not designating employees who did not wish to be civil partnership registrars on religious grounds was also reinforced by

[63] Whilst this term may seem ugly it captures the idea that Ladele's duties could have reverted back to those she undertook prior to the coming-into-force of the *CPA*. The alternative term 're-designate' does not sufficiently convey this option.
[64] Vickers, above n. 42, p. 293.
[65] The morale of Ladele's gay colleagues is assessed under the *Alberta* criteria below at section 6.2.
[66] per Elias J. at para. 23.
[67] *Ibid*., at para.s. 116 – 117.

the CA[68] and, whilst the Foreign and Commonwealth Office (FCO) (on behalf of the United Kingdom (UK) Government in *Ladele and McFarlane v. UK*) was against this as a solution,[69] it is lamentable that the courts in *Ladele* did not consider whether it was really necessary to designate all registrars as civil partnership registrars. The EAT was emphatic in the merits of non-designation in Ladele's situation, arguing that 'choosing not to designate those with strong religious objections would be a lawful way of reconciling conflicts in this highly sensitive area. We would certainly have thought it arguable that a council who then made all its designated officers available for civil partnership would be acting without discrimination in the provision of the civil partnership service'.[70]

Nevertheless, Islington *did* elect to 'ensure that *all* [its] registrars were designated to conduct, and did conduct, civil partnerships, as they regarded this as consistent with their strong commitment to fighting discrimination'.[71] Moreover, their attitude was that to make such an accommodation was wrong [72] and, as identified by Vickers, against the spirit of its 'Dignity For All' policy which committed it to equality on grounds of sexual orientation.[73] However, the fact that Islington did not have to designate her as a civil partnership registrar (which would, effectively, have accommodated her), was noted by the CA: '[i]f they had not so designated her, it seems ... that there would have been a powerful case for saying that she would then have had no cause to refuse to officiate at civil partnerships'.[74] Moreover, non-designation/'un-designation' would not have been inconsistent with its 'Dignity For All' policy: this had a specific scope, applying as it did to Islington's employees in the expectation that they fulfil their roles whilst promoting values of non-discrimination. Had the appellant not been designated from the outset, or had she been un-designated, she would not have been placed in a position where she would have had to refuse to perform certain civil partnership ceremonies, such refusals having the capacity to contravene the policy and its expectations of staff once placed

[68] per Lord Neuberger MR at para. 75.
[69] It was said that '[i]t is ... no answer that other local authorities had chosen to arrange their civil partnership services in a different manner': Observations of the Government of the United Kingdom, FCO, at para. 33.
[70] per Elias J. at para. 116.
[71] per Lord Neuberger MR at para. 46.
[72] per Elias J. at para. 23.
[73] Vickers, above n. 42, p. 292.
[74] per Lord Neuberger MR at para. 74.

in a given role. In any event, the fact another employee had not been designated a civil partnership registrar and reassigned elsewhere also suggests that non-designation (and by extension, 'un-designation') would not have contravened the policy.

Having argued that Ladele could have been fully accommodated from the start, reasonable accommodation will now be assessed from the *post-designation* perspective via the relevant factors from *Alberta*.

6.1 Financial cost to the employer / size of the employer

The financial costs associated with fully accommodating Ladele's request would not have established any undue hardship on Islington. There is no suggestion from the various judgments that this was an issue; moreover, it had not been a problem in accommodating the other employee who had been moved to another role. If there had been any monetary cost it is submitted that this would have been negligible in which case the same approach would be followed as that in *McClintock*.[75] One factor affecting this would be the offers made by Islington to Ladele during the dispute. The existence of such alternative offers of partial accommodation is likely to have meant that it would be less fair to expect Islington to foot all the financial costs associated with a finding that it had to reasonably accommodate Ladele in full,[76] although the exact balancing of negligible costs as between the parties would also be determined by the fact that the alternative accommodations were temporary.[77] In any event, evidence of costs would have been needed.[78]

6.2 Problems of morale for other employees

This was a distinct problem *post-designation* for Ladele's other colleagues, specifically two gay employees who objected to her stance on civil partnerships[79] and had argued that such a stance and any attempt to accommodate it would be

[75] See above, section 3.1.
[76] *O'Malley*: see chapter 7 above n. 68.
[77] *Ibid*.
[78] *Chambly*: see chapter 7 above n. 64.
[79] per Lord Neuberger MR at para.. 40.

demeaning and in breach of Islington's own 'Dignity For All' policy. The fact that an accommodation would have impacted on these employees could not, *of itself*, have been a bar to accommodation under the Canadian model.[80] *Renaud* has indicated that the burden of proving any problem of workforce morale on the employer is high[81] with the test being *substantial* interference with the rights of other employees.[82] In any event, it is debatable whether accommodation would have affected their *rights* whilst at work and, further, it seems unlikely that two would be a sufficient enough number of disgruntled workers to establish undue hardship on Islington in meeting Ladele's full request (morale and the rights of the two gay employees had evidently not been an barrier to the partial accommodation offers).[83] In situations such as this (and given that the issue for the gay employees was one of dignity rather than equality rights *at* work), Vickers has suggested that homosexual workers could pursue harassment claims, assuming that they could establish that accommodation, having regard to all the circumstances, could be reasonably considered as having the purpose or effect of violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.[84] As already implied, the criterion of workforce morale in *Ladele* was strongly shackled to another legitimate issue for the employer in dealing with Ladele's request: specifically the 'Dignity For All' policy. This is considered in more detail below as a separate undue hardship factor.[85]

6.3 Inter-changeability of the workforce / size of the employer[86]

The CA noted 'it is pretty clear that, by [fully] accommodating the wishes of the only registrar who wanted to avoid all civil partnership functions, Islington would not have significantly, if at all, impaired the quality of their registry services, whether in

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[80] *Renaud*: see chapter 7 above n. 74.
[81] *Ibid*., n. 76.
[82] *Ibid*.
[83] Significantly, under reasonable adjustments in domestic disability discrimination law, it is not enough for an employer to point to problematic staff morale as a barrier to accommodation: EHRC *Code of Practice: Employment*, para. 6.35.
[84] Vickers, above n. 42, pp. 296 – 297.
[85] See below, section 6.4.1.
[86] See the EHRC's *Code of Practice: Employment* for similar adjustments in domestic disability discrimination. For example, Islington may have enabled Ladele to have some of her duties allocated to another person, transferred her within the organisation to fill an existing vacancy, or if no such vacancy existed, assigned her to a different place of work: suggestions akin to those made at para. 6.33. Note the EHRC's criteria for 'reasonableness': see chapter 6, section 3.2.1.

the field of civil partnerships or otherwise'.[87]Whilst Ladele had been offered an alternative accommodation (albeit temporary) which she had not accepted (this was repeated to her a second time on becoming a direct employee of Islington)[88] her preferred full accommodation may still have been possible. It would have undoubtedly entailed some sort of equitable and efficient balancing of duties amongst particular employees who, once canvassed,[89] might have been willing[90] to undertake Ladele's civil partnership ceremony duties. This would have depended on unknown factors such as demand for civil partnerships and how many other registrars there were who were able to and available to perform the related functions. Assuming other registrars were willing, this would have reduced any undue hardship on Islington, particularly if civil partnerships were isolated in their occurrence.[91] Following Vickers' comments in relation to *Moore*, both Ladele and Islington could also have had a more positive dialogue to determine precisely what accommodations would have been reasonable after her designation as a civil partnership registrar. This would have produced a more interactive discussion between them (for example through correspondence or face-to-face meetings) than actually took place.

The practical ease with which Islington might have accommodated Ladele post-designation is evident once again from their accommodation of the other registrar who was moved to another role, although this might not have been an option open to Ladele given her different employment status at the time. Of course, once she became a direct employee of the Islington in December 2007, the option to move her to another role might have been pursued – in the event it was not. However, moving Ladele to another role might not have provided a workable solution for her given that she seemed to want to stay in her existing role rather than be transferred elsewhere to undertake a possibly very different job.

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[87] per Lord Neuberger MR at para. 44, quoting from the ET.
[88] The Canadian position may be that even though a counter-offer is less preferable for an employee a rejection of it in favour of attempting to secure full accommodation is more likely to amount to undue hardship: see chapter 7, section 4.1.4.
[89] *Renaud*: see above n. 87.
[90] Note the views of Hambler and Vickers on taking into account other employees' willingness to cooperate: see chapter 7 n. 89 and n. 90, respectively.
[91] *Alberta*: see chapter 7 n. 86.

6.4 Other undue hardship factors

The Canadian reasonable accommodation scheme might have provided Ladele with a full accommodation post-designation. Whilst Islington may have been able to point to specific factors from *Alberta*, each of these could be met with counter-arguments based on facts which might have meant that accommodation was still not disproportionate or 'impossible'. However, there are *other* considerations specific to *Ladele* which merit exploration, particularly as they go to legitimate matters on which both Islington and the courts rejected the notion of accommodation.

6.4.1 Internal policies and external public relations

A valid concern for Islington was the fact that by accommodating Ladele it would have paradoxically been in breach of its own 'Dignity For All' policy. Aside from the policy's link with employee morale there was a broader issue: specifically the fact that it affirmed Islington's public commitment to non-discrimination on, amongst other grounds, sexual orientation in the provision of services to the public. The CA noted that a rejection of accommodation concerning Ladele's stance – which was based on perceived religious hostility towards same-sex civil partnerships – would have been entirely consistent with the 'Dignity For All' policy once she was designated a civil partnership registrar. Such a policy was an overarching attempt to commit not only to the promotion of equality as between Islington's employees but also towards members of the public who were users of their services.[92] It was said that Ladele's 'refusal to perform [civil partnerships] involved discriminating against gay people in the course of [her] job; she was being asked to perform that 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'.[93] Moreover, in discussing indirect discrimination and the issue of justification the CA, quoting from the EAT judgment, found that 'once it is accepted that the aim of providing the [civil partnership] service on a non-discriminatory basis was legitimate – and in truth

[92] per Lord Neuberger MR at para. 45.
[93] *Ibid*.. at para. 52.

it was bound to be – then ... it must follow that Islington was entitled to require all [designated] registrars to perform the full range of services'.[94]

To permit Ladele's full accommodation request would have undermined Islington's own non-discriminatory objectives and, as a result, it was *not* disproportionate to require *all* such designated civil partnership registrars to perform full civil partnership duties[95] (presumably the partial offer of accommodation made did not violate the policy as that offer was temporary). Clearly, to have decided otherwise would have placed Islington in the unenviable position of risking not only alienation of the two gay colleagues and any other affected colleagues who found Ladele's position homophobic,[96] but also the transmission of negative signals to the wider public about Islington's attitude towards equality on grounds of sexual orientation. Nevertheless, under the *Meiorin* test, employers have to accommodate unless it is *impossible* for them to do so. Fully accommodating Ladele post-designation, whilst inconsistent with the spirit of the 'Dignity For All' policy, would not have presented an intractable *practical* problem. The limited nature of the exception could have been emphasised given that it only affected one individual in relation to a particular religious objection – religion and belief also constituting another protected characteristic in the equality balance.

Of course, this pre-supposes that the *Meiorin* conception of 'impossible' is effectively limited to practical concerns; it is perfectly conceivable that it may be defined more widely to mean 'impossible' at the level of policy and public relations. This was certainly claimed by Islington who had 'not disputed that an effective service could be provided even if the [appellant] did not carry out the civil partnership duties. [Rather] ... part of the commitment to the promotion of equal opportunities and fighting discrimination [was] that employees should not be permitted to refuse to provide services to the community for discriminatory reasons'.[97] The legitimacy of taking such a position was also addressed by comments on the Equality and Human Rights Commission's (EHRC) intervention in *Ladele*

[94] *Ibid*.. at para. 49.
[95] *Ibid*.. at paras.. 50 and 52.
[96] On the homophobic impression conveyed to the two gay colleagues by Ladele's stance see the judgment of Lord Neuberger MR at para. 40.
[97] per Elias J. at para. 97.

and McFarlane v. UK made by the UK FCO. However, here the FCO confusingly only seemed to require that the discriminatory practice did not mean that the service user(s) had to go *elsewhere* to obtain the service,[98] which was *not* the issue in *Ladele* (it was accepted at all stages of litigation that civil partnership services would *still* have been provided at the same time, in the same place and by the same public authority irrespective of accommodating the appellant's religious views). The FCO opined that '[d]iscriminatory practices in the provision of goods and services, including because of sexual orientation, are, in and of themselves, matters which a democratic society is entitled to prohibit irrespective of whether the services in question is available elsewhere'.[99] It thus remains somewhat unclear what the FCO's position would be on fully accommodating Ladele where this would not have led to service users having to go elsewhere to obtain a civil partnership ceremony.[100]

This uncertainty aside, it seems clear that Islington's position was that Ladele's request would have breached the 'Dignity For All' policy on equality. [101] On this view, the fact that such a failure to accommodate would also not have respected religion or belief is simply indicative of a subordination of religion or belief by the policy imperative: this would be an act of indirect discrimination against religion or belief, albeit justified as proportionate precisely *because* of a policy based on public relations which required all designated civil partnership registrars to perform their full functions.[102] Sandberg has attacked this subordination, claiming that in *Ladele*, 'the obligations on the employer not to discriminate on grounds of sexual orientation trumped the rights of the employee not to be discriminated against on grounds of

[98] This issue also relates to circumstances where there is a clash between religion and issues of sexual orientation in the provision of goods and services. For general discussion of this in domestic cases see chapter 6, section 2.1 and chapter 12, section 3.3.3. For discussion in relation to Canadian reasonable accommodation (there is no US test for reasonable accommodation in goods and services provision) see below, section 6.4.2 and in particular n. 125.

[99] *Ladele and McFarlane v. UK*: Comments of the Government of the United Kingdom on the Third Party Interventions, FCO, at para. 14.

[100] However, given that the FCO argues that '[i]t is only possible to enter civil partnerships through a civil partnership registrar. [The appellant] cannot give precedence to her religious views ...,' it may be inferred that the FCO would have viewed accommodation of Ladele as discriminatory even where services users would not have had to obtain the civil partnership ceremony elsewhere: *Ladele and McFarlane v. UK*: Observations of the Government of the United Kingdom, FCO, at para. 8.

[101] Communication of a positive commitment regarding equal access to services irrespective of sexual orientation was supported by the FCO: Observations of the Government of the United Kingdom, Foreign and Commonwealth Office, 14 October 2011, at para. 31. Quite apart from the general public, Elias J commented that any negative impression of such a commitment would also 'send the wrong message to staff of the council about its commitment to equality': para. 100.

[102] This reasoning is supported by both the EAT at para. 98 and the CA at paras. 49 – 50.

religion or belief. There seems to be no recognition that equality policy protects discrimination on grounds of religion as well as on grounds of sexual orientation'.[103] Nonetheless, it was found that the values inherent in the policy were 'entirely rationally connected'[104] with the legitimate aim of requiring *all* staff to perform their jobs in a non-discriminatory fashion. Even if this had not been the essence of Islington's legitimate aim, the FCO highlighted that an alternative legitimate aim might have been simply 'ensuring that there are sufficient employees to provide services'[105] irrespective of the 'Dignity For All' policy.

6.4.2 Legal obligations on the employer[106]

Whilst the 'Dignity For All' policy laid the foundations for Islington's legitimate aim, the policy's guarantee of sexual orientation equality (as towards users of its services) was also legally entrenched by the *Equality Act (Sexual Orientation) Regulations 2007* (*SO Regs 2007*),[107] a point fortified in the CA by Lord Neuberger MR's discussion of those regulations taking 'precedence over any right which a person would otherwise have by virtue of his or her religious belief or faith, to practice discrimination on the ground of sexual orientation'.[108] Moreover, had the facts of *Ladele* been litigated after 1st October 2010 and the implementation of the *Equality Act 2010*, such a policy may also have been viewed as a valid attempt to adhere to the new public sector equality duty.[109]

Notwithstanding the *Meiorin* test of 'impossibility', it might be viewed as difficult to sustain arguments for accommodation where such treatment would, *prima facie*,

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[103] Sandberg, above n. 53, p. 172.
[104] per Elias J. at para. 100.
[105] Observations of the Government of the United Kingdom, FCO, at para. 31.
[106] This issue, as linked to the 'Dignity For All' policy, would have affected the assessment of 'reasonableness' under the EHRC's *Code of Practice: Employment*. For example, it may have related to 'the extent to which it is practicable for an employer to take the step' (para. 6.28), such a test being capable of wider application to take into account broader issues of employer work policies and legally imposed duties.
[107] SI 2007/1263. Of course, by choosing not to designate Ladele there would have been *no* danger of Islington providing and operating a service in a discriminatory manner – this being because there would have been no designated registrars who would later have wanted to be excused from carrying out the service. Such a position would have better accorded with Islington's 'Dignity For All' policy and the general prohibition of discrimination on grounds of sexual orientation under the *SO Regs 2007* and, in exercising its functions, take heed of the new public sector equality duty under the *EA*.
[108] At para. 69.
[109] *S. 149(1)*. Non-designation or 'un-designation' would have circumvented this duty as well.

constitute unlawful discrimination. However, proportionality and impossibility can still be addressed by contrasting Islington's *mode* of self-imposing the 'Dignity For All' policy with its *right* to self-impose such a policy. Whilst self-imposition of the 'Dignity For All' policy was Islington's right and an entirely appropriate and legitimate act,[110] this could become open to challenge under the 'impossibility' test where the policy disproportionately impacted specific employees, it not having any built-in accommodation mechanisms. In such situations, the 'impossibility' test may require that proportionality be weighed more evenly as between employer and employee, particularly as interpretation of the 'Dignity For All' policy was left to Islington *itself*. Inevitably, this is open to the objection that to create any pragmatic exceptions would have undermined the aims of the policy. However, given that the process of not creating exceptions *also* did not guarantee dignity and respect for employees such as Ladele (the policy stated, *inter alia*, that 'there should be equality and freedom from discrimination ... for *all* staff)',[111] it may be asked whether the proportionality balance as struck between policy and pragmatism post-designation was fair. Certainly, strong practical arguments can be made in favour of redressing the balance.

Such practical arguments have been proposed by Lafferty in the Canadian context of legalised same-sex marriage and whether marriage commissioners who object for religious reasons to same-sex marriages should be accommodated from having to perform such marriage ceremonies. She has argued that an employee's '*position and visibility* in relation to the task of solemnization, including the process for same-sex couples to attain civil marriage (which may involve obtaining a license, having a ceremony, and documenting registration) are factors to consider'[112] in determining accommodation. This seems particularly relevant in Ladele's case, and indeed in the circumstances of *McClintock*.[113] On this view, whether it was possible to provide a full accommodation post-designation for Ladele might have depended on the very specific parameters of her responsibilities, such as how far she was involved in the initial administrative tasks of arranging civil partnerships and whether this involved

[110] As found by both the EAT at para. 98 and the CA at para. 46.
[111] This is outlined by Lord Neuberger MR at para. 9 (emphasis added).
[112] L. Lafferty, 'Religion, Sexual Orientation and the State: can public officials refuse to perform same-sex marriage?' (2007) 85 Canadian Bar Review 287, p. 311 (emphasis added).
[113] Similarly, the suggestion would also apply to the appellant in *McFarlane v. Relate Avon Ltd*, discussed below: see section 8.

her as a first point of contact for members of the public. If she was involved in such tasks and there was a risk she might have turned away members of the public then a full accommodation would still have been impossible (so as to cause undue hardship on Islington), unless she had swapped with a colleague which, on the facts, did seem practicable.

Critically, this type of swap would not have jeopardised provision of the *full* service in question (as requested by the service user); as a result, it would also have not contravened the 'Dignity For All' policy or the *SO Regs 2007*. The obvious need to avoid rejection of services to service users has been emphasised in relation to the Canadian same-sex marriage debate where it has been said that '[s]ame-sex couples appearing at a government office requesting marriage services should expect that they will not experience rejection by being refused service by a state representative whose job it is to serve the public'.[114] The fact that, had she been involved at the initial stages of civil partnership enquiries, Ladele might have been able to avoid such duties by swapping with other employees would mean that the impossibility threshold of undue hardship under the Canadian scheme might not have been attained: '[u]ndue hardship would [only] exist if there were no public officials available to meet the public for the purpose of providing a marriage license, ceremony or registration to a same-sex couple other than officials who refused to do so on religious grounds or if there were so few public officials available that re-assignment would impose an unreasonable burden on those who had no religious objections'.[115] Assuming both Ladele and McClintock were not involved as initial contacts for their services, and assuming they could have been accommodated behind the scenes, it remains unclear how either prospective same-sex civil partners or prospective same-sex adopters, respectively, would begin to frame a sexual orientation discrimination claim in the provision of goods or services where the accommodation of Ladele and McClintock had not thwarted attempts to obtain those services (this presupposes that there would have been enough civil partnership registrars or JPs to still offer the relevant *full* service).

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[114] Lafferty, p. 311. Lafferty also notes that in some Canadian provinces there are practical accommodations made for designated officials who do not wish to conduct same-sex marriage ceremonies and/or participate in the initial public-contact stages of such enquiries – as long as replacement officials can be identified. Those provinces are Ontario, Québec and Nova Scotia: p. 313.
[115] *Ibid*., p. 312.

The pragmatic arguments advanced above have been recently addressed in the Canadian courts. In *Re: Marriage Commissioners Appointed Under the Marriage Act* (*Re: Marriage Commissioners*)[116] the Saskatchewan Court of Appeal considered a reference question from the Canadian Government as to whether proposed legislation allowing public officials to refuse to conduct same-sex marriages would infringe access to public services without discrimination. It was held that there should be no such accommodation of religious views. [117] However, whilst the court cited a legal policy of non-discrimination on grounds of sexual orientation (similar to *Ladele)* as clearly operative in its reasoning,[118] comments were made to the effect that if the circumstances of a marriage commissioner's refusal had been presented differently then practicality may have been able to supervene over policy. Whilst the court determined that '[c]ommissioners who were appointed before the Queen's Bench decision recognizing the legality of same-sex marriage in this jurisdiction are in no meaningfully different position than those appointed after the decision was rendered',[119] it went on to consider factual scenarios that might affect whether an accommodation should be permitted. Where marriage commissioners were the first point of contact for same-sex couples in arranging a marriage the court was sceptical as to whether it could be guaranteed that there would always be fair access to marriage services for those couples. Any refusal by a marriage commissioner to a gay couple of the services they required would be 'very significant and genuinely offensive'.[120] Equally concerning, if a large number of marriage commissioners took advantage of such accommodations this might create a situation where same-sex marriage services became difficult to obtain – which may have had geographical implications.[121]

[116] [2011] SKCA 3.
[117] The court's decision was not based on a reasonable accommodation analysis; rather, it was based on a violation of *s. 15(1)* of the *Canadian Charter of Rights and Freedoms* which could not be justified under *s. 1*. However, certain of the court's comments and reasoning are relevant to the reasonable accommodation factors discussed here.
[118] per Richards JA. at paras 5 and 94. For treatment of this reason in Canada see also B. MacDougall, 'Refusing to Officiate at Same-Sex Marriage Ceremonies' (2006) 69 Saskatchewan Law Review 351, pp. 358 – 360.
[119] per Richards JA. at para. 23.
[120] *Ibid*., at para. 41.
[121] *Ibid*., at para.s 42 – 43.

However, the court also conceived of an alternative solution whereby marriage commissioners were not the first port of call for couples seeking to marry,[122] meaning that any accommodation could be arranged with commissioners discretely and 'behind the scenes'.[123] This would facilitate a system whereby a commissioner's refusal 'to be involved in a same-sex ceremony would not be apparent to the couple proposing to wed and there would be no risk of the couple approaching a commissioner and being refused services because of their sexual orientation'.[124] It is not known on the facts of *Ladele* (or *McClintock*) how involved either appellant was at the initial contact stage for same-sex couples enquiring about the relevant service. However, a pragmatic and complete accommodation may have been permitted which still afforded the *full* provision of the relevant service[125] when based on the proportionality reasoning in *Re: Marriage Commissioners*.

Notwithstanding these practical solutions, the proportionality balance between pragmatism and policy remains awkward even at the Canadian level of 'impossibility'. As in *McClintock*, Ladele was employed in a public job.[126] The courts reiterated that it did not matter that 'the civil partnership requirements could have been provided perfectly satisfactorily without obliging the [appellant] to perform these duties'[127] because, for example, 'there were sufficient registrars to perform the service'.[128] Despite the reality that, on this approach, no civil partnership ceremony services would have been withheld, the mere fact that *in principle* Islington (a public entity) *would* have been tolerating discriminatory conduct by one of their employees would be viewed as enough to prevent an accommodation. This followed by virtue of the *SO Regs 2007* and could, on a reading of 'impossible', have presented a justification by way of legal impossibility in Islington's refusal to accommodate Ladele. As contended by the CA, summarising the arguments of

[122] *Ibid*., at para.s 85 – 86.
[123] *Ibid*., at para. 85.
[124] *Ibid*., at para. 86.
[125] The issue of pragmatism versus policy in the provision of services is noted in chapter 12, section 3.3.3 in relation to *Bull and Bull v. Hall and Preddy* [2012] EWCA Civ 83, *R (Johns) v. Derby City Council* [2011] EWHC 375 (Admin) and *Catholic Care v. Charity Commission for England and Wales* [2011] UKFTT B1 (General Regulatory Chamber).
[126] per Lord Neuberger MR at para. 52. This was also emphasised in the EAT by Liberty who were permitted to intervene: the job was 'an important function of a public nature' – see para. 102. See also comments by Vickers and Rivers above n. 42.
[127] per Elias J. at para. 108.
[128] *Ibid*.

Liberty as an intervening party, 'on the natural meaning of the 2007 Regulations ... a refusal to perform civil partnerships, on the part of someone who is quite prepared to perform marriages, amounts to discrimination ... [This] involves the "provision to the public or a section of the public of ... services"'.[129] This was reinforced by the EHRC when it stated that '[i]t would not be reasonable for an accommodation on religious ... grounds ... to result in other unlawful discrimination'.[130] In *Ladele and McFarlane v. UK* it was reiterated that '[i]t will generally be proportionate to refuse to accommodate manifestations of discriminatory religious beliefs in the workplace whether public or private, but particularly so when the employee serves a public function'.[131] The EHRC also signalled that Ladele was '*obliged* by equality duties to positively advance equality of opportunity and [had] laudably sought to do so through equality policies such as the 'Dignity For All' policy'.[132] Had full accommodation thus been precluded then Ladele may have been forced to concede that Islington's partial (and temporary) accommodation offers were the best she could expect in the circumstances.

Nevertheless, there is a sense that such an interpretation of the 'Dignity For All' policy and the *SO Regs 2007* obligations is inflexible, particularly where in practice a full or partial accommodation might have been available which would not have frustrated either the dignity of same-sex service-users or legal provisions proscribing sexual orientation discrimination. It is submitted that where a pragmatic solution can be found this will be permitted under the Canadian model where the content and spirit of the legitimate aim can remain uncompromised by a practical resolution. This is a balance which falls outside the imperfect reaches of the domestic indirect discrimination proportionality analysis. Where such a balance favours the employee it should also be viewed as sidestepping the 'core job' rule which has required that excusal from undertaking specific tasks on conscientious grounds should not be permitted '[w]here carrying out the task in question is a significant aspect of the job'.[133] It is argued that such a rule should not be determinative of the success or

[129] per Lord Neuberger MR at para. 68.
[130] EHRC: Legal Intervention on Religion or Belief Rights: seeking your views', August 2011, p. 5.
[131] *Ladele and McFarlane v. UK*: Submission of the EHCR at para. 35. This was reiterated at para. 56.
[132] Submission of the EHRC, at para. 50 (emphasis added).
[133] Vickers, above n. 4, p. 170. This has also been extended into areas where an employee has no conscientious objection to a task but seeks accommodation in the undertaking that task. See *Noah* (above n. 35) where indirect discrimination was found as the aim of requiring all stylists to display

otherwise of the proportionality outcome under the Canadian model of reasonable accommodation. Consequently, the 'core job' rule is not viewed as an undue hardship factor in this or other cases considered across chapters nine to eleven: it may still be possible to argue for a full or partial practical accommodation (even if it does relate to a core function of the employee's job) where it can be shown that there is no danger of compromising the legitimate employer aim(s).

An inescapable corollary of finding a pragmatic accommodation for Ladele would be the view that other types of beliefs motivated by religion (for example, sexist or racist beliefs[134]) would also have be accommodated, lest policy prohibiting discrimination against race and sex be elevated above policy prohibiting discrimination against sexual orientation. This point was not addressed in *Re: Marriage Commissioners*. It is a tension which is perhaps irresolvable even by the Canadian reasonable accommodation test, although some might point to the fact that 'behind the scenes' accommodation of sexist or racist religious beliefs would be less likely to be tolerated by other employees whose cooperation in a practical accommodation would be essential.

7. *LADELE*: APPLYING THE UNITED STATES MODEL

In relation to the practical versus legal policy conundrum identified above, this also presents problems under the US model. It is not proposed to rehearse these issues here, suffice it to say that the definition of *de minimis* undue hardship[135] as 'minimal' or 'trifling' may extend beyond mere practical difficulties of accommodation and impact upon employer policy and public relations considerations in the proportionality analysis.

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their hair was disproportionate because it did not relate to a sufficiently 'core' enough element of their job: per Judge Auerbach at para. 160.

[134] For example, in the EAT Elias J. noted Liberty's argument that accommodation of Ladele could 'lead to situations which almost everyone would find wholly unacceptable. For example, a racist who objected to performing mixed race marriages or Jewish marriages would have to be accommodated in similar circumstances': at para. 106.

[135] *Hardison* and *Ansonia*: see chapter 8, n. 68 and n. 69, respectively.

7.1 Economic hardship

It has already been indicated that economic hardship would not have been a likely factor in preventing the accommodation of Ladele,[136] although depending on any level of funding required there is the possibility under the US model that such costs may have resulted in undue hardship[137] (assuming evidence was produced[138]). This aside, 'non-economic hardship' would then form the main focus.

7.2 Automatic non-economic hardship

This raises the issue of accommodation and whether this would have required Islington to contravene the *SO Regs 2007* post-designation. Again, this would depend on the exact parameters of Ladele's job and whether there was a risk of discrimination being perpetrated against same-sex partners who enquired about obtaining a civil partnership. Any legal contravention would have precluded accommodation.[139] The fact that, post-designation, there was also a problem with contravention of the 'Dignity For All' policy should there be any accommodation would also have meant that undue hardship would be present given the fact the US courts have deferred to employer's internal policies in the past,[140] specifically those in the public sector. Indeed, this might be particularly so where such a policy is in place to address the public's perception of impartiality[141]and, presumably, non-discrimination. Significantly, there would have been no bar to excusing Ladele from civil partnership ceremonies had she *not* been designated as a civil partnership registrar; such non-designation would have been outside the reach of the *SO Regs 2007*, the new *EA* equality duty and, indeed, the 'Dignity For All' policy. The same matters regarding non-designation and 'un-designation' of Ladele[142] would be relevant to this discussion.

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[136] See above, section 6.1.
[137] See both *EEOC v. Townley Engineering and Manufacturing Company* (*Townley Engineering*) 859 F.2d 610 (Ninth Circuit, 1988), chapter 8, section 3.1.1 on the validity of economic hardship and *Protos* on the fact that the employer's resources in meeting this cost should be taken into account: chapter 8, section 3.1.2.
[138] See *Tooley*, chapter 8 n. 79.
[139] See *United States v. Board of Education for the School District of Philadelphia* (*Philadelphia*) 911 F.2d 882 (Third Circuit, 1990) , chapter 8 n. 88.
[140] See *Webb*, chapter 8 n. 92.
[141] *Ibid*., n. 91.
[142] As discussed above: see section 6.

7.3 Factors refuting or suggesting non-economic hardship?

It appears that the non-designation/'un-designation' of Ladele would have been the *only* way under the US model in which she could have been accommodated. Post-designation, whilst the possibility of accommodating her seems at least open to some debate under the Canadian doctrine, such a debate would seem to be closed under the US jurisprudence courtesy of *Webb*. Even if this is incorrect, the presence of real hardship either in the form of complaints by other workers or the existence of the 'Dignity For All' policy itself[143] would have signalled the existence of undue hardship.

The fact that Islington did offer accommodation to Ladele (albeit temporary) which was ultimately refused (on two occasions) would probably have been found to preclude a requirement that Islington go further in accommodating her requests. Such employee refusals coupled with more onerous subsequent employee accommodation requests (Ladele responded by repeating her request for full accommodation) have often been found to impose more than *de minimis* hardship on the employer. Indeed, the onus on the employee to accept the accommodation offer was interpreted strictly in *Bruff v. North Mississipi Health Service* (*Bruff*):[144] no further accommodation offer is required even if the original offer was unrealistic, impractical or unhelpful.[145] Notably, even where the employee suggests an alternative option there is no expectation that the employer must offer the employee their preferred accommodation.[146] This case law appears to go against the decision in *Buonanno v. AT&T Broadband LLC* (*Buonanno*)[147] that alternative accommodation suggestions by employees *should* be permitted. Given the totality of all of these considerations it appears that the US doctrine of reasonable accommodation provides few, if any, ways in which Ladele may have argued for exemption.

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[143] *Costco*: see chapter 8 n. 111.
[144] 244 F.3d 495 (Fifth Circuit, 2001).
[145] Although Islington must have offered Ladele the alternative accommodation for *religious* reasons: see *Proctor*, and chapter 8 n. 125 and n. 126. This might have been satisfied given that when Elias J. discussed Islington's counter-offer he did so in comparison with the offer made to the other religious employee: at para. 7.
[146] See *Ansonia*, *Wilson v. US West Communications* 58 F. 3d 1337 (Eighth Circuit, 1995) and *Breech v. Alabama Power* 962 F. Supp. 1447 (US District Court, Alabama Southern Division, 1997): outlined in chapter 8, section 3.1.5.
[147] 313 F.Supp. 2d 1069 (D. Colorado, 2004).

8. *McFARLANE v. RELATE AVON LTD.* (*McFARLANE*) [148]

The appellant (McFarlane) was employed by the respondent (Relate) which was a national organisation providing relationship counselling services to its clients. Relate were members of the British Association for Sexual and Relationship Therapy (the Association) and all counsellors employed by them were required to be members of the Association. The Association observed a Code of Ethics containing Principles of Practice, paragraphs 18 – 19 of which required counselling services to be offered to both mixed-sex and same-sex couples. This requirement was reinforced by Relate's own equal opportunities policy. Consequently, it was inevitable that counsellors working for Relate would, at some point in their work, be obliged to have not only mixed-sex but also same-sex couples assigned to them for counselling purposes.

McFarlane was a Christian who believed that same-sex sexual activity was sinful. As a result, he felt unable to do anything which might endorse, or be seen to endorse, such activity. After undertaking training with Relate he took up a paid post with them in August 2003, signing up to their equal opportunities policy as required. Initially, his work fell within the domain of marital and couples counselling (akin to relationship counselling), such counselling covering all manner of relationship issues including, albeit not necessarily, sexual issues falling short of specific sexual dysfunction or disorder. In December 2005 McFarlane was approached to counsel a lesbian couple, a request to which he ultimately acceded notwithstanding his earlier reservations which he had outlined to his supervisor. He had felt able to dismiss these reservations on the basis that conducting relationship counselling with that particular lesbian couple did not involve endorsement of any sexual relationship between the couple. Subsequently, he counselled two other lesbian couples. It appears that in none of the lesbian counselling cases did he have to specifically address any issues of a sexual nature.

[148] [2010] EWCA Civ B1. The facts referred to in the section which follows are taken from the judgments of Underhill J in the EAT ([2010] IRLR 196), Laws LJ in the CA, the Statement of Facts in *Ladele and McFarlane v. UK*, the EHRC's submission in *Ladele and McFarlane v. UK*, the FCO's Comments on the third party interventions in *Ladele and McFarlane v. UK*, 14 October 2011 and the FCO Observations of the Government of the United Kingdom in *Ladele and McFarlane v. UK*, 14 October 2011.

In September 2006 McFarlane advised Relate of his wish to undertake a diploma course in psycho-sexual therapy (PST), a type of therapy necessarily concerned with issues of sexual dysfunction between a couple and, by extension, direction to couples regarding how to encourage greater sexual satisfaction between partners. As such, it was distinct from the character of the work that he had previously performed. Due to his religious beliefs, he raised the possibility of being excused from having to work with same-sex couples where PST issues were involved.[149] This request also extended to being excused from relationship counselling where sexual issues specifically arose in the context of same-sex couples.

Eventually, in December 2007 Relate wrote to him, stating that such accommodations would clash with, and undermine, the equal opportunities policy which McFarlane had signed when he commenced employment. It also added that any exception would reduce his workload and was likely to lead to similar requests from other counsellors. There is also evidence to suggest that at this time Relate received a letter from other therapists expressing concerns that an anonymous counsellor was unwilling, on religious grounds, to work with gay, lesbian and bi-sexual clients. Relate sought agreement from McFarlane that he undertake PST with same-sex couples and continue to offer same-sex relationship counselling where it involved sexual matters. McFarlane's reply was equivocal, stating that he was happy to undertake relationship counselling with all types of couples but that he had 'evolving' attitudes towards PST with same-sex couples. This was regarded as a refusal to undertake PST with same-sex couples and, as such, a disciplinary matter. At a disciplinary meeting in January 2008 McFarlane seemed to reverse his position and assured his bosses that he would be happy to undertake both PST and relationship counselling with same-sex couples. However, later that month Relate formed the view that he was not genuine about this earlier assurance and that comments he had made to his supervisor after the disciplinary meeting revealed a lack of intent to honour his assurance. Following further disciplinary action he was

[149] The requirement that McFarlane undertake both relationship counselling and PST of same-sex couples was not an unexpected or unforeseen change to his role caused by a change in law. In such a situation, Vickers' argument (see chapter 7 n. 84) that employees should be treated less sympathetically where they voluntarily assume duties knowing that they will be unable to undertake them on religious grounds, would hold against an affirmative accommodation outcome.

dismissed and claimed, *inter alia*, direct and indirect discrimination,[150] both of which were rejected by the ET and EAT[151] before the CA then refused permission to appeal on both grounds.[152] The CA noted that indirect discrimination had, *prima facie*, been found, but that it was justified.[153] McFarlane was refused leave to appeal further and now applies to the European Court of Human Rights on, amongst other grounds, *Article 9* both separately and in conjunction with *Article 14*.[154] A decision from Strasbourg is awaited.

9. *McFARLANE*: APPLYING THE CANADIAN MODEL

9.1 Financial cost to the employer / size of the employer

There were no indications in *McFarlane* that there would have been any monetary cost associated with full accommodation. Consequently, there would have been no financial undue hardship. Even if there had been costs associated with McFarlane's accommodation then the lack of suggestions by Relate is likely to have meant that it would be more proportionate to expect them to foot any financial costs associated with a finding that it had to make reasonable accommodation,[155] particularly where accommodation was only needed on an irregular basis.[156] It is submitted that any financial costs would have been negligible – they certainly would not have made accommodation impossible.

9.2 Problems of morale for other employees

There was specific evidence to suggest that accommodating McFarlane's religious beliefs might have received both negative *and* positive approval from fellow employees. The former was arguably evinced by the letter written and sent by concerned employees to Relate in December 2007. However, the latter may also be

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[150] *RB Regs 2003, Regulations 3(1)(a)* and *3(1)(b)*, respectively.
[151] per Underhill J. at para. 21 (in relation to direct discrimination) and para. 32 (in relation to indirect discrimination).
[152] per Laws LJ at para.s. 27 – 28.
[153] *Ibid*., at para. 27.
[154] *Ladele and McFarlane v. UK* [2011] ECHR 737.
[155] *Chambly*: see chapter 7 n. 64(it is clear that evidence would also have been required of any financial cost).
[156] *Chambly*: see chapter 7 n. 65.

claimed in relation to Relate's view that accommodation would be 'likely to lead to similar requests from other counsellors',[157] implying that there might have been other colleagues of the same view as McFarlane. However, it is unlikely that accommodating McFarlane would have negatively affected the *rights* of any employees in the workplace. There was no overt evidence that any counsellors were gay or that, even if they were, they wished to pursue this matter any further.

9.3 Inter-changeability of the workforce / size of the employer[158]

It was *implied* that employee reallocation would be a factor in accommodation. This can be seen from the EAT's observation that agreeing to the request was likely to lead to similar requests from other counsellors, the implication being that – were other counsellors likely to follow suit and ask for exemptions too – this would place a disproportionate burden on Relate to accommodate and consequently amount to undue hardship.[159] This would cause problems with 'the basic level of coverage of work'.[160] Moreover, there would be 'potential fragmentation of the management process if too many staff [were] unavailable at different times ... [because of] the cumulative effect of too many requests'.[161] Even in relation to McFarlane, such a burden would present practical and administrative difficulties for Relate whereby 'it would not be possible to filter potential PST clients so that that [McFarlane] ... would not have to deal with lesbian, gay or bisexual couples'.[162] This might mean that under the approach in *Moore*, notwithstanding the fact that there was no engagement with McFarlane's accommodation request, it could be more likely that to require any accommodation would amount to undue hardship given that any chance to achieve a

[157] per Underhill J. at para. 6.
[158] See the EHRC's *Code of Practice: Employment* for similar adjustments in domestic disability discrimination. Relate may have enabled McFarlane to have some of his duties allocated to another person: para. 6.33. Of course, this is subject to the Relate's objection that this would have in fact presented practical difficulties as it would 'reduce the amount of work that he would be able to do and was likely to lead to similar requests from other counsellors' (per Underhill J. at para. 6), the implication being that such a practical measure would be administratively challenging and therefore unrealistic as a solution (see 'reasonableness' criteria at para. 6.28).
[159] It does not appear that, as required in *Renaud*, any formal employee canvassing was done to determine this. Similarly, the facts are vague as to whether any employees would have been willing to swap relevant duties with McFarlane: see chapter 7 n. 87.
[160] Vickers, above n. 4, p. 160.
[161] *Ibid*.
[162] *Ladele and McFarlane v. UK*. This was also raised in the EAT where was noted that the ET had recognised that there could be problems with 'filtration or separa.tion of clients' and that it 'was not practicable to operate a system under which a counsellor could withdraw from counselling same-sex couples' (per Underhill J. at para. 26).

realistic, equitable and efficient balance of duties would be seriously compromised. Depending on the ease with which workers could be reallocated, a partial accommodation by way of semi-regular excusal from same-sex PST/relationship counselling might have been possible.

9.4 Other undue hardship factors

There was evidence that a full accommodation would have been challenging for Relate to implement; indeed, the impression is that it would have been difficult at a practical level due to the inter-changeability of the workforce and the size of Relate's organisation. It is necessary to consider other legitimate issues which are likely to have an effect on whether accommodation was possible.

9.4.1 Internal policies and external public relations

Significantly, McFarlane had signed up to provisions which required him not to act in discriminatory ways. He was a member of the British Association for Sexual and Relationship Therapy and its Code of Ethics which contained Principles of Practice, including the need to provide counselling services with due regard to, amongst other characteristics, sexual orientation. Moreover, he had also signed Relate's equal opportunities policy which stipulated that, *inter alia*, no staff, counsellors or clients would receive less favourable treatment on the basis of personal or group characteristics, including – but not limited to – culture (which may include religion or belief) and sexual orientation. The effect of him signing up to these policies would be similar to that experienced by McClintock and Ladele who had signed up to similar arrangements: any requirement by a court that an employer should accommodate in such circumstances would be in direct contravention of those policies. This would transmit inconsistent and contradictory signals regarding the employer's commitment to equal opportunities, creating serious public relations problems.[163] This consequently legitimised Relate's aim to 'offer its services to

[163] As noted by the FCO – *Ladele and McFarlane v. UK*: Observations of the Government of the United Kingdom, at para. 31

same-sex couples in precisely the same way as to heterosexual couples',[164] as applied to all staff.

However, such a legitimate aim might well have been disproportionate at the level of practice (although it is not known whether a full 'behind the scenes' exemption would have been possible on the facts). Unfortunately for McFarlane, the personal nature of the service offered meant he was perhaps in closer contact with service users than McClintock and Ladele meaning there was a greater likelihood of him turning same-sex users away directly, violating the policies to which he had signed up (this being exactly the sort of scenario the Saskatchewan Court of Appeal sought to avoid in *Re: Marriage Commissioners*). On this basis the rejection of his accommodation request could be argued as proportionate and justified at the level of policy: there was no practical way in which full accommodation could be granted without seriously compromising Relate's internal policies. It is not clear whether some form of partial accommodation (for example, similar to the temporary accommodation offers in *Ladele* would have been practicable so as to minimise compromising the internal policies). Indeed, Relate argued that any accommodations 'would be unacceptable as a matter of principle because [they] ran "entirely contrary to the ethos of the organisation to accept a situation in which a counsellor could decline to deal with particular clients because he disapproved of their conduct"'.[165] Indeed, the FCO commented that Relate was 'entitled to conclude that it would undermine their commitment to equality of access to services if they permitted employees, regardless of the sincerity of their religious beliefs, to refuse to provide services to individuals because of their sexual orientation'.[166]

In trying to defeat pragmatism with policy, Relate could have highlighted (as Liberty did in *Ladele*) that the internal policies were also implementing equality on grounds of sexual orientation as guaranteed by the *SO Regs 2007*. The fact that an employer who was subject to such laws was accommodating McFarlane's request would raise legal liability issues, undoubtedly signifying that it might have been (legally) 'impossible' for them to accommodate him.

[164] per Underhill J. at para. 3.
[165] *Ibid*., at para. 25.
[166] *Ibid*., at para. 29.

10. *McFARLANE*: APPLYING THE UNITED STATES MODEL

10.1 Economic hardship

Economic hardship does not appear to have been an important issue in precluding accommodation in *McFarlane*. If it had then, depending on the cost, this may have amounted to undue hardship under the US approach to reasonable accommodation.[167] Evidence would be required.[168] Following consideration of this, focus would shift to non-economic factors[169] and their effects in establishing undue hardship.

10.2 Automatic non-economic hardship

After McFarlane had commenced employment the existence of other relevant discrimination laws (the *SO Regs 2007*) would have had a major impact on whether Relate was under an obligation to accommodate exemption requests which conflicted with those provisions.[170] However, these provisions did not arise for consideration during proceedings and so the point is hypothetical. Had it been argued then its force would have depended on the contours of McFarlane's responsibilities and how far there was a chance he would have directly refused to provide relationship and/or PST counselling services to same-sex couples. If there had been such a chance then his accommodation request would have been in peril of contravening specific legal provisions imposed by the State creating a more than *de minimis* burden on Relate.[171] Unlike *Ladele* (where the appellant could have been un/re-designated), there would have been no way in which McFarlane's accommodation requests could fall outside the reach of both the *SO Regs 2007* and Relate's internal equality policies.[172] In order to sidestep the duties he wished to avoid he would have had to resign.

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[167] *Townley Engineering*: outlined in chapter 8, section 3.1.1. Regarding employer resources see *Protos*, chapter 8 n. 81 and, generally, section 3.1.2.
[168] See *Tooley*, chapter 8 n. 79.
[169] As provided for by *Hardison*.
[170] This might have been the only non-economic factor existing in *McFarlane* that did not require employer engagement. For example, the rule in *Webb* may have been of dubious application given that Relate was a private entity.
[171] See *Philadelphia*, chapter 8 n. 88.
[172] The latter may have precluded accommodation as per *Webb*, although as Relate was a private organisation it may be argued that the US courts would take a stricter view of accommodation from the equality policies of public entities given church and state separa.tion in the US.

10.3 Factors refuting or suggesting non-economic hardship?

The facts of *McFarlane* certainly highlight that Relate sought to rely on hypothetical hardship, particularly in light of the General Manager's assertions that any exemptions 'would reduce the amount of work that he would be able to do and was likely to lead to similar requests from other counsellors'.[173] Relate seemed to offer no concrete evidence for this meaning that the supposed difficulties would not have cleared the *de minimis* test. [174] However, this is a rule which has been eroded in *Hardison*[175] meaning that, whilst these cases do pre-date *Alamo*, the position remains uncertain regarding hypothetical hardship. In any event, the fact that there *was* evidence in *McFarlane* that fellow employers had begun to draw Relate's attention to McFarlane's attitudes points to real hardship should those employees have gone on to formally complain about McFarlane's behaviour. Such evidence can be seen from both the letter sent by employees to Relate around December 2007 and the views of McFarlane's supervisor regarding his conduct as made clear in January 2008. Of course, in any event the existence of internal policies of themselves would have satisfied real hardship.[176]

Assuming that the *SO Regs 2007* were not argued by Relate, and also taking into account the uncertainty over hypothetical hardship and whether Relate could establish real hardship, the fact that no counter-offer of partial accommodation was made would be significant. Whilst McFarlane's conduct could be interpreted as a refusal to acknowledge diversity in human sexuality (which may be deduced from his request to be excused from performing same-sex counselling) this may not necessarily have closed off accommodation under the US model. Although such a refusal can amount to non-economic hardship[177] employers still need to engage with such a refusal and either look for ways in which an employee can affirm diversity in an alternative way or at the least explain why the policy cannot be amended for the individual employee. If this is not done then no undue hardship on the employer may

[173] per Underhill J. at para. 6.
[174] As outlined in *Tooley* and *Alamo*: see chapter 8 n. 104 and n. 107, respectively.
[175] See chapter 8 n. 114.
[176] *Costco*: see chapter 8 n. 111.
[177] *Buonanno*: see chapter 8, section 3.1.4.

be found.[178] However, whilst no counter-accommodation offers were made by Relate there was evidence that a counter-accommodation suggestion was made by *other* employees to them via their letter of December 2007 – this amounting to training and supervision of McFarlane in his work.[179]

[178] *Buonanno*: see chapter 8 n. 101.
[179] *Ladele and McFarlane v. UK.*

CHAPTER 10: RELIGION AND EMPLOYER DRESS CODES

1. *AZMI v. KIRKLEES METROPOLITAN COUNCIL* (*Azmi*)[1]

The respondent (Kirklees) controlled a junior school at which the appellant (Azmi) was a bi-lingual support worker (BSW). Including Azmi, there were eight such BSWs working at the school, their role being to work in a team to support pupils' learning and welfare and to assist in the educational activity of children from ethnic minority backgrounds. The duties included teaching support, pupil support for targeted minority ethnic pupils at risk of under achieving and team activities. Azmi, who was a devout Muslim, was employed on a fixed-term contract for one year between the 1st September 2005 and the 31st August 2006. When appointed in September 2005, she was assigned to support Year 6 classes (10 and 11 year old children) due to her wish to work part time (this wish stemming from child care commitments) and the fact that part time hours could be accommodated better with older children. Year 6 had five classes and five class teachers, two of whom were male.

On commencing work at the school, Azmi immediately asked whether she could wear a veil covering her head and face (save her eyes) when she was in contact with adult males, specifically male teaching staff, or whether arrangements could be made so that she would not have to work alongside male staff at all. She had not worn such a veil at her interview for the post and at no time during the interview did she indicate that her religious beliefs required her to wear a veil. She also did not wear a face veil on her training day in advance of the academic year. Her explanation for not veiling in these situations was that her husband had advised her to go unveiled. She wore her veil whilst teaching and, in mid-September 2005, the school decided it could not segregate her from male staff whilst at work, either when in class or liaising generally with male staff. To have accommodated any change in her duties would have necessitated substantial timetable revisions. Regarding whether, alternatively, Azmi should be able to wear the veil at work, the school began to conduct enquiries. Subsequently, Kirklees provided advice to schools within its

[1] [2007] IRLR 434. The facts referred to in the section which follows are all taken from the judgment of Wilkie J. in the Employment Appeal Tribunal (EAT).

jurisdiction in October 2005. The result of this advice, some of which had been informed by observations of Azmi's conduct in classes whilst veiled in September 2005, was that the desire to express religious identity did not transcend the primary requirement for optimal communication between BSWs and children. Following observation of Azmi it had become apparent that the pupils she was instructing were seeking visual information from her which they could not obtain because they were unable to see her facial expressions. It was decided that – in accordance with such advice – Azmi should not veil when working directly with children. However, the school did confirm that she could wear the veil when walking around open areas of the school site.

Azmi rejected this compromise and reiterated her wish to be veiled whenever in contact with adult males, including when in class. In response, the school observed her again in early November 2005 on two separate occasions, this time both veiled when working alongside a male member of staff and unveiled when working alongside a female member of staff. It was concluded that when veiled, pupils did not engage with her to the same extent as they had done when unveiled; this included not reacting to her verbal praise. Once more, she was asked to unveil. In December 2005, Azmi wrote to the school maintaining that she and the pupils worked well together and they had understood her. She challenged the view that the veil was hindering her communication with the pupils and, indeed, indicated that she would try to use more verbal communication and a louder verbal praise when she was veiled. After a period of sick leave, she returned to work in February 2006 and was informed once again that the school required her to be unveiled when in class. She was unwilling to comply with this instruction and so was asked, on a temporary basis, to support year 3 classes where most or all of the class teachers were female – meaning she could be unveiled. The option of being veiled when walking around the school remained open to her. Azmi was happy working unveiled with female colleagues in year 3 classes but, when she was advised that the management instruction remained that she should not be veiled in the classroom, she restated her intention to wear a veil if required to work with male staff. At this stage Azmi was suspended and she commenced proceedings against Kirklees alleging, *inter alia*,

direct and indirect discrimination on grounds of religion or belief,[2] both of which failed in the Employment Tribunal (ET). Direct discrimination also failed in the Employment Appeal Tribunal (EAT)[3] whilst indirect discrimination failed in the EAT on grounds of justification.[4]

2. *AZMI*: APPLYING THE CANADIAN MODEL

2.1 Financial cost to the employer / size of the employer

There was no evidence that there would have been any financial costs associated with accommodating Azmi's requests. As such, Kirklees would have failed under this heading to establish undue hardship. *If* there had been a financial cost directly arising from Azmi's requested full accommodation (for example, the hiring of more female teachers) then, on the basis that the school had made alternative accommodation offers already, it would have been proportionate to expect some or most of the cost of complete accommodation to have been borne by Azmi herself.[5] These costs would have to be worked out on the basis that Azmi worked part-time and would only have needed to have worked alongside female colleagues for half the week.

2.2 Problems of morale for other employees

There was also no evidence that Azmi's full accommodation would have affected the morale of the other school employees by interfering with their rights at work. This is unsurprising given that a particular colleague's interpretation of their religious dress obligations is unlikely to be a matter on which other colleagues have strong views. One way in which morale could have been a more credible factor is if full or partial accommodation were not made for other Muslim staff so as to create resentment. However, any discontent amongst other staff because of this would need to be

[2] *RB Regs 2003*, *Regulations 3(1)(a)* and *3(1)(b)*, respectively.
[3] per Wilkie J. at paras. 56 – 57.
[4] *Ibid*., at para. 74.
[5] *Ontario Human Rights Commission (O'Malley) v. Simpson Sears* (*O'Malley*) [1985] 2 SCR 536: see chapter 7 n. 68.

substantial[6] so that accommodation was 'impossible'. This was not apparent on the facts.

2.3 Inter-changeability of the workforce / size of the employer[7]

There *was* evidence that the ability to reasonably accommodate Azmi would have been affected by the school's size and available workforce. It had been argued that it was *not possible* to isolate her from male staff in the classroom.[8] However, this might not have amounted to impossibility under the test in *British Columbia (Public Service Employee Relations Comm) v. BCGEU* (the '*Meiorin*' case)[9]. For example, she may have been moved to another year group's classes where there were exclusively female teachers, although she had been deliberately placed with year 6 classes due to this being the best way in which to accommodate her request to work part-time. Alternatively, the male year 6 staff could have swapped with female staff in other year groups although this may have been frustrated by a lack of other teachers' ability to swap duties across the timetable. Under *Central Okanagan School District Number 23 v. Renaud* (*Renaud*) the school should have at least canvassed this possibility.[10] There was also no evidence that other staff members were opposed to swapping with Azmi.

Whilst impossibility in relation to swapping duties remains undetermined, the school did attempt to take other steps to accommodate the appellant. Engagement with her demands was manifested by numerous investigations into the feasibility of both her

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[6] *Central Okanagan School District Number 23 v. Renaud* (*Renaud*) [1992] 2 SCR 970: see chapter 7 n. 76.

[7] Under the Equality and Human Rights Commission's (EHRC) *Equality Act 2010: Code of Practice (Employment)* (*Code of Practice: Employment*) for reasonable adjustments in disability discrimination (para. 6.33), Azmi may have switched with another colleague assuming both that there were year groups where there were all-female teachers and that this did not necessarily leave her with a reduced workload and the same job title and benefits. As a corollary of this, she may have had hours of work altered which may neither have suited her care responsibilities nor – as appeared on the facts – the respondent's school. Of course, this would have had to pass the EHRC's criteria for 'reasonableness' contained in paras. 6.28 (including practicability, disruption and cost) and 6.35 (cooperation of other workers). Reasonableness is assessed objectively: para. 6.29. The *Code of Practice: Employment* is available at:
<http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf>, accessed 24th August 2012.

[8] per Wilkie J. at para. 9.

[9] [1999] 3 SCR 3.

[10] See chapter 7 n. 87.

request to be veiled when supporting male staff[11] and her need to be veiled outside classrooms in case of contact with male staff when in communal areas.[12] This may have satisfied the threshold in *Moore v. British Columbia (Ministry of Social Services)* (*Moore*)[13] where – in a case that also concerned whether other workers could have been reassigned – it was decided that only a *total* failure to take any steps would not satisfy undue hardship in Canadian reasonable accommodation. In any event, it may have been open to Azmi to avoid making the accommodation requests in the first place, [14] for example by advising the school of her need to be separated from male staff at the earliest available opportunity, such as at interview, on acceptance of the post or at her training day. This would have promoted earlier awareness of her need to be veiled in public. She was clearly aware of her religious beliefs at these material times, notwithstanding that she had been advised by her husband to be unveiled on these occasions.[15]

2.4 Other undue hardship factors

Whilst the factors in sections 2.1 and 2.2 would not have established undue hardship on Kirklees this is not the case with the matters posed in section 2.3. Meanwhile, another pressing matter was the argument advanced by the school in defence of requiring teachers to be unveiled when in class: this concerned the issue of communication.

2.4.1 The veil and communication

The main factor in rejecting Azmi's indirect discrimination claim was the advice from Kirklees which stated that when communicating with pupils it was imperative that all school staff reinforced the spoken word with facial expressions as a form of body language. The evidence was clear that any obscuring of the face by a veil would reduce communication signals. It was said that, 'the desire to express religious

[11] Such investigations comprised, for example, the observation of her teaching whilst unveiled on 21st September and further observations of her teaching two different classes on 7th November where she was veiled in one lesson and unveiled in the other.
[12] per Wilkie J. at para. 14.
[13] (1992) 17 CHRR D/426.
[14] An issue Vickers has suggested considering: see chapter 7 n. 84.
[15] At para. 8 of Wilkie J's judgment it is unclear whether Azmi's husband encouraged her to be unveiled for just her training day or, additionally, her interview as well.

identity does not overcome the primary requirement for optimal communication between adults and children'.[16] The EAT was clearly persuaded that this was a legitimate aim[17] in the education of children based on, in particular, evidence of a clear and well-supported policy that 'the requirements of her job were such that the wearing of the veil was incompatible with them'.[18] Azmi had been deliberately recruited to provide support to pupils: such communication would be hindered by the wearing of a veil. Consequently, the legitimate aim was achieved proportionately through the rule that she refrain from veiling when teaching. Indeed, 'in relation to education, communicating with pupils adequately is an essential aspect of a teaching assistant's ability to do the job'.[19] It would have 'impact[ed] on the ability to fulfil the job function'.[20]

It is significant that the EAT made reference to the observation notes made on Azmi's conduct when veiled. Aside from the question of whether she had been observed for a long enough period of time (this amounted to two separate observations across one and then two lessons, respectively), it had been noted whether there was a 'possibility of ... [her] raising her voice and using more verbal communication'.[21] Under an 'impossibility' test, it was presumably not beyond the capabilities of the school to observe Azmi for a longer period to determine whether an emphasis on more concerted verbal communication would have sufficed for teaching purposes – or, indeed, a greater attempt to use hand and body gestures. From Wilkie J's judgment,[22] it is apparent that this latter option was suggested by the school. Likewise, other suggestions by the school included Azmi using a screen in lessons to separate her from male colleagues, sitting with her back to such colleagues or removing the target pupil group from the classroom.[23]Such suggestions would have facilitated a more religiously sensitive approach to proportionality given that 'compensation for veil-wearing [could] be found in other areas such a use of voice,

[16] per Wilkie J. at paras. 10 – 11.
[17] *Ibid*., at para. 64.
[18] G. Calder and S. Smith, 'Differential Treatment and Employability: A UK case-study of veil-wearing in schools', in G. Calder and E. Ceva (eds.), *Diversity in Europe: dilemmas of differential treatment in theory and practice* (London: Routledge, 2011), p. 158.
[19] *Ibid*., p. 161.
[20] A. McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 Industrial Law Journal 1, p. 13.
[21] per Wilkie J. at para. 69.
[22] *Ibid*., at para. 73.
[23] *Ibid*.

ability to listen, hand gestures etc. Indeed, it may be argued that a person wearing a veil might potentially be a better communicator overall than someone who does not, precisely because of these compensations'.[24] However, given that such suggestions were made to Azmi, all of which appear to have been rejected, it might seem that – short of fully accommodating her (which would have compromised the legitimate aim of effective communication) – Kirklees had effectively done everything they could in their attempts to provide a solution[25] without undermining the legitimate aim of good communication which was instrumental in 'raising the educational achievements of the pupils'.[26]

3. *AZMI*: APPLYING THE UNITED STATES MODEL

3.1 Economic hardship

There was no evidence that any economic hardship would have been encountered by the school in accommodating Azmi. If evidence[27] had been available, this would have needed to detail the financial circumstances of the school.[28] Such hardship aside, focus would turn to non-economic forms of hardship.

3.2 Automatic non-economic hardship

In trying to establish automatic non-economic hardship, it seems that *Webb v. City of Philadelphia* (*Webb*)[29] may be unhelpful given that Kirklees and the school had no dress code policy for staff: Azmi was simply asked to refrain from wearing the veil.

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[24] Calder and Smith, in Calder and Ceva, above n. 18, p. 165.
[25] This would satisfy the threshold in *Noah v. Desrosiers t/a Wedge* (*Noah*) [2008] ET 2201867/07 where it was said that, absent accommodation, dress code policies 'may (and very likely will) not be justified if there are in fact alternative ways of achieving, or mostly achieving, the employer's legitimate aim that have a lesser, or no, discriminatory impact': per Judge Auerbach in *Noah* at para. 149. In the case of Kirklees, a public authority, the alternative accommodations offered show a public sector employer attempting to engage as best it could with religious liberty. Vickers notes that the public sector has not always been viewed as an appropriate environment in which to tolerate displays of individual religiosity given that this may infringe upon state neutrality and religion: L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), pp. 163 – 164. See also comments by Vickers referred to in chapter 9 n. 42.
[26] E. Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Abingdon: Routledge, 2012), p. 120.
[27] Suggested as a necessity in *Protos v. Volkswagen of America Inc*. (*Protos*) 797 F.2d 129 (Third Circuit, 1986): for discussion see chapter 8, section 3.1.2.
[28] *Tooley v. Martin—Marietta Corp*.(*Tooley*) 648 F.2d 1239 (Ninth Circuit, 1981): see chapter 8 n. 79.
[29] 562 F.3d 256 (Third Circuit, 2009).

Other bases on which the US courts have automatically found that undue hardship will be established (such as legal infringement and health and safety) were not present on the facts.

3.3 Factors refuting or suggesting non-economic hardship?

The United States (US) courts have found that legitimate types of non-economic hardship which require employer engagement include refusal to do duties[30] and work timetable issues,[31] all factors which affected the accommodation request of Azmi. However, the conduct of the school in attempting to engage with her requests and offer accommodation suggestions means that its actions did not fall foul of *EEOC v. Ithaca Industries* (*Ithaca Industries*)[32] (as confirmed in *Buonanno v. AT&T Broadband LLC* (*Buonanno*)[33]), where it was determined that any potential undue hardship on the employer will automatically be ruled out where absolutely no accommodation engagement is made. The US model would view strictly Azmi's obligation to accept partial alternative offers of accommodation. The existence of employer counter-suggestions and accompanying employee rejections would usually indicate that undue hardship had been placed on the employer even where such solutions were unrealistically or impractically difficult for the employee.[34] Notably, there was no evidence that Azmi would have had any difficulty in agreeing to any of the accommodation suggestions made; indeed, the school attempts to accommodate appear almost exhaustively reasonable.

It is significant that Azmi made no alternative accommodation suggestions; it is probable that she was determined to secure full accommodation. However, if she had been willing to compromise (although it is difficult to envisage how many more compromises remained given the lengths to which the school went in suggesting alternative options), there is US authority to the effect that employers will sometimes

[30] *Shelton v. University of Medicine and Dentistry of New Jersey* (*Shelton*) 223 F.3d 220 (Third Circuit, 2000). *Peterson v. Hewlett Packard* (*Peterson*) 358 F.3d 599 (Ninth Circuit, 2004) and *Wilson v. US West Communications* 58 F. 3d 1337 (*Wilson*) (Eighth Circuit, 1995): outlined in chapter 8, section 3.1.5.
[31] *EEOC v. Ithaca Industries* (*Ithaca Industries*) 849 F.2d 403 (Ninth Circuit, 1978).
[32] *Ibid*.
[33] 313 F.Supp. 2d 1069 (D. Colorado, 2004).
[34] For example, see discussion of *Bruff v. North Mississippi Health Service* (*Bruff*) 244 F.3d 495 (Fifth Circuit, 2001), chapter 8, section 3.1.5.

be obliged to accept employee suggestions where these are sensible and measured.[35] Of course, there would have been no guarantee that she would have been awarded her preferred accommodation.[36] Vickers reinforces this interpretation of the US position: '[t]he fact that Azmi could identify alternative accommodations that she would have preferred did not change matters. In effect, the EAT took the same approach as the US Supreme Court [in Ansonia] on accommodating religious claims, where the employer is under no obligation to offer the employee the least disadvantageous accommodation available'.[37]

4. *HARRIS v. NKL AUTOMOTIVE LTD* (*Harris*)[38]

The appellant (Harris) was a Rastafarian who worked for the respondent (NKL) as an executive driver between April 2004 and February 2006. In order to manifest his Rastafari religious beliefs he kept his hair in dreadlocks. NKL was unaware that Harris was a Rastafarian or that he kept his hair in dreadlocks – indeed, whilst it had been clear during his job interview that his hair was long it had been tied back. During the course of Harris' employment, his hair became increasingly unkempt, matted and untidy. NKL objected to this and made its concerns known to him between October 2005 and February 2006: it believed that – in violation of its dress code – his hair had become unacceptably untidy and that such an appearance poorly represented their company. However, it indicated that it did not object to long hair *per se*; to this extent it pointed to other drivers whose hair was long, albeit tidy. Further, it reasoned that drivers could wear caps if they wished to conceal their hair temporarily whilst at work, a solution not written into its dress code but, rather, arranged with drivers after discussion. Notwithstanding these compromises, it reiterated that it required employees' hair to be tidy. Harris was upset and angered by these references to his hair and a representative of NKL was made available to visit his home to discuss the matter further. However, Harris did not accept this offer and, ultimately, terminated his employment. He alleged, *inter alia*, both direct

[35] *Buonanno*, see chapter 8 n. 138.
[36] *Ansonia Board of Education v. Philbrook* (*Ansonia*) 479 US 60 (1986): see chapter 8 n. 140.
[37] L. Vickers, 'Religious Discrimination in the Workplace: an emerging hierarchy?' (2010) 12 Ecclesiastical Law Journal 280, p. 288.
[38] [2007] UKEAT 0134_07_0310. The facts referred to in the section which follows are all taken from the judgment of Elias J. in the EAT.

discrimination,[39] which was unsuccessful before the ET and not argued before the EAT, and indirect discrimination.[40] The latter claim was unsuccessful before the ET and similarly unsuccessful before the EAT on the grounds that Harris had not identified a relevant provision, criterion or practice (PCP) that had been applied to him and, consequently, could not have been disadvantaged.[41] The lack of a relevant PCP was explained on the basis that at no time had NKL imposed a rule against dreadlocks; instead, it had merely applied a requirement of tidy hair.[42] Whether this particular requirement disadvantaged Rastafari because all dreadlocked hair is necessarily untidy was not explored; this argument had not been pursued in earlier proceedings before the ET or in advance of the EAT hearing. Even if it had, it would have become necessary to investigate further whether dreadlocks were completely incompatible with maintaining tidy hair.[43]

5. *HARRIS*: APPLYING THE CANADIAN MODEL

5.1 Financial cost to the employer / size of the employer

There was no evidence that accommodating Harris' full request would have been financially costly. Indeed, as accommodation would have cost NKL nothing they would have been unable to establish undue hardship under this criterion. If there had *somehow* been a direct financial cost then, as NKL had already made alternative accommodation offers, it would have been fair (according to *Ontario Human Rights Commission (O'Malley) v. Simpson Sears* (*O'Malley*)[44]) to expect some of the cost of complete accommodation to have been met by Harris. Had there been a negative image of NKL conveyed to its customers or the public by it being seen to employ an individual who had untidy hair, and had this led to NKL losing business due to poor company image, then accommodation may have had *indirect* financial implications. Such a scenario is considered below.[45]

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[39] *RB Regs 2003, Regulation 3(1)(a).*
[40] *Ibid*., *Regulation 3(1)(b).*
[41] per Elias J. at para. 25.
[42] *Ibid*., at para. 19.
[43] *Ibid*., at paras. 20 – 22.
[44] See chapter 7 n. 68.
[45] See below, section 5.4.

5.2 Problems of morale for other employees

It is improbable that accommodating Harris' hair style would have affected the morale of NKL's other workers by interfering with their rights as employees. It is doubtful that the state of his hair was an issue on which other colleagues had particularly strong views. Consequently, this factor would also have presented a barrier to NKL establishing undue hardship. There were other employees who had long hair and were required to keep it tidy;[46] had Harris' untidy hair been permitted, it is possible that those other employees may have subsequently complained that such accommodation was unfair in that it imposed a greater burden on them to appear tidy. However, this would not have 'substantially'[47] affected any discernible right they possessed. If some or all of those other employees were religious then it is possible Harris' accommodation could also be extended to other religious employees.

5.3 Inter-changeability of the workforce / size of the employer

In *Harris*, there was no evidence that NKL's ability to reasonably accommodate would have been affected by its size and workforce. His desired accommodation would have had no conceivable bearing on these issues or any other nature of their organisation. Moreover, whilst Harris was aware of his religious need to wear dreadlocked hair, NKL did not challenge him on this for over a year after his employment started – even though his hair was becoming noticeably more untidy. Consequently, he may not necessarily have been able to foresee problems arising from the way he kept his hair. This would negate Vickers' argument in relation to workforce inter-changeability, namely that employees should sometimes be expected not to undertake work they are aware they will be unable to perform on religious grounds. Notably, the rule of general application from *Moore*, namely that a total lack of employer engagement will lead to a finding of no undue hardship, would be of no use to Harris given that some accommodation attempts had been made.

[46] per Elias J. at para. 12.
[47] 'Substantial' being the threshold required before undue hardship can be assessed: *Renaud*. See chapter 7 n. 76.

5.4 Other undue hardship factors

The factors in sections 5.1 to 5.3 above would have posed no accommodation barriers for Harris. However, there remains an important issue which underlined NKL's refusal to accommodate, notably their company image and the related matter of employee tidiness (as required by their dress code). This now requires further exploration.

5.4.1 Employer's image[48] *and employee's dress*

Requiring NKL to have accommodated Harris would have created image problems for their company: to that extent, the refusal of full accommodation served a legitimate purpose. It is not difficult to envisage that any perception by its customers or the public that it allowed employees to be untidy in appearance could affect reputation and, ultimately, business. This was a point which did not escape the EAT's attention when it stated that, 'the Company expressed concerns that ... his hair was untidy and that he did not represent the company well'.[49] *Specific* evidence from NKL was lacking to demonstrate that Harris' wearing of his hair in an untidy manner would adversely affect their business, although it may be said this link was self-evidently clear. In reinforcing the legitimacy of their commercial interests as a block on full accommodation, NKL might also have relied on the fact that employees generally are under an implied contractual duty not to disrupt an employer's business undertaking. This principle was outlined in *British Telecommunications Plc v. Ticehurst* (*Ticehurst*):[50] here it was said that employees should not make their employer's businesses 'unmanageable'[51] through any intentional actions and that they should serve their employer faithfully within the requirements of the agreed contract.[52] Nevertheless, *Ticehurst* could be distinguished given that in that case the employee's obligation not to act against her employer's interests stemmed from the fact that she was a manager in charge of other employees and who was entrusted in

[48] Under the EHRC's *Code of Practice: Employment* this might have been a reasonableness factor under 'financial and *other* costs' precluding full accommodation: para. 6.28.
[49] per Elias J. at para. 5.
[50] [1992] ICR 383.
[51] per Ralph Gibson LJ at p. 399.
[52] *Ibid*., at p. 398.

giving instructions to others and in supervising their work. Harris was in a different position.

Assuming NKL's reasons did constitute a legitimate aim, it would seem that full accommodation was not possible: this would have compromised the tidiness requirement too far. This distinguishes *Harris* from *G v. St. Gregory's Catholic Science College* (*G*)[53] in which the High Court held that a school ban on the 'cornrows' hairstyle for male pupils was indirect race discrimination. Such a ban could not be justified as proportionate even when considering the policy reasons underlying it (for example, discipline and in particular a fear of male gang culture and violence).[54] This was because deeply held cultural and religious grounds for an exception had been established and conformity with the ban was regarded as impossible.[55] Seemingly, *Harris* also had deeply held cultural and religious grounds for requiring accommodation, although a distinction could be drawn between the legitimate aims in *Harris* and *G*. Further, the ban in *G* was of a particular *type* of hair style and not merely untidy hair of *any* style as in *Harris*; the rule in *G* was therefore likely to be more pernicious and less easily justifiable.

Given the problems associated with full accommodation, it is significant that NKL had already made concerted efforts to engage with Harris' request by offering him the opportunity of wearing a cap to conceal his long hair[56] or, alternatively, allowing him to wear his hair long provided it was presented tidily.[57] In addition, it had offered him the chance to meet with an employer representative to discuss the situation further[58] – presenting another occasion on which a mutually workable outcome could have been determined. On any interpretation, given that he rejected all of these compromises, it is difficult to see how else NKL could have done more given that to have accommodated outright might have been interpreted as impossible at the level of policy.

[53] [2011] EWHC 1452.
[54] per Collins J. at paras. 22 – 23.
[55] *Ibid*., at paras 48 – 51.
[56] *Ibid*., at para. 12.
[57] *Ibid*.
[58] *Ibid*., at para. 9.

6. *HARRIS*: APPLYING THE UNITED STATES MODEL

6.1 Economic hardship

In the event there had been a direct financial cost associated with Harris' accommodation request (for example, loss of business), this may have prevented such a request from being successful given that economic hardship can surmount the level of undue hardship above which an employer is not required to accommodate.[59]

6.2 Automatic non-economic hardship

In the case of non-economic hardship, there was evidence in *Harris* of a driver dress code meaning that the set rule in *Webb* against accommodation where there exists such a policy would act against full accommodation. It would surmount the *de minimis* threshold because of the identified business need. The US courts have held that in limited circumstances, certain prescribed non-economic factors (these being dress policy or a religious neutrality policy, legal infringement and health and safety) can automatically preclude any attempt at accommodation. However, there is a possibility that the decision in *Webb* may be restricted to public organisations given that the employer in that case was a public entity. Nevertheless, the broader issue of public perception remains live in *Harris* and it is possible that the US courts could use this common factor with *Webb* to find against Harris' need for accommodation.

6.3 Factors refuting or suggesting non-economic hardship?

Even if the US courts were not to follow the spirit of *Webb*, it is probable that the actions of NKL would still have satisfied the *de minimis* test for undue hardship meaning that no accommodation would have been necessary. This is evident from the attempts they made to engage with Harris' request. However, they did not provide specific evidence that Harris' untidy wearing of his hair would necessarily lead to a problem with their business. This might be viewed as a form of hypothetical

[59] *EEOC v. Townley Engineering and Manufacturing Company* (*Townley Engineering*) 859 F.2d 610 (Ninth Circuit, 1988): see discussion in chapter 8, section 3.1.1. An assessment of NKL's finances would be required (*Tooley*: see chapter 8 n. 79) along with evidence of any economic hardship: *Protos* (discussed in chapter 8, section 3.1.2).

hardship which has generally been shunned by the US courts in attempting to establish undue hardship.[60] However, in light of *Cloutier v. Costco* (*Costco*)[61] it would need to be determined whether the requirement that all workers' appearance be tidy amounted to a designated formal policy (in which case hardship would be present) or whether this was a more informal rule which was not officially recorded as company policy (in which case it would not satisfy *Costco*[62]). However, either way, after *Trans World Airlines v. Hardison* (*Hardison*)[63] it is possible this rule will be relaxed in future.

In any event, the attempts by NKL at accommodation may be likely to have shown enough of an attempt to accommodate up to the *de minimis* standard. Indeed, from *Bruff* and *Shelton* it seems that the employee is obliged to accept such alternatives – if they are rejected no other duty to reasonably accommodate will be found. The only way in which Harris could have shown that undue hardship was not present would be if he could demonstrate that NKL's counter-offers had not been made on a religious basis. *Proctor v. Consolidated Freightways*[64] establishes that accommodation attempts for religious employees specifically have to be *religiously* motivated.[65] It is possible that the suggestions made by NKL to Harris were those repeated to *all* workers with untidy hair irrespective of the reason for any untidiness.

7. *EWEIDA v. BRITISH AIRWAYS PLC* (*Eweida*)[66]

The appellant (Eweida) was a devout practising Christian who had worked as a member of flight check-in staff for the respondent (British Airways) since 1999. She was required her to wear a uniform given that her job involved contact with the public. Eweida was happy to wear her uniform but, between May and September

[60] See both *Tooley*, chapter 8 n. 104 and *EEOC v. Alamo Rent-A-Car* (*Alamo*) 432 F.Supp. 2d 1006 (D. Arizona, 2006): see chapter 8 n. 106.
[61] 390 F.3d 126 (First Circuit, 2004): see chapter 8 n. 111.
[62] *Ibid*.
[63] 432 US 63 (1977).
[64] 795 F.2d 1472 (Ninth Circuit, 1986).
[65] See chapter 8 n. 127.
[66] [2010] EWCA Civ 80. The facts referred to in the section which follows are taken from the judgments of Elias J. in the EAT ([2009] IRLR 78), Sedley LJ in the Court of Appeal (CA), the Statement of Facts in *Eweida and Chaplin v. UK* [2011] ECHR 738, the EHRC's submission in *Eweida and Chaplin v. UK*, the Foreign and Commonwealth Office's (FCO) Comments on the third party interventions in *Eweida and Chaplin v. UK*, 14th October 2011 and the FCO Observations of the Government of the United Kingdom in *Eweida and Chaplin v. UK*, 14th October 2011.

2006, began arriving for work wearing a plain silver cross (not a crucifix) that was between one and two inches high and which was visible over her uniform. Until this point she had worn the cross under her uniform. She claimed that she regarded the visible wearing of such an item as a central aspect of her own personal faith, even though she accepted that it was not a specifically religious requirement of her faith. That she was religious, a Christian, and had chosen to manifest her religion through a legitimate personal expression was not in dispute at any stage during proceedings.

British Airways strictly prohibited employees from wearing any items visibly above their uniforms; items could only be worn under uniforms. They had a practice of exempting some religious items from this policy, provided the wearing of such items was a mandatory scriptural requirement. They also required that the item only be worn above the uniform if it could not physically be concealed below clothing. Moreover, even if both these conditions were satisfied management approval had to be sought before such an accommodation would be allowed.

British Airways refused to allow Eweida to wear the cross over her uniform, although Eweida chose to ignore this refusal. Having made its uniform policy clear to her, British Airways sent her home from work in September 2006 for contravening the staff dress policy. In October 2006, they attempted to accommodate Eweida by offering her administrative work that did not involve contact with customers and, consequently, no wearing of a uniform – she would be free to wear the cross on top of her clothes. Such a move would have entailed no loss of pay; however, she rejected the offer. Following a decision in February 2007 to amend its uniform policy (after a period of staff consultation which had begun in November 2006), British Airways later permitted all staff to display faith symbols over their uniforms subject to a detailed application procedure. The cross, amongst other religious symbols, was immediately approved for this purpose.

In being banned from wearing the cross above her uniform Eweida claimed, *inter alia*, both direct and indirect discrimination[67] before the ET. She was unsuccessful in both claims and, after dropping the former, appealed the latter to the EAT where she

[67] *RB Regs 2003*, *Regulations 3(1)(a)* and *3(1)(b)*, respectively.

was also unsuccessful.[68] She further appealed this ground to the Court of Appeal (CA) and was similarly unsuccessful.[69] It was notable that in all the decisions concerning indirect discrimination it was found that there had been no disadvantage suffered,[70] although, if there had been, the question of whether it would have been justified split the courts.[71] On being refused leave to appeal to the Supreme Court she made an application to the European Court of Human Rights under *Article 9* both separately and in conjunction with *Article 14*.[72] Given that British Airways is a private organisation, Eweida also seeks to determine whether, in the event there was an interference with her freedom of religion, there was a breach of the state's positive obligation to protect her religious rights under *Article 9*.[73] A decision from Strasbourg is currently awaited.

8. *EWEIDA*: APPLYING THE CANADIAN MODEL

8.1 Financial cost to the employer / size of the employer

There would have been no financial implications to British Airways of simply allowing Eweida to wear her cross over the top of her uniform. If there had *somehow* been a direct financial cost then, given British Airways had made an effort to accommodate her prior to its change in uniform policy, it may have been appropriate for Eweida to have borne an appropriate proportion of this.[74]

8.2 Problems of morale for other employees

It is highly unlikely that permission for Eweida's desired accommodation would have impacted negatively on the rights and morale of other employees in the workplace, religious or otherwise. There was no evidence to suggest that the request

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[68] per Elias J. at para. 64.
[69] per Sedley LJ at para. 39.
[70] per Elias J. in the EAT at para. 31 and per Sedley LJ in the CA at para. 28.
[71] According to Elias J. in the EAT, the ET believed that such disadvantage would not have been justified: paras. 18 – 19. Indeed, Elias J. concurred with this reasoning: paras. 72 – 76. In contrast, Sedley LJ in the CA was of the view that, had there been disadvantage suffered, such indirect discrimination would have been justified: paras. 34 and 37 – 39.
[72] *Eweida and Chaplin v. UK* [2011] ECHR 738.
[73] *Eweida and Chaplin v. UK*: Statement of Facts.
[74] *O'Malley*: see chapter 7 n. 68.

would have had this effect. It was mentioned in the EAT that 'there was ... no basis for saying that there was any evidence that other Christians felt disadvantaged because they could not openly wear the cross',[75] although even if this had been the case any morale issues that may have arisen from providing the accommodation solely for Eweida could have been, and in the end were, dealt with by allowing all religious employees to wear religious insignia above their uniforms (subject to approval). Indeed, the lack of evidence available concerning employee morale suggests that this did not present a problem. Certainly, the *Meiorin* test of 'impossibility' would not be satisfied.

Interestingly, there was evidence that Eweida had acted insensitively at times towards colleagues and displayed a lack of empathy for those without a religious focus in their lives.[76] Whilst this might have affected their empathy for her, it would not have affected their rights *at work* in relation to morale.

8.3 Inter-changeability of the workforce / size of the employer

There was no evidence that British Airway's ability to reasonably accommodate Eweida would have been affected by these two linked criteria. However, the argument advanced by Vickers that employees may sometimes be expected not to undertake work they are unable to perform on religious grounds might have been useful to British Airways. It is unlikely that Eweida did not know about the ban on the wearing of items above employees' uniforms in advance of her decision to wear the cross over her tunic; before this she had been in post for at least six years – during this time she had ample opportunity to approach her bosses about the type of work she could limit herself to where there was no need to wear a uniform. Such a delay could certainly be regarded as anathema to her claim for reasonable accommodation, the delay itself being remarked upon by Sedley LJ in the CA who commented that he was having to adjudicate the effect of a rule 'which for some 7 years had apparently caused [Eweida], along with the rest of [British Airways'] staff, no known problem'.[77] British Airways' counter-offer of an alternative role without

[75] per Elias J. at para. 58.
[76] per Sedley LJ in the CA, at para. 3.
[77] *Ibid*., at para. 33.

customer contact and any corresponding need to wear a uniform[78] reveals that, had she made enquiries earlier, a conflict might have been avoided.

Nevertheless, the possibility of Eweida having developed her personal faith (in such a way as to have decided only in September 2006 that she needed to wear the cross above her uniform) must not be discounted. More evidence of this would be needed, although if successfully claimed it would rebut Vickers' argument on this point. In such circumstances, the fact that a counter-offer was made might not mean that undue hardship would be found given Sedley LJ's comments that the counter-offer was made, 'not perhaps as speedily as it might have been'.[79] This was echoed in the EAT where it was said that 'the issue of visibly wearing the cross had not been considered until November 2006, only after it had been raised as an issue by [Eweida]. Moreover, once it had been raised, the policy was still applied to the detriment of [Eweida]'.[80]

On the assumption that Eweida was aware at an earlier juncture than September 2006 of her personal desire to wear the cross over her uniform, she should arguably have been on strong notice as to the more problematic nature of her accommodation request. Significantly, the rule from *Moore* that a total lack of employer engagement will lead to the finding of a duty to reasonably accommodate would be of no use given that an accommodation attempt had been made.

8.4 Other undue hardship factors

Whilst the matters debated in sections 8.1 and 8.2 above would have posed no barriers to excusing Eweida from the uniform rule, it is suggested that Vickers' argument in relation to *Moore* under section 8.3 is persuasive, notwithstanding the possibility that Eweida could have had legitimate faith reasons for delaying her request. There is a further undue hardship issue to contemplate in *Eweida,* significantly the matter of company image and the related issue of employee dress as required by British Airways' uniform code.

[78] As explained in the EAT by Elias J. at para. 3, in the CA by Sedley LJ at para. 33 and in *Eweida and Chaplin v. UK*: Statement of Facts.
[79] per Sedley LJ para. 33.
[80] per Elias J. at para. 75.

8.4.1 Employer's image and employee's dress

This was the predominant factor[81] in blocking Eweida's request. The uniform policy had been implemented to create an appropriate company brand and image. In the EAT it was observed that the uniform policy enhanced 'brand uniformity'[82] and gave British Airways 'a consistent, professional and reassuring image world wide'.[83] Furthermore, 'the wearing of a uniform played an important role in maintaining a professional image and in strengthening recognition of the [respondent's] brand'.[84]

Nevertheless, the question remains whether a duty to reasonably accommodate could still be identified via a more detailed assessment of the circumstances. *Noah v. Desrosiers t/a Wedge* (*Noah*) has signalled that where there is ambiguity, employers might be required to cite specific evidence of actual impact on their company if accommodation were required by the law: there was not much evidence of this in *Eweida* although the ET referred to the 'business need'[85] and the 'business case',[86] signifying that an attempt *may* have been made by British Airways to justify the policy. Nonetheless, even if British Airways could point to specific evidence of business interest it seems difficult to envisage that this would be credibly threatened by an employee wearing a discrete and innocuous religious symbol such as the cross over her uniform. However, in dismissing this possibility British Airways had tried to partially accommodate her believing that this would be the best way to satisfy both Eweida's request and its own legitimate business aim. They offered her the option of undertaking an administrative role without customer contact and the consequent need for a uniform. This revealed an attempt to accommodate Eweida from what had been a 'previously unobjectionable rule'[87] in a flexible way.[88]

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[81] per Elias J. in the EAT who upheld the ET's finding on proportionality (at para. 75) which included the fact that 'the uniform policy was desgined to achieve a legitimate aim' (at para. 17), notably one which 'served an important purpose' (at para. 17). Sedley LJ in the CA also found that the aim was legitimate: see para. 37.
[82] per Elias J. at para. 17.
[83] *Ibid*.
[84] *Eweida and Chaplin v. UK*: Submission of the EHRC at para. 29.
[85] per Elias J. at para. 18.
[86] *Ibid*.
[87] per Sedley LJ in the CA at para. 37. The FCO was clearly also of this view: *Eweida and Chaplin v. UK*: Observations of the Government of the United Kingdom, FCO, at para. 40.
[88] Sedley LJ seemed of the view that this counter-offer was generous given that it was an 'accommodating offer' to move her 'without loss of pay': see para. 33.

However, under the *Meiorin* test it would still need to be asked whether to accommodate fully would have been 'impossible'? On this, the circumstances of *Eweida* are very significant. The ET was of the opinion that, had British Airways not completely accommodated, such a refusal would have been disproportionate.[89] The EAT reported that the ET did 'not consider that the blanket ban on everything classified as "jewellery" struck the correct balance between corporate consistency, individual need and accommodation of diversity'.[90] The EAT supported this view, lauding the eventual decision to completely accommodate Eweida by highlighting that '[o]nce the issue arose [British Airways] dealt with it relatively expeditiously and amended the policy'.[91] Ultimately, British Airways' *volte face* reveals that full accommodation and their legitimate business needs could co-exist harmoniously. Whilst the domestic courts indicated that, had disadvantage been found, they would have been split on justification and proportionality,[92] full accommodation would undoubtedly have been the outcome under the undue hardship test in Canadian reasonable accommodation.

9. *EWEIDA*: APPLYING THE UNITED STATES MODEL

9.1 Economic hardship

Given that there was no evidence in *Eweida* of any prospect of economic hardship being suffered by British Airways, this would not have presented accommodation difficulties. If there had then this would have been a valid ground on which British Airways could have claimed undue hardship.[93]

9.2 Automatic non-economic hardship

Of more relevance was British Airways' dress code policy: this clearly could have amounted to non-economic hardship in not even requiring them to engage with

[89] The ET quoted in the EAT by Elias J. at para. 19.
[90] *Ibid*.
[91] per Elias J. at para. 71.
[92] See above n. 71.
[93] *Townley Engineering*: see chapter 8, section 3.1.1. A claim of economic hardship would have required the usual enquiries into not only company finances (*Tooley*: see chapter 8 n. 79) but also evidence for that hardship (*Protos*: see chapter 8, section 3.1.2).

Eweida's accommodation request. Once again, *Webb*[94] would be applicable on the issue of dress codes meaning British Airways would have a particularly unchallenging *de minimis* threshold to cross. Nevertheless, given the public nature of the employer's work in *Webb* it is not obvious that under the US system it would be the case that such a precedent would extend to private employers.

9.3 Factors refuting or suggesting non-economic hardship?

Even if the US courts were not to follow the tenor of *Webb*, it is likely that the conduct of British Airways would still have surmounted the *de minimis* hurdle for undue hardship. The fact they did engage with Eweida's request by making an alternative offer increases the likelihood of a finding that there was no duty to reasonably accommodate: particularly in situations where the employee has refused that alternative accommodation.[95] Of course, if British Airways had made no engagement at all the *de minimis* level of undue hardship would not have been satisfied.[96] Notably, they provided little supporting evidence of business hardship, although on the basis of *Costco*[97] all that would have been needed to establish hardship would be the existence of the formal uniform policy itself. In any event, the approach in *Hardison*[98] might have meant that a lack of evidence regarding assertions of hardship would still be permitted. Significantly, even if Eweida had found the counter-offer of accommodation unhelpful because, for example, she only wished to work in a role with customer contact, the fact that British Airways had made the alternative offer would be important: Eweida would have been obliged to accept it, lest she otherwise receive no accommodation at all.[99] In the CA, Sedley LJ noted the rather truculent attitude of Eweida towards her bosses remarking on her 'incomprehension of the conflicting demands which professional management seeks to address and resolve on a near daily basis'.[100] Had she been more pro-active in proposing her own alternative accommodation suggestions then – were these to have been ignored by British Airways – it may have been possible under the US model to

[94] See chapter 8, section 3.1.3.
[95] See *Bruff* and *Shelton*, chapter 8, section 3.1.5.
[96] See *Ithaca Industries* and *Buonanno*, chapter 8 n. 95 and n. 99, respectively.
[97] See chapter 8 n. 111.
[98] See chapter 8 n. 114.
[99] See *Bruff* and *Shelton*, section 9, section 3.1.5.
[100] At para. 3.

identify a failure to reasonably accommodate. It is noteworthy that the undue hardship threshold under the Canadian model would have required British Airways to fully accommodate (the eventual result), whereas the much higher threshold in the US test would have not required accommodation to that extent.

10. *CHAPLIN v. ROYAL DEVON AND EXETER HOSPITAL NHS FOUNDATION TRUST* (*Chaplin*)[101]

The appellant (Chaplin) was a devout practising Christian who had worked for the respondent (the NHS Trust) since 1989. During the period to which her claim related she was a Ward Sister charged with clinical nursing in a geriatric ward. As a sincere personal form of religious manifestation, she had always worn a crucifix on a chain around her neck, including at work when undertaking clinical duties. The cross was always visible above clothing. Indeed, this had been the case since she began working for the NHS Trust in April 1989. However, in June 2007 the NHS Trust implemented a new uniform policy which for the first time introduced a 'V-neck' collarless tunic that Chaplin was required to wear. This accompanied a change in jewellery policy at that time which also forbade the wearing of any jewellery for whatever purpose, religious or otherwise, although exceptions in some circumstances were still permitted, subject to approval. Despite the June 2007 policy changes, Chaplin continued to wear her cross over her clothes as she had done under previous uniform and jewellery policies. In the past this had neither attracted comments from her supervisors nor caused any injury either to herself or a patient. Nonetheless, the ET noted[102] that a distinguishing feature between this and *Eweida* was that the 2007 jewellery rule in *Chaplin* was motivated by health and safety concerns stemming from guidance from the Department of Health. The guidance which influenced the Department of Health had, in turn, been informed by research into hospital health and safety conducted by Thames Valley University. Such concerns comprised the risk of contamination should the cross and chain come into contact with open

[101] [2010] ET 1702886/2009. The facts referred to in the section which follows are taken from the judgment of Employment Judge Hollow in the ET, the Statement of Facts in *Eweida and Chaplin v. UK* [2011] ECHR 738, the EHRC's submission in *Eweida and Chaplin v. UK*, the FCO's Comments on the third party interventions in *Eweida and Chaplin v. UK*, 14th October 2011 and the FCO Observations of the Government of the United Kingdom in *Eweida and Chaplin v. UK*, 14th October 2011.

[102] At para. 8.

wounds (when, for example, Chaplin was dressing a wound), damage of injury to the thin and frail skin of elderly patients and danger of injury to Chaplin herself should a patient seize the necklace and pull at it.

In June 2009, Chaplin was asked to remove her crucifix and chain: she refused. It was noted that one of her Christian colleagues had similarly been required to remove her crucifix for health and safety reasons following the uniform amendment; this colleague had complied with that order. Other religious employees were also asked to modify their appearances: for example, one was advised that he could not wear the Kara bracelet around his wrist, one was told he could not wear the Kirpan ceremonial dagger and two were told they were only permitted to wear the Hijab if it was a close-fitting sports Hijab. These requirements caused no further problems. Given Chaplin's refusal, the NHS Trust embarked on a number of discussions with her along with two individuals acting as her representatives: the first being a member of the Royal College of Nursing, the other being Chaplin's local Pastor. These meetings aimed to identify alternative accommodation suggestions. One such suggestion included her returning to work wearing her previous uniform. However, this was rejected by the NHS Trust who commented that the new uniforms corresponded to different job roles and presented a necessary professional image that set a good example to junior staff. Chaplin suggested that she wear a crew-neck t-shirt underneath her V-neck tunic so that the cross could be worn underneath that, although it later transpired that she would not have been prepared to stick to this suggestion. The NHS Trust also rejected this on the basis that the chain holding the cross would still be visible at the back of her neck and therefore liable to being pulled by an elderly patient. Chaplin's Pastor asked whether she could secure her crucifix on its chain by using a magnetic catch as opposed to a clip, meaning that if it were seized by a patient it would instantly be released from her neck. The NHS Trust believed this was an improved suggestion, although the crucifix would still be suspended so as to be a source of potential injury or contamination.

The NHS Trust also proposed several alternatives, all of which were rejected by Chaplin. These included her wearing a turtle-neck t-shirt underneath her V-neck tunic under which the crucifix could be worn on its chain. Such a t-shirt would not allow the chain to be visible at the back of the neck. Chaplin maintained, contrary to

her earlier accommodation suggestion, that she required the wearing of the cross to be visible. It was further suggested by the NHS Trust that she wear the crucifix and chain pinned to the inside of her tunic or inside a pocket – for the same reason, this was refused by Chaplin. A similar suggestion was that she could wear the cross and chain visibly attached to her identity badge; this was also rejected by Chaplin because it was sometimes required that identity badges be removed when undertaking close-contact clinical duties. A final suggestion was for Chaplin to be redeployed from her clinical setting to a non-clinical role where she was allowed to wear her cross and chain visibly. She reluctantly accepted this position, although it ceased to exist from July 2010 after which she claimed direct and indirect discrimination,[103] both of which were unsuccessful in the ET[104] with the majority finding that the indirect discrimination claim failed because there was no disadvantage.[105] Even if there had been disadvantage, the majority felt that this would have been justified[106] although Mr Parkhouse for the minority believed this would not have been justified.[107] On being advised that, in light of the CA's decision in *Eweida*, an appeal to the EAT would be futile[108] she applied to the European Court of Human Rights on the basis of *Article 9* both separately and in conjunction with *Article 14*.[109] A decision from Strasbourg is currently awaited.

11. *CHAPLIN*: APPLYING THE CANADIAN MODEL

11.1 Financial cost to the employer

There would have been no direct financial cost to the NHS Trust of permitting Chaplin to wear her cross and chain over the top of her uniform. If there was a cost *somehow* associated with this, then *O'Malley*[110] would be determinative: Chaplin would be expected to meet some, if not a significant proportion, of the costs given the great extent that was gone to in suggesting alternative accommodations. Whilst the NHS Trust's image was alluded to during the ET's consideration of the case,

[103] *RB Regs 2003, Regulations 3(1)(a)* and *3(1)(b)*, respectively.
[104] per Judge Hollow at paras. 26 and 28, respectively.
[105] *Ibid*., at para. 28.
[106] *Ibid*.
[107] *Ibid*.
[108] *Eweida and Chaplin v. UK*: Statement of Facts.
[109] *Eweida and Chaplin v. UK*.
[110] See chaper 8 n. 68.

given the nature of its activities (publicly funded provision of healthcare) it seems improbable that reasonable accommodation would have had any possible indirect financial implications stemming from this factor. The issue of the NHS Trust's image is considered more fully below.[111]

11.2 Problems of morale for other employees

There was scant evidence that employee rights and morale would have been a problem for other members of staff, religious or otherwise, had Chaplin been fully accommodated. Regarding religious staff, there was no indication that other Christian employees felt so strongly about wearing the cross that they were prepared to contravene the uniform and jewellery codes. It is possible that the other Christian nurse who had been content to remove her cross would have complained about specialist treatment for Chaplin, although this could have been met by accommodating her on the same footing. Likewise, other religious non-Christian staff members could have been accommodated via this exception so as to avoid morale issues. Chaplin herself asserted that employee rights and morale would not have been a problem, stating that her wearing of the cross and chain 'had never caused any difficulty, comment, query or objection from any of her supervisors'.[112] Of course, complete accommodation of her wishes violated health and safety provisions, a matter that is considered separately.[113]

11.3 Inter-changeability of the workforce / size of the employer

Even if the accommodation request had involved the swapping of duties, undue hardship may have been difficult to establish due to the fact the NHS Trust was able (albeit temporarily) to transfer the Chaplin to a different role in a different location.[114] Any future swaps would of course have required that the NHS Trust canvass the convenience of this with other staff[115] although, based on the availability of swaps in the past, this does not appear to have been an obstacle.

[111] See below, section 11.5.1.
[112] per Judge Hollow at para. 14.
[113] See below, section 11.4.
[114] per Judge Hollow at para. 24 and *Eweida and Chaplin v. UK*: Statement of Facts.
[115] *Renaud*: see chapter 7 n. 87.

Vickers' argument regarding knowledge of religious beliefs on commencing employment would have been unhelpful to the NHS Trust. When Chaplin commenced her job she was aware of both her faith and her desire to manifest it by visibly wearing the cross (and chain). Indeed, having been confirmed in 1971 she had always visibly worn a cross on a chain and had always done so during the course of her clinical duties.[116] From 1989 until 2007 she had been permitted to visibly wear her cross on a chain at work, indicating that both she and her employers should have been aware of her religious needs. On this basis, Chaplin was not on notice as to the likely problematic nature of her religious manifestation until the uniform policy suddenly changed (whereupon she communicated her accommodation request). The rule that a total lack of employer engagement will require an accommodation[117] would not apply in *Chaplin* given the extent to which the NHS Trust attempted to offer other suitable accommodations.

11.4 Workplace health and safety[118]

The NHS Trust's concerns about the health and safety implications of accommodating Chaplin were very clear for the ET to see. It was noted that, had she been allowed to wear her crucifix on its chain, there would be risks of contamination with open wounds,[119] liability of injuring the thin and frail skin of elderly patients[120] and danger of injury to the appellant should a patient seize the necklace and pull at it.[121] Unsurprisingly, it was entirely appropriate to take such real and identifiable health and safety concerns into account when determining how to respond to Chaplin's request, the ET deciding that this was 'by far the most important aspect'[122] of the case, there being a 'unanimous view [that it] would be a legitimate aim'.[123] In support of this aim, the NHS Trust was able to point to third party research conducted by Thames Valley University which had been the basis for its change in

[116] *Ibid*.
[117] *Moore*: see chapter 7 n. 79.
[118] Other recent ET cases concerning religious discrimination and employer dress codes have also raised health and safety matters in hospitals, notably *Adewole v. Barking, Havering and Redbridge University Hospitals NHS Trust* [2011] ET (unreported). Adewole, a Muslim midwife, lost her claim that being required to wear scrub trousers as opposed to a scrub dress was indirect discrimination.
[119] per Judge Hollow at para. 19.
[120] *Ibid*., at para. 13.
[121] *Ibid*., at para. 18.
[122] *Ibid*., at para. 29.
[123] *Ibid*.

uniform and jewellery policies.[124] Depending on the form of this research (for example, whether it was of an empirical nature), this may have provided more up-to-date concrete examples of situations, real or hypothetical, when health and safety had been compromised in hospitals when staff were permitted to wear items of jewellery on chains around their neck. However, if such evidence was superficially vague or assertive on the likelihood of the risk of injury, it has been suggested that accommodation should be required 'in the absence of statistical evidence of disproportionate rates of serious injuries'.[125]

Under the Canadian impossibility test it still needs to be asked whether the health and safety policy which constituted the legitimate aim could have been fully or partially accommodated without prejudicing the policy's effect. Certainly, the prospect of full accommodation seems remote given the many ways in which the NHS Trust was able to justify the problems inherent in a nurse wearing a cross and chain when dealing with patients. Even on the basis of the generous Canadian scheme, the myriad health and safety pitfalls of accommodating fully would have made it impossible at the level of policy to accommodate Chaplin. This is supported by Canadian jurisprudence such as *Bhinder v. Canadian National Railway*[126] where it was said by the majority that health and safety concerns were a legitimate bona fide aim which transcended the religious accommodation request.[127] The minority view, specifically that the employee's request would have had no health and safety implications for anyone else other than the employee himself, is clearly not applicable in the context of nursing care. It may also be said that *Multani v. Commission scolaire Marguerite-Bourgeoys*,[128] a freedom of religion claim, is distinguishable given that the schoolboy's kirpan was to be securely sealed within the lining of his clothes[129] – Chaplin rejected any such attempt to conceal her cross and chain.

[124] *Ibid*., at para. 12.
[125] A. McColgan, 'Religion and (In)equality in the Workplace' (2009) 38 Industrial Law Journal 1, pp. 25 – 26.
[126] [1985] 2 SCR 561.
[127] See chapter 7 n. 94. This strict approach was also followed in *Pannu v. Skeena Cellulose Inc* (2000) 38 CHRR D/494: see chapter 7 n. 96.
[128] [2006] 1 SCR. 256.
[129] See chapter 7 n. 124.

It seems inevitable that partial accommodation via a compromise would be more appropriate. This accords with the outcome in *R (on the application of Watkins-Singh) v The Governing Body of Aberdare Girls' High School*[130] which concerned a school ban on a Sikh pupil's wish to wear the Kara bracelet as part of her uniform. The ban was held to be indirect religious discrimination even taking into account situations such as physical education lessons where 'health and safety might be an issue'.[131] However, the school pupil was prepared to remove or cover the Kara when placed in circumstances where health and safety may have been endangered.[132] To that extent, it is submitted that accommodation in Chaplin would not necessarily have frustrated the health and safety rule: there could have been partial accommodation along the lines of the many suggestions made to Chaplin.

11.5 Other undue hardship factors

Chaplin raises the supplementary issue of image and employee dress. This represents a further legitimate aim cited by the NHS Trust as additional evidence precluding Chaplin's accommodation request.

11.5.1 Employer's image and employee's dress

The NHS Trust attempted to argue that a function of the 2007 policy changes was 'to present a corporate and professional image'.[133] Further, this was to be enhanced by it 'setting an example [to junior staff] of the observance of the uniform policy'.[134] It was declared that these matters amounted to identified legitimate aims,[135] although it was contestable as to whether Chaplin's bosses had specifically adduced evidence to establish that these aims would have been compromised by affording the desired accommodation.[136] Nevertheless, even if such evidence had been present, the maintenance and enhancement of brand and image (whilst clearly a legitimate aim) would clearly not have been an impossible block on either partial accommodation (as

[130] [2008] EWHC 1865 (Admin).
[131] per Silber J. at para. 16.
[132] *Ibid*, at paras 16 and 87.
[133] per Judge Hollow at para. 29.
[134] *Ibid*.
[135] *Ibid*.
[136] As required in *Noah* above n. 25.

the various concessions of the NHS Trust show) or, potentially, full accommodation. It is submitted that *Eweida* is useful in establishing that image and dress policy, whilst legitimate aims, are unlikely to be incompatible with a block on full accommodation given that where the religious manifestation is appropriate it will not sufficiently undermine that policy objective. On this basis, full accommodation in *Chaplin* would not have led to undue hardship.

12. *CHAPLIN*: APPLYING THE UNITED STATES MODEL

12.1 Economic hardship

It is unlikely that there was any prospect of economic hardship being suffered by the NHS Trust had they accommodated Chaplin. If there had been, it would seemingly have placed a possible automatic bar on accommodation of any sort given that the *de minimis* threshold in US can be crossed when an employer has to contribute financially to an accommodation[137] and there is evidence of this,[138] particularly in relation to the employer's financial resources.[139]

12.2 Automatic non-economic hardship

Chaplin concerned two forms of non-economic hardship which have been found to automatically block any accommodation engagement. Firstly, Chaplin was subject to a dress code: her contravention of this may – of itself – have placed undue hardship on her bosses to the *de minimis* standard. This has been seen in *Webb*.[140] Moreover, given that Chaplin worked in the public sector for an employer whose uniform policy sought to create a public perception of professionalism, it may be said that this accords with *Webb* even further. Secondly, contravention of health and safety matters[141] was also a legitimate reason for blocking full accommodation. Given the presence of these key forms of non-economic hardship in *Chaplin* – and considering the low *de minimis* level at which undue hardship will be found to exist – it seems

[137] *Townley Engineering*: see chapter 8, section 3.1.1
[138] *Tooley*: see chapter 8 n. 79.
[139] *Protos*: see chapter 8, section 3.1.2.
[140] See chapter 8, section 3.1.3.
[141] *EEOC v. Kelly Services Inc*. (*Kelly Services Inc.*) 598 F.3d 1022 (Eighth Circuit, 2010): see chapter 8, n. 89.

very probable that these, of themselves, would have been enough to frustrate Chaplin's claim for special treatment.

12.3 Factors refuting or suggesting non-economic hardship?

In the unlikely event that the US courts were not to follow either *Webb* or *EEOC v. Kelly Services Inc*. (*Kelly Services Inc.*),[142] it is likely that full accommodation would still have amounted to undue hardship. The extensive attempts at accommodation engagement[143]by the NHS Trust are testament to this. Indeed, numerous accommodation offers were made all of which were rejected by Chaplin. In any case, the NHS Trust's references to health and safety were based on policy. *Costco*[144] has decided that where an employer policy exists this will be sufficient of itself to establish undue hardship at a *de minimis* level where there is a subsequent accommodation request. The fact that third party university research existed to support the NHS Trust's position on health and safety is analogous to the expert evidence in *Kalsi v. New York City Transit Authority*:[145] this demonstrated real hardship. In any event, elsewhere in the US jurisprudence[146] it is clear that hypothetical difficulties as cited by employers *have* been found to cross the *de minimis* threshold; this would be of more relevance to the issue of staff appearance which was a less formalised requirement than the health and safety measure.

If further evidence were needed under the US model that full accommodation was unrealistic, there were other factors that could have been used against Chaplin too. For example, where an employee rejects accommodation offers made by the employer it has been determined that no further duty to fully accommodate exists.[147] This is the case even where the employer has made impractical, unhelpful or unrealistic alternative offers,[148] although on the facts of *Chaplin* the accommodation solutions made would certainly have been ones which were helpful in the circumstances. For example, given that Chaplin had indicated she might be prepared

[142] See chapter 8, section 3.1.3.
[143] *Buonanno* and *Ithaca Industries*: see chapter 8 n. 99 and n. 95, respectively.
[144] See chapter 8 n. 111.
[145] 62 F.Supp.2d 745 (1998).
[146] See *Hardison*: chapter 8 n. 114.
[147] See *Bruff* and *Shelton*: chapter 8, section 3.1.5.
[148] *Ibid*.

to wear the crucifix and chain under her clothes (despite the fact she later reversed this position) it was entirely reasonable that the NHS Trust suggested the wearing of a turtle-neck t-shirt under her v-neck tunic so that the cross *and* chain would not be visible.[149] Moreover, whilst it is also true to say that Chaplin's bosses did find fault with all of her own accommodation suggestions, it is clear from the US jurisprudence that where accommodations have been offered by the employer there is no obligation to accept the counter-suggestions most preferable to the employee[150] – the evidence on the facts of *Chaplin* being that the employee did make numerous counter-suggestions herself.[151]

[149] The circumstances of this offer were detailed by Judge Hollow at paras. 18 and 20.
[150] See *Ansonia*, *Wilson* and *Breech*: chapter 8, section 3.1.5.
[151] per Judge Hollow at para 18.

CHAPTER 11: RELIGION AND WORK SCHEDULES

1. *CHERFI v. G4S SECURITY SERVICES* (*Cherfi*)[1]

The appellant (Cherfi) was a practising Muslim who began working for the respondent (G4S) in May 2001. He was employed as a security guard and worked nights until 2003; at this point he was moved permanently to another site where he worked days. This arrangement continued until June 2005. Whilst working days he began leaving work at lunchtime every Friday to attend prayers at his local mosque. When G4S' contract at that site ended in June 2005, Cherfi became a 'floating guard',[2] undertaking other duties at various locations although predominately at a Job Centre Plus site. Here, there was a relaxed atmosphere about guards vacating the premises at lunchtimes and Cherfi habitually left on Friday lunchtimes to attend his mosque. His supervisor noted that Cherfi's Friday lunch absences could last up to an hour and a quarter; however, this did not pose a problem as other guards also took similar time off for their lunch breaks. Moreover, the supervisor was aware as to why Cherfi left the site. It appears there was a prayer room available at the Job Centre Plus location although Cherfi did not make use of this facility.

In October 2007, Cherfi's supervisor informed the line manager at the Job Centre Plus site of the Friday lunchtime arrangement. The line manager considered that this constituted an unauthorised absence and Cherfi was suspended. There followed an investigation, disciplinary procedure and, ultimately, an oral warning. Cherfi later returned to work and was subsequently informed by the line manager that he *could* in fact attend his mosque on Friday lunchtimes.

By October 2008, Cherfi had developed further unrelated grievances and a meeting was arranged with his head of operations. At that meeting, in addition to discussion of these separate complaints, he was notified that he would no longer be able to attend Friday lunchtime prayers at his mosque because G4S' client required, as part of their contract, that a specific number of security guards be assigned to the Job

[1] [2011] EqLR 825. The facts referred to in the section which follows are all taken from the judgment of HHJ Reid QC in the Employment Appeal Tribunal (EAT).
[2] The language of the EAT, per HHJ Reid QC at para. 8.

Centre Plus site for a set number of hours each day. This amounted to a stipulation that all guards be present for the full duration of their duty including at lunchtime – for which they were paid. If this stipulation was breached it would not only entail G4S incurring a financial penalty but also risk jeopardising the contract between them and their client. As such, it had become a requirement of G4S' agreement with its client that security guards, whether temporary or permanent, work shifts of at least eight hours. This meant that Cherfi's contract could not be formally adjusted to allow him to have Friday lunchtimes off work.

This new position was confirmed to other workers in a memorandum in late October 2008. At the same time, the head of operations for the Job Centre Plus site wrote to Cherfi to appraise him of the new position. In this letter he indicated that he was prepared to amend Cherfi's contract of employment so that he work Monday to Thursday with the option of working a fifth day on either a Saturday or Sunday. Cherfi rejected this alternative offer as he was not prepared to work at weekends; he decided to take all Fridays off work either as sick leave, authorised annual leave or authorised unpaid leave. In March 2009, he was advised by letter from his head of operations that this could not continue. As a result, in May 2009 he claimed against G4S in the Employment Tribunal (ET) for both direct and indirect discrimination.[3] As noted in the judgment of the Employment Appeal Tribunal (EAT),[4] his clam for direct discrimination in the ET was unsuccessful in relation to the main issue of his absence on Friday lunchtimes. His claim for indirect discrimination in the ET was also unsuccessful because any discrimination flowing from the requirement he work Fridays had been justified as proportionate:[5] this formed part of his appeal to the EAT on the grounds that the ET had failed to balance the discriminatory impact of this requirement on Cherfi with the needs of G4S.[6] His appeal on this matter was unsuccessful for the same reasons as in the ET.[7]

[3] *Employment Equality (Religion or Belief) Regulations 2003* SI 2003/1660 (*RB Regs 2003*), *Regulations 3(1)(a)* and *3(1)(b)*, respectively.
[4] per HHJ Reid QC at paras. 2 and 11.
[5] *Ibid*., at para 4.
[6] *Ibid*., at para 5.
[7] *Ibid*., at paras 45 – 46.

2. *CHERFI*: APPLYING THE CANADIAN MODEL

2.1 Financial cost to the employer / size of the employer

There were clear tangible costs associated with accommodating Cherfi. The EAT was persuaded that avoidance of these was a legitimate aim in precluding accommodation, the specific matter to which the aim related being the contract between G4S and its client which required Cherfi to be on site during his whole shift. This legitimate aim was referred to as 'the operational needs [of the business] which [G4S] had in complying with its contract',[8] the EAT noting that this aim had to be legitimate because of evidence pointing towards not only the real 'financial penalties involved ... but also the danger of losing the contract altogether if there was continued and persistent breach of the contract'.[9] The EAT was satisfied that there existed real evidence of likely loss of revenue from any breach of contractual obligation: it was commented that '[G4S] would suffer financial penalties if breaches of the [contractual] provisions occurred, but more importantly it is apparent that breaches would put the continuation of the contract at risk'.[10] Moreover, the EAT reported that the ET had 'specifically found as a fact that [G4S] could only run its business properly and on a sound financial basis by engaging security guards working shifts of at least eight hours whether on a permanent or temporary basis'.[11] This aim is fortified by the general principle from *British Telecommunications Plc v. Ticehurst*[12] that employees should not conduct themselves in such a way as to endanger their employer's business interests.

Having determined that the aim in relation to the financial costs and breach of contractual obligations was legitimate, and that specific proof of this may have been present,[13] it becomes necessary to assess proportionality[14] and undue hardship.

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[8] *Ibid*., at para. 45.
[9] *Ibid*., at para. 44.
[10] *Ibid*., at para. 17.
[11] *Ibid*., at para. 19 (emphasis added).
[12] [1992] ICR 383.
[13] Proof is required. See *Chambly (Commission Scolaire Regionale) v. Bergevin* (*Chambly*) [1994] 2 SCR 525: see chapter 7 n. 64.
[14] Such legitimate business aims have been found to be justified as proportionate in rejecting employee accommodation requests. In particular, see recent cases where employees have sought specific days off from work for religious reasons and unsuccessfully claimed, *inter alia*, indirect religious discrimination: *Mba v. Mayor and Burgesses of London Borough of Merton* (*Mba*) [2012]

Despite the fact it had become a requirement of Cherfi's work agreement that he be at the Job Centre Plus site at all times, including lunchtimes,[15] both full and partial accommodations were possible up to the point of impossibility[16] so as to not frustrate the contractual obligation G4S had with its client. It was noted by Liberty in *Ladele v. London Borough of Islington* when it intervened at the EAT level[17] that in relation to employees 'taking time off for religious worship ... the manifestation of belief ought if possible to be accommodated, unless to allow time off would disproportionately prejudice the running of the business'.[18] In *Cherfi*, full accommodation could have been provided by G4S: this could have been met by employing Cherfi on a part-shift basis on Fridays and asking or recruiting another security guard to cover his lunch hour.[19] However, this possibility was rejected due to the 'financial impracticability'[20] of it given that the replacement guard would have to be paid for the whole shift – not just the lunchtime period. Of course, had G4S been required to employ another security guard then they would have not been expected to bear the full cost of this – under *Ontario Human Rights Commission (O'Malley) v. Simpson Sears* (*O'Malley*)[21] Cherfi would have been required to contribute to the expense of recruiting a replacement guard. This would have been particularly appropriate given that the absence request would have been regular.[22]

Alternative *partial* accommodations were also available. G4S had offered Cherfi either the opportunity to work at weekends[23] or the use of the on-site pray room during Friday lunchtimes.[24] Given the 'impossibility' threshold, these partial

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EqLR 526 (per Judge Williams QC at paras. 79 – 89); *Patrick v. IH Sterile Services Ltd* (*Patrick*) [2012] EqLR 91 (per Judge Smail at para. 33); and *Moise v. Strettons Ltd* (*Moise*) [2012] EqLR 91 (here it was found that there had been no indirect discrimination as there was no identifiable disadvantage – however, if there had been disadvantage the legitimate aim would have been justified: per Judge Ferris at para. 66). In relation to indirect discrimination the first and third cases were heard under the *RB Regs 2003, Regulation 3(1)(b)*; the second case was heard under the *Equality Act 2010, s. 19*.

[15] This could be inferred from the fact this seemed to be the position in relation to all members of staff at the appellant's site: per HHJ Reid QC at para. 16.

[16] This being the test for undue hardship in Canada: *British Columbia (Public Service Employee Relations Comm) v. BCGEU* (the '*Meiorin*' case) [1999] 3 SCR 3: see chapter 7 n. 54.

[17] [2009] IRLR 154.

[18] At para. 103.

[19] per HHJ Reid QC at para. 44.

[20] *Ibid*.

[21] [1985] 2 SCR 536.

[22] *O'Malley*: see chapter 7 n. 66.

[23] per HHJ Reid QC at para. 15.

[24] *Ibid*., at paras. 34 and 43.

accommodations would have been necessary for G4S to offer before it could be said accommodation would have reached the point of undue hardship. As Cherfi rejected all compromises this point was probably reached.

2.2 Problems of morale for other employees

The impact on employee rights and morale in the face of accommodation is not one which seems to have been particularly pressing.[25] However, the fact that G4S did employ other religious Muslims was observed by the EAT[26] meaning that, had only Cherfi been accommodated, the other Muslim employees may have had legitimate grounds for accommodation.[27] Inevitably, any financial costs of accommodating Cherfi would be exacerbated by allowing other Muslim workers time off on Friday lunchtimes, this being in terms of any cost covered by G4S and the extra work involved in arranging appointment of any extra security guards. This may have reached the 'impossibility' threshold in relation to Cherfi and all other Muslim employees. Of course, the likelihood of employee morale being a factor seems low given that at no stage in the proceedings did G4S seek to show hardship of this variety.

2.3 Inter-changeability of the workforce / size of the employer[28]

Even if cost and employee morale had not been relevant factors, accommodation would still not have been particularly practicable for G4S. There was no obvious evidence that other guards would have been able to swap duties with Cherfi, especially on a regular arrangement. However, G4S would have needed to show that

[25] Employee morale as related to this issue was raised in *Mba* per Judge Williams QC at para. 78.
[26] per HHJ Reid QC at paras. 25 and 34.
[27] There was also evidence that other, possibly non-Muslim, employees liked to take long lunch breaks (per HHJ Reid QC at paras. 9 and 10) – although in their case, any effect on morale would be irrelevant given that they would not have required a religious accommodation along the same lines as the appellant.
[28] Under the Equality and Human Rights Commission's (EHRC) *Equality Act 2010: Code of Practice (Employment)* (*Code of Practice: Employment*) for reasonable adjustments in disability discrimination law, Cherfi may have been the beneficiary of flexible working as a potential adjustment: para. 6.33. Of course, this would have had to pass the EHRC's criteria for 'reasonableness' contained in paras. 6.28 – it is submitted financial cost would have been a major factor militating against this, particularly as reasonableness is assessed objectively: para. 6.29. The *Code of Practice: Employment* is available at: <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf>, accessed 24th August 2012.

other guards would not have been able to cooperate with Cherfi's accommodation request following a canvassing exercise.[29] Following on from *Moore v. British Columbia (Ministry of Social Services)* (*Moore*)[30], it might be questioned as to whether – following Vickers' argument – Cherfi should have advised G4S when he commenced day shifts in 2003 that he would be unable to undertake guard duties on Friday lunchtimes for religious reasons. This may have further assisted G4S in blocking the accommodation request because Cherfi, as a practising Muslim, would presumably have known in advance of his commitment to Friday prayers and that this would have clashed with his work. Clearly, the rule from *Moore*, specifically that a total lack of employer engagement will lead to a finding of no undue hardship and corresponding duty to reasonably accommodate, would have been of no use to the Cherfi given that accommodation attempts had been made.

3. *CHERFI*: APPLYING THE UNITED STATES MODEL

3.1 Economic hardship

As noted, there was potential in *Cherfi* for significant economic hardship to be suffered by G4S had it been forced to fully accommodate. This could have related to the financial penalties they would have incurred from their client had the contract between them had been breached and subsequently terminated, or the additional costs of hiring another guard (so as to avoid breaching the contract). Such costs would usually be enough under the United States (US) approach to negate any accommodation expectation on the employer. Indeed, in *EEOC v. Townley Engineering* (*Townley Engineering*) it was specifically declared that economic hardship was a form of hardship.[31] Presumably, the degree of economic hardship likely to be experienced (concerning either associated costs of breach of contract or those linked to hiring a replacement for Cherfi) would have cleared the *de minimis* threshold.[32] Given the fact that G4S was able to point to specific financial hardship in

[29] *Central Okanagan School District Number 23 v. Renaud* (*Renaud*): see chapter 7 n. 87.
[30] (1992) 17 CHRR D/426.
[31] 859 F.2d 610 (Ninth Circuit, 1988): see chapter 8, section 3.1.1.
[32] *Tooley v. Martin—Marietta Corp.* 648 F.2d 1239 (*Tooley*) (Ninth Circuit, 1981): see chapter 8 n. 79.

fully accommodating Cherfi, this would have satisfied the need for evidence of financial hardship.[33]

3.2 Automatic non-economic hardship

Cherfi's possible breach of contract might have constituted an automatic non-economic form of hardship, the presence of which would not have required any accommodation efforts[34] by G4S.

3.3 Factors refuting or suggesting non-economic hardship?

In the unlikely event that other workers had been able to swap duties with Cherfi, other considerations under the US model would become important. Significantly, G4S made attempts to accommodate Cherfi, such attempts usually signalling that the employee is required to accept such alternative offers. They made concerted efforts to accommodate him by allowing him to either work Saturdays or Sundays instead of Fridays, or work Fridays and make use of the on-site prayer room. These were all refused, this being sufficient to cross into the zone of undue hardship.[35] Indeed, '[i]f the facility to swap shifts exists, the employer will have met the obligation to accommodate'.[36] The US courts have also held that where a religious employee makes an unrealistic or unworkable accommodation suggestion this may be refused too,[37] such a scenario potentially being present depending on whether the suggestion of getting a replacement guard came from Cherfi himself during the course of discussions. This ties into the general narrative of the US jurisprudence that, 'the courts are clear that the duty of accommodation carries with it a responsibility on employees to attempt to accommodate their religious needs through the means

[33] *Protos v. Volkswagen of America Inc*. 797 F.2d 129 (*Protos*) (Third Circuit, 1986): see discussion in chapter 8, section 3.1.2.
[34] On legal infringement constituting an automatic non-economic hardship see *United States v. Board of Education for the School District of Philadelphia* (*Philadelphia*) 911 F.2d 882 (Third Circuit, 1990): chapter 8 n. 88.
[35] See *Shelton v. University of Medicine and Dentistry of New Jersey* (*Shelton*) 223 F.3d 220 (Third Circuit, 2000) and *Bruff v. North Mississippi Health Service* (*Bruff*)244 F.3d 495 (2001): chapter 8, section 3.1.5.
[36] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 188.
[37] As in *Peterson v. Hewlett Packard* (*Peterson*) 358 F.3d 599 (Ninth Circuit, 2004) and *Virts v. Consolidated Freightways* (*Virts*) 285 F.3d 508 (Sixth Circuit, 2002): see chapter 8 n. 132 and n. 133, respectively.

offered by the employer'.[38] Finally, under the US scheme the quality of evidence submitted by G4S relating to hardship would need to be checked. Presuming they were able to relate Cherfi's absence on Friday lunchtimes with their legitimate concerns relating to cost and breach of contract, it should have been possible to argue this as prospective real hardship, this capable of amounting to undue hardship for *de minimis* purposes.[39] Even if this evidence was more speculative than real, the decision from *Trans World Airlines v. Hardison* (*Hardison*)[40] still indicates that hypothetical hardship has not yet been dismissed as capable of constituting undue hardship.

4. *COPSEY v. WWB DEVON CLAYS LTD* (*Copsey*)[41]

The appellant (Copsey) was a practising Christian who began working for the respondent (WWB) in March 1988. WWB operated clay quarries and Copsey worked at one of these sites, his shift patters arranged across Monday to Friday with opportunities for overtime on Saturdays and occasionally Sundays.

In later 1999 and early 2000, WWB was awarded a new contract which substantially increased the amount of sand they needed to produce. The only way to meet this extra demand was to extend the operating hours of employees. In February 2000, the employees' union accepted a proposal by WWB to introduce a system of seven day working, 24 hours a day, on the basis of 12 hour shifts via a rotating shift pattern. This would inevitably include Sunday working. Copsey and four other employees complained about the Sunday working and they were subsequently permitted a special arrangement to work six days a week. Whilst the other three were prepared to work Sundays if required, Copsey was not; he accordingly received a reduction in pay. At no point did he make it clear that his refusal was based on his religious beliefs regarding Sunday working.

[38] Vickers, above n. 36, p. 188.
[39] *Tooley* and *EEOC v. Alamo Rent-A-Car* (*Alamo*): see chapter 8 n. 104 and n. 107, respectively.
[40] 432 US 63 (1977).
[41] [2005] EWCA Civ 932. The facts referred to in the section which follows are all taken from the judgments of Mummery, Rix and Neuberger LJJ in the Court of Appeal (CA).

In early 2002, WWB secured yet another order at the site where Copsey worked, necessitating a further increase in output. This placed additional pressure on the workforce at the site, particularly those who were working on the seven day shift arrangement. Consequently, in March 2002 WWB attempted to include in that shift pattern the four workers, including Copsey, who were only working six days a week. This was met with opposition and as a result WWB advised that if the four workers did not agree to working on Sundays they could consider taking a redundancy package on generous terms. Two of the workers declined the redundancy offer and switched to the seven day working pattern; the other two, including Copsey, considered their positions. At a subsequent meeting, Copsey made it clear that, whilst he understood the reasons for Sunday working, he would resist any attempt to make him work on a Sunday. He was offered the chance of working at a different site where there was a five day shift pattern. He refused and there followed correspondence between him and WWB in which, for the first time, he indicated that his refusal to work on Sundays was due to religious reasons.

In April 2002, he was told that he would be dismissed at the end of May 2002 unless he agreed to working on Sundays. He was given the option of signing a compromise agreement on 'favourable terms',[42] although these terms are not known. He later applied for work at another plant in July 2002, although further information on this is unavailable. He was also given several chances to transfer to other positions within the company, these being supplementary to the offer to move to the other plant where shifts were five days a week. For example, he was offered the chance of switching to a position in the loading yard: this was rejected when it became clear that WWB could not guarantee that he would not be required to also work on Sundays in that post. Copsey advised WWB that he was only prepared to work on Sundays if there was a genuine and unavoidable emergency; this did not include production demands. He also applied for the position of laboratory assistant but later said he was unwilling to accept the salary attached to the post which was lower than his own.

Copsey was subsequently dismissed at the end of July 2002. It was not possible to claim either direct and/or indirect discrimination on grounds of religion or belief as

[42] The language of the CA, per Mummery LJ at para. 14.

the *RB Regs 2003* came into force after the relevant events had occurred,[43] although, in any event, there was little evidence that WWB had dismissed him directly because he was a Christian, or that he was disadvantaged. Even if disadvantage had been found, it may well have been justified (these conclusions would have been informed by the fact he had not made his religious stance clear from the start[44]). Copsey elected to claim unfair dismissal,[45] although this was unsuccessful in both the ET[46] and EAT[47] on the ground that his religion or belief had played no part in the dismissal and, rather, the business needs of WWB constituted 'some other substantial reason' which justified his dismissal.[48] He appealed to the Court of Appeal (CA) on the basis that *Article 9* had an impact on the unfair dismissal claim: the requirement to work Sundays and the overall circumstances of the dismissal were an unjustified interference with his freedom of religion. The CA found that WWB's actions had not breached *Article 9* as there was no interference with the right to freedom of religion: Copsey had a right to resign.[49] Even if there had been interference, it would have been justified due to WWB's economic concerns.[50]

5. *COPSEY*: APPLYING THE CANADIAN MODEL

5.1 Financial cost to the employer / size of the employer

There were financial implications for WWB in accommodation Copsey. The CA was persuaded that the likely harm to WWB's output was a legitimate aim within the context of *Article 9* that could justify blocking full accommodation. It was said that

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[43] per Mummery LJ at para. 8(3).
[44] Similar to the position in *McClintock v. Department for Constitutional Affairs* [2008] IRLR 29: see chapter 9, section 2.
[45] This was claimed under *s. 94(1)* of the *Employment Rights Act 1996* which provides that an employee has 'the right not to be unfairly dismissed'. The test for unfair dismissal is contained in *ss. 98(1) – (4).*
[46] per Mummery LJ at para. 17.
[47] *Ibid*., at para. 19.
[48] *Ibid*., paras. 17 – 19.
[49] *Ibid*., at paras. 30 – 39, although in his leading judgment Mummery LJ said that in the absence of the specific situation jurisprudence of Strasbourg he would have found interference with *Article 9*. Rix LJ preferred the view that where an *employer* changes the terms of a religious employee's employment contract so as to materially interfere with their freedom of religion that potentially engages *Article 9* unless reasonable accommodation is offered and accepted. If not accepted then there may be no interference, although where there is doubt there should be reference to *Article 9(2):* at para. 69. This is different to the situations discussed in chapter 9 where amendments to employee duties were brought about by changes in the law.
[50] per Mummery LJ at para. 41.

requiring Copsey to work on Sundays, 'was a sound business reason, an economic necessity for them'.[51]Moreover, this necessity was borne out of 'compelling economic reasons'[52] that were linked to '[t]he required increase in production requirements'.[53] On this basis, the court seemed satisfied that there was evidence that accommodation would pose specific harm to WWB's financial interests by causing a diminution in output so as to create difficulty in meeting its orders.[54] This evidence would be supported by the rule in *Ticehurst*.

Having established that the economic and business imperative must have been the main legitimate aim, it becomes necessary to assess proportionality and undue hardship up to the point of impossibility (on the assumption Copsey had made his religious objections clear from the start). In particular, it may be asked whether Copsey could have been fully accommodated without WWB's business interests being frustrated. In all likelihood this would have been challenging: quite apart from issues that would have existed with getting him to swap duties with fellow colleagues,[55] allowing him to take all Sundays off would have risked a reduction in output which, in turn, would have been injurious to its interests as a business. The only remaining option for full accommodation would have been the hiring of a replacement worker to fill Copsey's Sunday duties at extra cost to WWB. Such a cost may have been particularly disproportionate given the seven day working policy which presumably would also have applied to any replacement worker. Nevertheless, it would have to be asked whether this would have been 'impossible'. Presumably, it would have been impossible at the level of practicability and administration, although WWB would have needed to adduce evidence of this. Moreover, financial impracticability would also be a block, although *O'Malley* makes it clear that it can be fair to expect employees to contribute to any costs associated with their full accommodation. It is not clear how much this might have been. However, given the wide-ranging ways in which WWB had attempted to accommodate, combined with

[51] per Mummery LJ at para. 17.
[52] *Ibid*., at para. 41.
[53] *Ibid*., at para. 27.
[54] Evidence of financial cost would be required: *Chambly*, see chapter 7 n. 64.
[55] See below, section 5.4.

the fact Copsey's absences would have been regular,[56] it may well have been that much of the cost of hiring a replacement would have been borne by Copsey.

In light of the alternative modes of partial accommodation which had been offered, WWB would have been viewed as attempting to accommodate up to the point of undue hardship. Copsey was offered a special arrangement in February 2000 to only work six days a week (although this was only temporary).[57] He had also been offered, in lieu of working on Sundays, a generous redundancy package.[58] He was further offered a permanent accommodation working on a five day shift pattern elsewhere in a different plant at the same location which was turned down.[59] Additional accommodations included a compromise agreement (the terms of which were not explained on the facts),[60] opportunities to transfer to a position in the loading yard which was ultimately refused due to WWB's inability to guarantee that he would not on occasions work on Sundays,[61] and the chance to work as a laboratory assistant which he rejected as it was a less well-paid job.[62] These attempts may well have satisfied the 'impossibility standard of Canadian undue hardship – indeed the court made reference to the doctrine of Canadian reasonable accommodation and noted that WWB had 'done everything that they could to accommodate [Copsey's] wish not to work on Sundays'.[63] It was stated that, in relation to *Article 9* claims, '[a]n employer who had sought to find a reasonable accommodation for his employee would have nothing to fear. Provided his solution was one which a reasonable employer could require, in that it lay within the range of reasonable responses to the problem, it would not be for an Employment Tribunal to second-guess the employer'.[64]

[56] *O'Malley*: see chapter 7 n. 66.
[57] per Mummery LJ at para. 12.
[58] *Ibid*., at para .13.
[59] *Ibid*., at para. 14.
[60] *Ibid*., at para. 15.
[61] *Ibid*., para. 16
[62] *Ibid*., para. 16 and per Neuberger LJ at para. 95.
[63] per Mummery LJ at para 41.
[64] per Rix LJ at para. 71.

5.2 Disruption of a collective agreement

The employees' union had been consulted about the accommodation request and formed the view that 'it was necessary to require [Copsey] to switch to a 7 day shift pattern',[65] a shift pattern that it had accepted.[66] However, Canadian reasonable accommodation has, characteristically, taken a more employee-friendly approach. For example, in *Renaud* it was said that collective agreements *per se* cannot automatically block necessary accommodations, although this will depend on how far accommodation would depart from all other conditions and terms of employment in any collective agreement.[67]

5.3 Problems of morale for other employees

There was reasonably firm evidence that employee morale would have been affected by full accommodation. The CA noted that the ET had 'taken soundings from [Copsey's] colleagues, who would be disadvantaged if he was made a special case. His colleagues were found to have little sympathy with his position'.[68] The well-being of the other employees was reiterated elsewhere,[69] along with their 'dissatisfaction'[70] at any prospective long-term accommodation of Copsey as an 'isolated'[71] case. However, it is difficult to see how morale would be legitimately affected by accommodation given that, unless such colleagues were also religious and required Sundays off, no workplace rights would have been affected. In relation to employees' availability and their general views regarding Copsey's accommodation request, these are considered below in section 5.4.

[65] per Mummery LJ at para. 17.
[66] *Ibid*., para. 11.
[67] *Renaud*: see chapter 7 n. 73.
[68] per Mummery LJ at para. 16.
[69] *Ibid*., at para. 27.
[70] per Neuberger LJ at para. 95.
[71] per Mummery LJ at para. 17.

5.4 Inter-changeability of the workforce / size of the employer[72]

It would have been very difficult to accommodate Copsey with regards to his colleagues as all employees were required to work the seven day shift arrangement meaning there would have been a lack of room for shift flexibility. It is known that other employees felt negatively about Copsey's request, although assuming they were free to swap with him it is not immediately obvious why this should be taken into account in the canvassing exercise.[73] Whilst Copsey raised his objections to Sunday working immediately, these objections were not on the basis of his religion or belief. As per *Moore,*[74] the fact of alternative accommodations might mean that under the Canadian model he had no automatic right to expect a swap in duties away from Sunday working.

6. *COPSEY*: APPLYING THE UNITED STATES MODEL

6.1 Economic hardship

The facts of *Copsey* demonstrate that economic hardship would certainly have been a problem for WWB in acceding to the accommodation request. This related to business necessity and the increased rate of orders received from clients. Such economic factors will be enough under the US model to cross the *de minimis* threshold for undue hardship and justify a rejection of accommodation.[75] As usual, some evidence of this business necessity would have to be adduced as in *Protos*[76] where there was no discernible economic loss occasioned when a worker was absent on Saturdays.[77] Presumably, WWB would be able to show such economic loss in relation to business efficiency and production.

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[72] Under reasonable adjustments in disability discrimination law, Copsey may have been accommodated by the imposition of flexible working (as in *Cherfi*). However, this would have been subject to the same issue of financial cost: see above n. 28.

[73] See the views of Hambler and Vickers: chapter 7 n. 89 and n. 90, respectively. Note that under reasonable adjustments in domestic disability discrimination law, it is not enough for an employer to point to negative staff attitudes as a barrier to accommodation: EHRC *Code of Practice: Employment*, para. 6.35.

[74] See chapter 7, section 4.1.4.

[75] *Townley Engineering*: see chapter 8, section 3.1.1.

[76] See chapter 8, section 3.1.2.

[77] See chapter 8 n. 81.

6.2 Factors refuting or suggesting non-economic hardship?

If economic hardship was not present due to inadequacy of evidence then, absent any of the automatic non-economic hardship factors, the next stage in the US analysis would be to assess the employer response to the accommodation request. WWB made formidable efforts to accommodate all of which failed to find favour with Copsey. The rejection of these would have been sufficient to surmount the US *de minimis* hurdle of undue hardship.[78] Copsey did not make his own suggestions as to how he might be accommodated; he also did not counter WWB's alternative offers with other ideas.

It has already been mentioned that some sort of evidential link between economic hardship and non-accommodation must have been present before the CA. On that basis, it may be that real hardship[79] would be satisfied, although even if not, the possibility of hypothetical hardship also clearing the *de minimis* hurdle still exists due to the continuing effect of *Hardison*. The fact there existed evidence of other workers resenting any accommodation of Copsey would also count as real hardship under the rule in *Tooley* and *Alamo*.

[78] See *Bruff* and *Shelton*: chapter 8, section 3.1.5.
[79] This will clear the *de minimis* hurdle: see *Tooley* and *Alamo*, see chapter 8 n. 104 and n. 107, respectively.

CHAPTER 12: CONCLUSION

1. RELIGION AND RELIGIOUS EXCEPTIONS

During this thesis a particular perspective on religious liberty protection in the United Kingdom (UK) has been developed. This has investigated the extension of religious liberty through the use of religious exceptions in limited circumstances. It has been acknowledged that this enhanced protection must be orientated around an idea that sometimes religion should be accorded further special protection by allowing it to avoid legal censure. Protection of religion has been predicated on a theoretical platform that accepts the concept of human dignity (incorporating the ideas of autonomy and equality) as a prevailing justification for that protection.

At a more detailed level, research has been focused on the *practical* implications of these exceptions to determine what contributions they make to our conceptualisation of religious liberty in the United Kingdom. Attention has been centred on religious exceptions in anti-discrimination law and this case-study has revealed the useful, if limited, practical ways in which religious bodies have been permitted to contravene the state's legitimate aim in proscribing discrimination. The narrowness of the exceptions is necessary given the concession the state makes in creating them, although as relatively minor features of religion law their role in privileging religion is nonetheless significant. The emphasis on exceptions recognising the rights of religions as institutions receives lukewarm approval from Rivers who notes that religious exceptions 'may be more or less adequate in preserving the group's right to maintain its identify',[1] although he advocates a more collective dimension to religious rights as rooted in constitutional principle.[2] He believes this is more apt to achieve religious liberty in the long term because 'it requires institutional anchoring in the recognition of a quintessentially religious domain ... which is important enough to be immune from state interference. It requires religions and the state to be

[1] J. Rivers, *The Law of Organised Religions: between establishment and secularism* (Oxford: Oxford University Press, 2010), p. 322.
[2] *Ibid*., see discussion at pp. 318 – 322.

thought of, in some sense, as coequal in law'.[3] This better entrenches religion's position in UK society; it also permits individual rights to flow from it.[4]

However, recent jurisprudence concerning religious discrimination has shown that the courts have often relegated religion in the face of other legitimate aims. This affects the interests of religious *individuals* whose specific circumstances fall outside those covered by the religious exceptions. Rivers argues that this relegation amounts to a '"recreationalisation" of religion: '[t]he effect is to turn religion into another hobby ... the law need make no space for the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers. Religion thus acquires all the moral weight of stamp-collecting or train-spotting'.[5] Consequently, this thesis has argued for careful attention to be paid to reasonable accommodation as *another* way in which the special protection afforded by religious exceptions could be extended to religious individuals. It has justified this call in a distinctive way by applying comparative models of reasonable accommodation to domestic cases so as to better demonstrate how religious interests and competing legitimate aims can co-exist. Should any domestic attempt be made to replicate these models of reasonable accommodation, it is submitted that this would help redraw the imbalance in the recent religious discrimination case law.

2. RELIGIOUS INDIVIDUALS AND REASONABLE ACCOMMODATION: THE LEGAL FRAMEWORK

It is important to situate the doctrine of reasonable accommodation in the UK's legal framework. A focus on individualised religious liberty immediately clashes with organised religion's role in the constitution providing the starting point for religious liberty, as supported by Rivers. In this sense the doctrine of reasonable accommodation is vulnerable to a charge that, far from augmenting religious interests, it actually diminishes them. This is because a concentration on the individual dimension of religious liberty is less likely to foster respect for religion at

[3] J. Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecclesiastical Law Journal 371, p. 399.
[4] This position will be revisited below in comments on reasonable accommodation: see section 2.
[5] Rivers, above n. 3, p. 398.

a more global and collective level so as to percolate down to the individual. It is caused by a 'new secularism' emerging in the UK constitution that trivialises religion,[6] exemplified by trends identified in the recent jurisprudence. Rivers is forthright in his attack on this: '[t]he confidence of the new secularism in the superficial and unreasoned nature of religion renders it ultimately less able to tolerate the growing diversity of British society. For, as a solution to the fundamental problem of settling the terms of peaceful and fair coexistence in a society of competing rationalities, the new secularisation of the British constitution is deeply implausible'.[7] The view is that provisions orientated around the individual (such as reasonable accommodation) are fundamentally unable to facilitate broader constitutional respect for religion, which is imperative in realising longer-term religious liberty goals. As with any individualised legal construct, reasonable accommodation is part of the problem and not the solution to ensuring stronger religious liberty. Collective religious interests may be eclipsed unnecessarily by more narrow individual notions of religious rights which then lead to inferior protection for religion as an entity.

However, reasonable accommodation and recognition of collective rights are not mutually exclusive. On the contrary, individual and group rights have, and indeed continue, to co-exist. In any event, Vickers contests the idea that group rights should be the default basis for religious interests, arguing that the more modern approach is to conceive of them at the individual level. She has reasoned that 'collective rights are an important aspect of individual rights, but they derive their value from individual interests ... collective rights gain their validity and value from the individuals who make up the collective'.[8] Even if this is not accepted, before modes of religious liberty protection are rejected there should be further debate 'to explain why religion is protected at all in modern times'.[9] Indeed, given that there are ongoing 'extensive debate[s] over whether religious interests should be understood as individual or collective rights',[10] the idea that reasonable accommodation be

[6] *Ibid*., pp. 396 – 399.
[7] *Ibid*., p. 399.
[8] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart, 2008), p. 42.
[9] L. Vickers, 'Twin Approaches to Secularism: organised religion and society' (2012) 32 Oxford Journal of Legal Studies 197, p. 202.
[10] *Ibid*., p. 201.

dismissed as a possible solution to recent marginalisation of religion seems premature. Certainly, reasonable accommodation – with its ability to elevate the religious individual's interests as better balanced against another's legitimate aim – has a proven ability to raise the profile of religion across various participatory elements of society, for example the workplace.

This thesis has not sought to pinpoint where a reasonable accommodation duty would be located in domestic law. However, in the event that the Canadian or United States (US) models were adopted,[11] some commentators have argued for a *sui generis* classification of reasonable accommodation. Rather than forming part of indirect discrimination (or being interconnected with something akin to indirect discrimination[12]), it should constitute a wholly independent free-standing claim. Waddington and Hendriks support this: 'the right to an effective accommodation does not entirely fit within the prevailing distinction between direct and indirect discrimination.'[13] In light of the comments made in chapter six on the differing ways in which indirect discrimination and reasonable accommodation aim for equality of opportunity (for example there is the absence of a comparator in reasonable accommodation), this certainly seems sensible. This is supported by Schiek et al who comment that 'reasonable accommodation discrimination typically emerges in response to the failure to make an adaptation to ensure equal opportunities and commonly does not follow from differentiation on a forbidden or seemingly neutral ground'.[14] However, perspectives on this are not unanimous, with others such as Howard drawing attention to similarities between indirect discrimination and reasonable accommodation. These include use of a proportionality analysis which may suggest that 'the justification of indirect discrimination can be interpreted as including a duty to make reasonable accommodation'.[15] This signals that another option is an in-built reasonable accommodation duty within indirect discrimination.

[11] A preference as to which model be replicated in domestic law is outlined below, sections 3.3.1 and 3.3.2

[12] For example, see reasonable adjustments for disability at the domestic level: chapter 6, section 3.2.1.

[13] L. Waddington and A. Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination' (2002) 18 International Journal of Comparative Labour Law and Industrial Relations 403, p. 427.

[14] D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (Oxford: Hart, 2007), p. 745.

[15] E. Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Abingdon: Routledge, 2012), p. 139.

Indeed, if one of the comparative models were to be adopted this presents flexibility as to how that duty would be drafted.[16] However, given the alternative burdens of proof inherent in both claim routes it may be wiser to create a separate duty for reasonable accommodation so as to keep the duty distinct. In reasonable accommodation, the burden is on the defendant to establish that an accommodation would create undue hardship; in indirect discrimination the initial burden is on the claimant. Vickers alludes to this distinction as a reason for maintaining reasonable accommodation as a distinct duty;[17] similarly, so do Waddington and Hendriks.[18]

Having addressed some obstacles to the introduction of a domestic reasonable accommodation duty, the rest of this closing chapter will focus on assimilating the theoretical, conceptual, practical and policy elements of the reasonable accommodation investigation tracked across Parts III and IV. These consolidate the case for the doctrine's domestic introduction for religion and are considered below in sections 3.1 to 3.4.

3. THE CASE FOR REASONABLE ACCOMMODATION

3.1 Theoretical imperatives

A theme of this thesis has been the postulation of human dignity (together with autonomy and equality) as an established normative basis for the protection of religious interests at the legal level, consistent with proponents such as Vickers and McCrudden.[19] Not all scholars agree on this as the foundation of religious liberty and indeed the concept of dignity, what it means and whether it can be relied upon as a theoretical basis in law are contested. However, it may certainly be conceived of as a *positive* reason for the protection of, amongst other interests, religion. Without more, this attraction may seem simplistically intuitive; however, it is embodied in the notion that '[i]f we accept that all humans are equal, we need to give equal concern

[16] It is imagined this might be in the *Equality Act 2010* although the aim here is not to draft a definitive reasonable accommodation amendment to existing legislation; it is to advance the debate in favour of reasonable accommodation of religion at the domestic level.
[17] Vickers, above n. 8, p. 224.
[18] Waddington and Hendriks, above n. 13, p. 427.
[19] See discussion in chapter 2, section 2.

and respect to the different world views that they develop'.[20] Further, it links with the inherently individualistic spirit of reasonable accommodation as supported by the Equality and Human Rights Commission (EHRC) in its submission that 'recognition of the principles of dignity and autonomy requires an approach to the definition of manifestation that focuses primarily on the conviction of the adherent'.[21] Moreover, its positivity as a justification for validating religious interests sits in contrast to other more impersonal justifications for protecting religious liberty. For example, Biedefelt grounds the guaranteeing of religious interests in the idea of state neutrality, although he ultimately concludes that neutrality could be attacked for its idealistic futility.[22] As a result, he declares support for reasonable accommodation *in spite of* neutrality:

> members of minorities should have the possibility to demand, to a certain degree, personal adjustments when general legal provisions collide with their conscientious convictions. Such measures of 'reasonable accommodation', which often have been criticized as allegedly privileging minorities, in fact should be seen as an attempt to rectify situations of indirect discrimination … even in liberal democracies that are devoted to the principle of neutrality in questions of religion.[23]

The attraction of human dignity above other justifications can also be made in relation to toleration, Sandberg contending that religious exceptions and special treatment of religion indicate that protection of religious interests has moved beyond mere toleration.[24]

3.2 Conceptual imperatives

If human dignity exists as a prominent normative basis for a duty of reasonable accommodation, then equality as a sub-strand of this theory clearly positions that duty in the sphere of anti-discrimination law. This was explored in chapter six where it was said that equality of opportunity unites reasonable accommodation with indirect discrimination. However, one notable difference in this regard was reasonable accommodation's strident individualised focus, an approach which has

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[20] Vickers, above n. 8, p. 40.
[21] EHRC submission in *Eweida and Chaplin v. UK*, at para. 16.
[22] See chapter 2, section 4.
[23] H. Bielefeldt, 'Freedom of Religion or Belief – a human right under pressure' (2012) 1 Oxford Journal of Law and Religion 15, pp. 24 – 25.
[24] R. Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), p. 37.

not been without criticism for its assimilationist impact. Schneiderman has attacked the concept of accommodation for being a 'formalistic standard of review, assimilationist in its objectives, and largely oblivious to the presence of domination'.[25] This is echoed elsewhere. Waddington and Hendriks repeat the idea of accommodation leading to domination of the group to which the accommodated individual belongs, contending that '[i]n most instances, an individual accommodation leaves unchallenged and unaffected the underlying discriminatory policy which resulted in the initial exclusion'.[26] This does nothing to improve the standing of religion in society, perhaps also impacting disproportionately on minority religions, supporting Rivers' argument that the individual arena is ill-suited to securing religious interests in the long term. Beaman, writing from a more socio-legal perspective, reinforces this position by rebuking reasonable accommodation for tolerating structural inequality and condemning those who use the language of 'accommodation' in ignorance of the fact that '[r]eligious [groups] in this framework are relegated to a "less-than" status in which the official response appears as benevolent generosity rather than as a recognition of equality as right or equality of position'.[27] This invokes a colonial privilege that '"we" will tolerate "you"'.[28]

It cannot be denied that these arguments reveal conceptual weaknesses in the protection claims of reasonable accommodation. Critics of the duty claim that instead of adjusting individual imbalances, the religious liberty emphasis instead should be on ameliorating disadvantage, exclusion and alienation which exist on a much larger scale. Of course, the doctrine of reasonable accommodation, at least as it is conceived in Canada and the US, is not a panacea for addressing all the ills suffered by religion in society. Indeed, it does not claim to be. Instead, it has been argued that the theory of human dignity represents a useful theoretical underpinning for reasonable accommodation, with the benevolence inherent in this theory useful in distancing the doctrine from the conceptual denunciations above. In any case, such denunciations may overstate the ease with which religion as a collective entity can

[25] D. Schneiderman, 'Associational Rights, Religion and the Charter', in R. Moon (ed.) *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008), p. 67.
[26] Waddington and Hendriks, above n. 13, pp. 414 – 415.
[27] L. G. Beaman, '"It Was All Slightly Unreal": what's wrong with tolerance and accommodation in the adjudication of religious freedom?' (2011) 23 Canadian Journal of Women and the Law 442, p. 447.
[28] *Ibid*., p. 443.

bargain for more power at a greater level in seeking to command more favour and respect. This is not to deter ambition of religious liberty on a grander scale; rather it is to acknowledge that reasonable accommodation as a device is plainly ill-equipped to challenge *deep-rooted* societal problems concerning religion. Its attraction lies elsewhere in the concentration on individual matters and associated respect for dignity; this will be shown through discussion of the practical focus the doctrine brings to adjudication of disputes. That focus allows a religious individual more latitude to achieve a full or partial accommodation alongside another's legitimate aim. Significantly, the ability of reasonable accommodation to search for optimum equitable co-existence between practical accommodation and a legitimate aim, particularly where there is a clash of protected characteristics, may not only provide an individual solution; it may also catalyse a process whereby legal and societal institutions begin to take cognisance of religious interests.

3.3 Practical imperatives

3.3.1 The benefits of proportionality

The practical elegance of reasonable accommodation is provided by its proportionality analysis. This is especially the case with the Canadian model which, as seen in Part IV, possesses a great ability to consider arguments for religious liberty from its more nuanced, intricate and forensic analysis of the facts in an individual's situation. This enables it to better discover accommodation leeway than the current justification test in indirect discrimination. The latter may appear to require judges to balance a religious individual's interests against a competing legitimate aim; however, the domestic case law resoundingly establishes that the quality of judicial reasoning this test encourages can sometimes be superficial and unnecessarily inimical to religious interests. Instead the Canadian model's schematic outline of prescribed factors (as set out in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission*)[29] (*Alberta*)) demands a more complete consideration of matters (along with any *other* relevant issues) which may reveal how a full or partial accommodation could actually be provided without troubling the defendant's

[29] [1990] 2 SCR 489.

legitimate aim. In Canada, this exploration is further facilitated by an undue hardship standard ('impossibility', as stipulated in *British Columbia (Public Service Employee Relations Comm) v. BCGEU*[30]) which obliges exhaustive examination of the facts to verify the possibility of an accommodation. Whilst this approach favours the religious claimant it is not at the expense of undermining or diluting the defendant's legitimate aim: it is clear that this must remain unaffected in the accommodation equation. Special treatment of religion in this way so as to reverse the effects of recent case law does not have to be problematic, as Vickers highlights: 'different grounds of discrimination may fit better with different understandings of equality ... Assuming that it is acceptable to treat different grounds of discrimination differently, then it is unnecessary to provide for interchangeable interpretation of similar terms used in relation to the different grounds of discrimination'.[31]

If adopted, this level of analysis would address many commentators' concerns with judicial reasoning at the justification stages of indirect discrimination claims. Whilst Sandberg argues that 'focusing properly on the question of justification by looking at the facts, risks and contexts of the particular case would have the *same* result as applying the question of reasonable accommodation',[32] it is submitted in this thesis that *only* the application of reasonable accommodation (along the Canadian lines) would achieve this. Sandberg seems to concede this point when he states that if reasonable accommodation were to put an extra gloss on the legal provisions which was 'necessary to ensure that the focus is upon justification ... then the concept [of reasonable accommodation] would be helpful'.[33] Canadian reasonable accommodation would address his concerns that justification should 'allow for nuanced fact-specific conclusions which do not constrain subsequent cases'.[34] Moreover, it would address Stychin's contention that 'balancing and accommodation demands some form of contextual analysis, which engages with the competing interests on the particular facts ... Only a factual analysis can answer [the question of

[30] [1999] 3 SCR 3.
[31] Vickers, above n. 8, pp. 228 – 229.
[32] R. Sandberg, 'Submission to the Consultation on Legal Intervention on Religion or Belief Rights' (EHRC Submission), September 2011: available at, <http://www.law.cf.ac.uk/clr/research/Russell%20Sandberg%20%28Cardiff%20University%29%20Submission%20to%20the%20Consultation%20on%20Legal%20Intervention%20on%20Religion%20or%20Belief%20Rights.pdf >, accessed 28th August 2012, p. 6 (emphasis added).
[33] *Ibid*.
[34] Sandberg, above n. 24, p. 130.

reasonable accommodation]'.[35] The exercise conducted in Part IV directly targets a particular lament of Stychin's, namely that in the arena of reasonable accommodation of religion 'there is rarely any consideration of *how* this balancing would actually be undertaken in hard cases'.[36]

Whilst there is a view that reasonable accommodation might signify 'the triumph of pragmatism over principle'[37] its attraction remains undimmed given that it provides an alternative, context-dependent and – therefore – *meaningful* way in which to deal with awkward balancing of competing claims. This is reinforced by McGoldrick who, in relation to the workplace, argues that '[s]ensitive and intelligent employment practices may resolve many practical problems but some may require weighing of claims that have at least an appearance of equal weight ... [C]onflicts ... can sometimes be resolved by common sense, good practice and a sense of proportionality. However, sometimes a *hard* choice has to be made and one principle or right is given preference over another'.[38] McColgan reinforces this perspective when she comments that reasonable accommodation is 'a pragmatic response to the fact that religious belief is an important organising feature of many people's lives and ... present arrangements are not even-handed in the extent to which they enable people to manage the competing demands upon them'.[39]

3.3.2 The problem with certainty

The arguments for group immunity (based on exceptions) advanced above by Rivers, and envisaged in Esau's 'islands of exclusivity',[40]appear to have an advantage over reasonable accommodation and its focus on proportionality. That advantage is certainty. Indeed, it is an advantage enjoyed by religious bodies at the domestic level

[35] C. Stychin, 'Faith in the Future: sexuality, religion and the public sphere' (2009) 29 Oxford Journal of Legal Studies 729, pp. 749 – 750.
[36] *Ibid*., p. 749 (original emphasis).
[37] *Ibid*., p. 753.
[38] D. McGoldrick, 'Accommodating Muslims in Europe: from adopting Sharia law to religiously based opt outs from generally applicable laws' (2009) 9 Human Rights Law Review 603, pp. 625 – 626 (emphasis added).
[39] A. McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 Industrial Law Journal 1, p. 25.
[40] See chapter 4, section 6.

in the exceptions for them in employment and goods and services provision.[41] The view is that a proportionality analysis weakens any *guarantee* of reasonable accommodation for religious adherents. There is no statutory 'immunity'; rather, there exists a claim route which is subject to a proportionality assessment, the result of which determines the outcome. This is noted by those who comment that in reasonable accommodation, 'the approach is fact-dependent and therefore cannot lead to the development of clear and simple precedent'.[42] There is also the charge that the fact-sensitive nature of proportionality means that it is open to a degree of subjective interpretation by judges so as to exacerbate uncertainty and lead to inconsistency. However, it is possible to construct a defence to the charge of uncertainty. Vickers has argued that the appeal of proportionality is *precisely* that it does not lead to rigid certainty. Ironically, the call for more immunity 'instead of relying on the fact-sensitive proportionality test, would result in less protection for religion and belief.[43] Indeed, 'the range of rights created by such a process would be very restricted'.[44] Rather, emphasis on a detailed proportionality test would provide 'clear procedural safeguards to ensure that restrictions on religions [liberty] ... are only imposed after proper consideration of the varied interests at stake'.[45] It is thus proportionality which provides the best protection for religious interests due to its ability to encourage meticulous assessment of the facts. This is demonstrated by the results in some of the cases detailed below in section 3.3.3.

Where Vickers may undermine her argument in favour of proportionality is her support for the US model of reasonable accommodation and undue hardship.[46] Understandably, she bases this on the fact the *de minimis* test is able to 'reduce[s] the potentially onerous nature of a duty of accommodation' which may be needed lest reasonable accommodation end up 'provid[ing] *too* much protection for religious interests'[47]. Whilst this concern is legitimate, it is submitted the US model is too

[41] See chapters 4 and 5, respectively. These are 'certain' in the sense they are identifiable in advance as reliable indicators of immunity in *specific* instances. However, they do not go as far as *full* immunity given that proportionality tests are incorporated into them.
[42] Vickers, above n. 8, p. 229.
[43] L. Vickers, 'Religious Discrimination in the Workplace: an emerging hierarchy?' (2010) 12 Ecclesiastical Law Journal 280, p. 299.
[44] Vickers, above n. 8, p. 231.
[45] *Ibid*., p. 232.
[46] *Ibid*., p. 222.
[47] *Ibid* (emphasis added).

haphazard to be a reliable judge of accommodation. This is evident in its application in Part IV. In particular, the low level at which *de miminis* is set often negates the need for the courts to engage with the criteria for undue hardship as set out in the Equal Employment Opportunity Commission guidelines.[48] It renders the doctrine of reasonable accommodation somewhat impotent. The preference should be for a model based on that in Canada with an undue hardship standard set appropriately high. This elevated standard is not to give undue recognition to religious rights; it is to *force* courts to engage with all the relevant issues in the case so as to resolve whether, and if so how far, an accommodation should have been made. Of course, there is the added element of church and state separation in the US which may explain why the *de minimis* standard is unsuited to the domestic sphere. Indeed, when discussing the appropriate standard for undue hardship in the Canadian case of *Central Okanagan School District Number 23 v. Renaud* [49] it was said that 'there is good reason not to adopt the "de minimis" test ... [this] was argued on the basis of the establishment clause of the First Amendment of the U.S. Constitution and its prohibition against the establishment of religion. This ... was thus decided within an entirely different legal context. The case law of this Court has approached the issue of accommodation in a more purposive manner'.[50]

3.3.3 The impact of Canadian reasonable accommodation in the cases in Part IV

In relation to *employment* Sandberg comments that an enhanced justification test would take 'into account the demands of the specific jobs and the cultures of the particular workplaces'. [51] Indeed, in the employment cases considered in Part IV the evidence shows that Canadian reasonable accommodation would have perhaps enabled full accommodations to have been reached in *McClintock v. Department for Constitutional Affairs*,[52] *Ladele v. London Borough of Islington*[53] and *Eweida v. British Airways PLC*[54] (had British Airways not acceded to the request after legal

[48] See chapter 8, section 3.1.
[49] [1992] 2 SCR 970.
[50] per Sopinka J at p. 983.
[51] R. Sandberg, 'A Uniform Approach to Religious Discrimination? The Position of Teachers and Other School Staff in the UK', in M. Hunter-Henin (ed.) *Law, Religious Freedoms and Education in Europe* (Farnham: Ashgate, 2011), p. 342.
[52] [2008] IRLR 29.
[53] [2009] EWCA Civ 1357.
[54] [2010] EWCA Civ 80.

proceedings commenced). It also reveals more fully the extent to which the employers in the remaining cases offered perfectly fair partial accommodations (indeed, as *far* as their legitimate aims would allow) which were unwisely rejected by the religious employees. [55]

These results demonstrate the value of the Canadian model: in particular, they show how it might have resolved previous intractable clashes between religion and issues of sexual orientation in employment which the courts had hitherto failed to reconcile. However, the Canadian approach to proportionality (balancing policy versus practicality) would probably not have been able to assist the religious individuals or groups in the *goods and services* cases of *Hall and Preddy v. Bull and Bull* (*Bull*),[56] *R (Johns) v. Derby City Council* (*Johns*)[57] or *Catholic Care v. Charity Commission for England and Wales* (*Catholic Care*).[58] If it had, such groups and individuals would have been refusing provision of services on the basis of sexual orientation, the statutory prohibition of which was a factor across all three cases in curtailing religious liberty.[59] Further, it would have been impossible to accommodate the various religious interests 'behind the scenes' because refusal of services might have been directly communicated to the services users, a contravention of the relevant statutory prohibitions. Even if behind the scenes accommodation had been possible, there would still have been a barrier to realising religious interests. Such accommodation would have either altered the nature of the service so that the *full* requested service was no longer available (for example, in *Hall* refusing a double room to a gay couple but offering them a twin room or two singles as alternatives) or, worse, closed off the service *altogether* (for example, refusing all services in *Hall* but advising the service users to use an alternative bed and breakfast, rejecting gay children for fostering in *Johns* but suggesting a different foster family and turning

[55] The exception is *McFarlane v. Relate Avon Ltd.* [2010] EWCA Civ B1 in which both full and partial accommodations would have been difficult to implement.
[56] [2012] EWCA Civ 83. On 5th July 2012 the Supreme Court granted leave to appeal this judgment.
[57] [2011] EWHC 375 (Admin).
[58] [2011] UKFTT B1 (General Regulatory Chamber).
[59] In *Bull*, see Judge Rutherford in the Bristol County Court ([2011] EW Misc 2 (CC)) at paras. 23 – 25 and Rafferty LJ in the Court of Appeal at paras 7 – 9; in *Johns*, see Munby LJ at para. 26; in *Catholic Care* see Judge McKenna at paras. 3 – 4. As a religious group linked to a public authority Catholic Care would have especially been under a duty to provide its services without discrimination on grounds of sexual orientation (*EqA 2010, Schedule 23, para. 2(10)(a)*), whilst the couples in *Bull* and *Johns* would not have been able to claim a religious exception given that they were not an organisation relating to religion or belief.

down adoption services to same-sex couples in *Catholic Care* but providing direction as to other adoption services[60]).

These cases may be distinguished from *Scott Brockie and Imaging Excellence Inc v. Ray Brillinger (No. 2)* (*Brockie*)[61] which was a freedom of religion claim and not one where the Canadian approach to reasonable accommodation (assuming this can be used by service *providers* as opposed to service *users*) was applied. Given comments in *Re: Marriage Commissioners Appointed Under the Marriage Act*[62] on the need for reasonable accommodation *not* to compromise the full service offered it seems that *Brockie* may no longer be good law. These arguments possibly address Sandberg's query[63] as to why the Bristol County Court decision in *Hall* did not elaborate on ways in which indirect discrimination on grounds of sexual orientation could ever be justified (the Court of Appeal did not rule on indirect discrimination in *Hall*). That accommodation in the cases concerning issues of sexual orientation would have had to take place alongside provision of the *full* service should assuage concerns from trade unions and LGBT stakeholders that reasonable accommodation could 'act as a vehicle for religious people to discriminate and thereby threaten the rights of LGB and T people'.[64] The United States does not have a reasonable accommodation test in relation to goods and service provision, although in chapter eight its increasingly flexible jurisprudence on free exercise of religion claims was noted as providing a very tentative template for future courts when addressing the *de minimis* test in reasonable accommodation claims.

If Canadian reasonable accommodation was unable to provide a solution in the above goods and services cases then other solutions have emerged. Chief amongst these is Sandberg's 'religious situation' rule which reverses the 'specific situation' rule:

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[60] As was temporarily allowed under the *Equality Act (Sexual Orientation) Regulations 2007*, (SI 2007/1263), Regulation 15(3).
[61] (2002) 43 CHRR D/90.
[62] [2011] SKCA 3.
[63] R. Sandberg, 'The Right to Discriminate' (2011) 13 Ecclesiastical Law Journal 157, pp. 172 – 173.
[64] A. Donald et al, *Equality and Human Rights Commission Research Report 84: religion or belief, equality and human rights in England and Wales*, p. 32. Available at: <http://www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf >, accessed 28th August 2012, p. 65.

> [t]his would cover the situation where a non-believer voluntarily submits to a religious situation. If a non-believer enters a place of worship, faith school or religious bookstore, then surely their voluntary submission should be an answer to any claim that the religious setting breaches their Article 9 [or equality] rights. The ... rule would help ... underlin[e] the autonomy of religious groups by asserting that when someone voluntarily enters the religious realm they cannot automatically insist on secular standards.[65]

Whilst this is an interesting proposition it seems reminiscent of Rivers' idea of religious immunity and Esau's vision of 'islands of exclusivity'. Even if such an exception could be negotiated, its terms would no doubt be narrowly drawn meaning that, whilst it would achieve certainty of protection, that level of protection may be set quite high so as to include recognised religious groups such as that in *Catholic Care* but not mere religious individuals as in *Johns*.

3.4 Institutional and stakeholder imperatives

It is important to step back from legal issues of proportionality to gauge how adoption of Canadian reasonable accommodation might operate at a wider level. Certainly, proportionality as an open-textured device is liable to address issues of equilibrium concerning religion and other interests in anti-discrimination law. In applying proportionality Vickers comments that 'the courts seem happier to allow a broader territory to be permeated by religious interests'.[66] This definitely seems the experience in Canada (and to a much lesser extent the US). It is more liable to foster religious liberty given not only its greater ability to discern routes through which interests can co-exist in individual cases but also its spirit of inclusion and respect which may percolate through to pockets of society, be they workplaces or other communities. Whilst this wider policy benefit should not be overplayed it is telling that introduction of reasonable accommodation to domestic law has received support from a range of sectors.

In particular, it is possible to identify judicial enthusiasm for a model of reasonable accommodation for religion. At the UK level the classic example is Rix LJ's allusion

[65] Sandberg, above n. 24, pp. 199 – 200.
[66] Vickers, above n. 9, p. 210.

to the doctrine in *Copsey v. WWB Devon Clays*[67] where he talked of an employer 'acting unfairly if he makes no attempt to accommodate his employee's needs'.[68] This has been matched by similar calls. For example, the Council of Europe's Commissioner for Human Rights has commented that '[a]s part of the further development of this new generation of [national equality] legislation, consideration needs to be given to extending the provisions on reasonable accommodation to the other grounds covered by the legislation ... Reasonable accommodation could be further developed'.[69] The Commissioner also confirms that '[a]ll organisations should be required to make reasonable accommodation for the practical implications of diversity across all grounds covered by the [national] legislation'.[70] As if in recognition of this, two recent decisions of the European Court of Human Rights have tantalisingly aligned the *Article 9(2)* proportionality test closer to one of undue hardship. In *Jakóbski v. Poland* [71] the applicant's freedom of religion was violated because he was not provided with a meat-free diet in prison. The court sign-posted a number of factors (similar to those in *Alberta*) which influenced its decision, for example: financial costs, inmate morale and disruption to the management of the prison.[72] The same approach was taken in another recent *Article 9* case[73] concerning a prisoner's right to practise fundamental rituals of his religion in jail. Whilst the case was ultimately found to be manifestly ill-founded[74] the court discussed *Article 9(2)* and listed, once again, financial implications.[75]

At the national level, the Equality and Human Rights Commission (EHRC) has argued for reasonable accommodation in cases of religion or belief,[76] presenting a change in direction from the previous government's declaration that '[w]e are not persuaded that reasonable adjustments should be extended [from disability] ... We consider that it would be unduly burdensome and reduce clarity of employers and

[67] [2005] EWCA Civ 932.
[68] per Rix LJ at para. 71.
[69] T. Hammarberg, *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, Strasbourg, 21st March 2011, p. 5.
[70] *Ibid*., p. 9.
[71] [2010] ECtHR (No. 18429/06).
[72] At paras. 50 – 52.
[73] *Kovalkovs v. Latvia* [2012] ECHR 280.
[74] At paras. 53 – 54.
[75] At para. 64.
[76] See online announcement from 11th July 2011: <http://www.equalityhumanrights.com/news/2011/july/commission-proposes-reasonable-accommodation-for-religion-or-belief-is-needed/>, accessed 28th August 2012.

service providers were required to respond to extensive new duties in this way'.[77] This was the view notwithstanding Home Office commissioned research in 2001 which considered the role of reasonable accommodation in religious discrimination.[78] The EHRC commented that '[j]udges have interpreted the law too narrowly in religion or belief discrimination claims';[79] it now directly supports the introduction of a reasonable accommodation test, contending that '[t]he Commission thinks there is a need for clearer legal principles to help the courts consider what is and what is not justifiable in religion and belief cases, which will help resolve differences without resorting to legal action. The Commission will propose the idea of 'reasonable accommodation' that will help employers and others manage how they allow people to manifest their religion or belief'.[80] To this end, and as already seen, it is intervening in the jointly heard appeals to the European Court of Human Rights (ECtHR) in both *Ladele and McFarlane v. UK*[81] (arguing that these cases were correctly decided)[82] and *Eweida and Chaplin v. UK*[83] (arguing that these cases were wrongly decided),[84] although in September 2011 it was announced that research into reasonable accommodation would now not form part of its intervention in these cases before Strasbourg. Notably, the UK government has also submitted representations to the ECtHR in all four cases albeit supporting the most recent domestic decisions which protected the employers in those cases.

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[77] *Discrimination Law Review – A Framework for Fairness: proposals for a single Equality Bill for Great Britain* (London: Crown, 2007), p. 73.

[78] B. Hepple and T. Choudhury, *Tackling Religious Discrimination: practical implications for policy-makers and legislators* (Home Office Research Study 221, Development and Statistics Directorate, 2001). This echoes the recommendation in B. Hepple, M. Coussey and T. Choudhury, *Equality: a new framework, report of the independent review of the enforcement of UK anti-discrimination legislation* (Oxford: Hart, 2000), that any 'definition of [religious] discrimination would need to incorporate the concept of reasonable adjustments to meet religious diversity', p. 48.

[79] *Ibid*.

[80] *Ibid*.

[81] [2011] ECHR 737. *Ladele* – application number 51671/10; *McFarlane* – application number 36516/10.

[82] See the Commission's submission to the European Court of Human Rights in September 2011: <http://www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf >, accessed 28th August 2012.

[83] [2011] ECHR 738. *Eweida* – application number 48420/10; *Chaplin* – application number 59842/10.

[84] See above n. 82.

More recently, and in response to consultation feedback,[85] the EHRC has reiterated its commitment to pursuing and potentially developing a concept of reasonable accommodation in cases concerning religion in order to 'help inform [its] early thinking in this area'.[86] It also announced that it 'intend[ed] to continue the dialogue with a range of interested stakeholders to explore this idea further'.[87] Consultation responses also indicated that the Equality Commission for Northern Ireland 'is recommending the introduction of an 'anticipatory duty' to make reasonable accommodations across all equality law protected characteristics'.[88]

The momentum behind the introduction of a doctrine of reasonable accommodation was further invigorated by a recent Parliamentary report entitled 'Clearing The Ground',[89] prepared by the 'Christians in Parliament'. This extended the debate to the stakeholder sphere, the report arguing, *inter alia*, for work to be undertaken regarding the utility of reasonable accommodation for religion to 'ensure that the rights of Christians and those of other faiths to manifest their belief were not unduly restricted,'[90] although it also acknowledged that care would need to be taken in not excessively regulating 'reasonableness'.[91]An evolving process of knowledge exchange has encouraged stakeholders elsewhere to warm to the advantages of reasonable accommodation, particularly in light of the more prescriptive approach it affords regarding proportionality factors. Recently, the ability of reasonable accommodation to lead to more religiously plural environments such as the workplace have been welcomed by such stakeholders who have debated that useful reasonable accommodation factors would include cost, health and safety and impact on colleagues.[92] These bear obvious resemblance to those factors outlined in *Alberta*.

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[85] See the Commission's Consultation Response Summary: <http://www.equalityhumanrights.com/uploaded_files/legal/consultation_response_summary.pdf>, accessed 28th August 2012.

[86] See online news announcement, 'Legal Intervention on Religion of Belief Rights': <http://www.equalityhumanrights.com/legal-and-policy/human-rights-legal-powers/legal-intervention-on-religion-or-belief-rights/ >, accessed 28th August 2012.

[87] *Ibid*.

[88] Equality and Human Rights Commission, 'Consultation response summary - legal intervention on religion or belief rights: seeking your views', p. 5.

[89] 'Clearing the Ground: preliminary report into the freedom of Christians in the UK', Christians in Parliament, February 2012. See: <http://www.eauk.org/current-affairs/publications/clearing-the-ground.cfm>, accessed 9th September 2012.

[90] *Ibid*., p. 35.

[91] *Ibid*.

[92] Donald et al, above n. 64,p. 66.

4. FINAL REMARKS

Adoption of Canadian reasonable accommodation in domestic anti-discrimination law would help facilitate better judicial engagement with individual religious interests as balanced with competing factors. This would certainly occur at the level of employment; until there is more case law generated it is unclear how useful it would be in the provision of goods and services. Nevertheless, when applied it has the potential – via an innovative proportionality analysis – to address individual grievances to a greater level of analysis than the current test of justification in indirect discrimination. This is likely to result in a more equitable balancing of religious claims as against others. At a philosophical and theoretical level it would also be founded upon similar principles to those which justify other forms of special protection for religion, in particular religious exceptions.

Moreover, it is potentially able to make a contribution to ways in which individual believers and stakeholders can signal to society at large that religion or belief is not only an individual characteristic that can be protected more equally in law, but also something which has more fundamental meaning in the realisation of religious liberty and group identity as a whole. Even if this latter contribution is modest, it highlights the role that reasonable accommodation could play in securing a more even footing for religious liberty in the courts and wider society. When considered against the backdrop of religious liberty evolution in the UK, reasonable accommodation may present a fresh perspective in the legal acknowledgement of religious interests.

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