

ACCOMMODATING RELIGIOUS BELIEF IN A SECULAR AGE: THE ISSUE OF CONSCIENTIOUS OBJECTION IN THE WORKPLACE

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I INTRODUCTION

A The Western Legal Tradition and Christian Faith

There was once a time when aspects of the Christian faith were firmly enshrined in the legal systems of countries that share in, or have inherited, a Western legal tradition.¹ Judaeo-Christian thought was to the formation of the Western legal tradition as the womb is to human life.² The history of Western law cannot be understood in isolation from religious influences, for at every level of society, and in every aspect of social and political life, these influences were pervasive.³ When Roman law was revived in the 11th and 12th centuries, the methodology which was used to study the Roman law texts was the same methodology of scholasticism – derived from Greek dialectical reasoning – which was used to explain, harmonise, and reconcile the Scriptures.⁴ Furthermore, the Christian theology of revelation was married with the Roman and Greek ideas of natural law to form the intellectual underpinnings of the medieval legal system.⁵ Religious ideas also influenced the content of both the civil law in Europe and the common law in various ways, especially through

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1 These are the countries in Europe, North America, and beyond with a shared heritage derived from Greek, Roman, and Judaeo-Christian thought. For the characteristics and origins of the Western legal tradition, see Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); Geoffrey Sawer, 'The Western Conception of Law' in René David (ed), *International Encyclopedia of Comparative Law* (Mouton and J C B Mohr (Paul Siebeck), 1975) vol 2, 14, 45.

2 Patrick Parkinson, *Tradition and Change in Australian Law* (Lawbook, 4th ed, 2010) 29.

3 Harold J Berman, *The Interaction of Law and Religion* (SCM Press, 1974).

4 Berman, above n 1; David S Clark, 'The Medieval Origins of Modern Legal Education: Between Church and State' (1987) 35 *American Journal of Comparative Law* 653; Alan Watson, *The Making of the Civil Law* (Harvard University Press, 1981).

5 J M Kelly, *A Short History of Western Legal Theory* (Clarendon Press, 1992); Stig Strömholm, *A Short History of Legal Thinking in the West* (Norstedts, 1985).

canon law.⁶ While many vestiges of that Christian influence remain within the common law world, there is a widespread consensus now that the law is, and should be, secular. What then is the place of Christianity within that legal tradition in a post-Christian age? What is the place of religion within a secular legal system?⁷

It might be thought that these are just variants of the same question. Yet they are profoundly different questions, and it is the equation of the first with the second that has led to some confusion about issues when faith and secular society conflict. These questions have recently been litigated in Britain amidst significant controversy,⁸ with warnings by a former Archbishop of Canterbury about the prospects of civil unrest if a proper balance is not found between competing interests.⁹ Similar issues will no doubt arise in Australia,¹⁰ and consideration of how to accommodate religious belief in a secular age is therefore of considerable importance.

B Religion and Same-Sex Relationships

The two British cases examined in this article, the facts of which are difficult to distinguish, both involved conscientious objection to providing professional services for gay and lesbian couples.¹¹ In the first, *Islington London Borough Council v Ladele*,¹² the issue was celebrating civil partnerships. In the second, *McFarlane*,¹³ the case concerned a sex therapist who did not want to provide psycho-sexual therapy to gay and lesbian couples. In deciding the case of *McFarlane* in the Court of Appeal, Laws LJ took the opportunity to make wide-ranging statements about the relationship between religion and law.

The issue of objection to homosexual practice is, of course, a highly sensitive and difficult one. The issue arises in the context of rapid social change concerning the acceptance of gay and lesbian relationships, and declining tolerance for those who find it difficult to give those relationships unqualified acceptance.

6 Thomas Glyn Watkin, *An Historical Introduction to Modern Civil Law* (Ashgate Publishing, 1999); Ellen Goodman, *The Origins of the Western Legal Tradition: From Thales to the Tudors* (Federation Press, 1995) 225.

7 A 'secular' legal system is one which relies upon reason, and not religious doctrine, as the justification for laws.

8 For websites devoted to religious liberty issues see, eg, Christian Institute, *News: Religious Liberty* <<http://www.christian.org.uk/religious-liberty/>>; Christian Concern, *Our Concerns: Religious Freedom* <<http://www.christianconcern.com/our-concerns/religious-freedom>>.

9 The witness statement is cited in *McFarlane v Relate Avon Ltd* [2010] IRLR 872, [16]–[17] (Laws LJ) ('*McFarlane*'). The statement is discussed further below.

10 For Australian websites devoted to religious liberty issues see, eg, Australian Evangelical Alliance Inc, *Religious Liberty* <<http://www.ea.org.au/ea-family/Religious-Liberty.aspx>>; Free2Believe <<http://www.free2believe.org.au/>>.

11 Other recent cases also raise similar issues: see, eg, *McClintock v Department of Constitutional Affairs* [2007] UKEAT 0223/07 (31 October 2007) (Magistrate seeking exemption from hearing same-sex adoption cases); *Hall v Bull* [2011] EW Misc 2 (CC) (4 January 2011) (Christian hotel confining double beds to married couples).

12 [2010] 1 WLR 955 ('*Ladele*').

13 [2010] IRLR 872.

There can be little doubt that the tide of public opinion has changed concerning same-sex relationships, but even now there are many in the community who genuinely have a problem with them. For some, the problem is based upon religious beliefs; for others it reflects the values of their family of origin or cultural milieu. Only 50 years ago, disapproval of homosexuality represented the moral orthodoxy.¹⁴ The world's great religions have traditionally taught a disciplined sexual ethic that has not included acceptance of same-sex relationships. Indeed, complete acceptance of homosexual practice is largely confined to secular Western societies.

In traditional Christian belief, affirmed both by the Catholic Church¹⁵ and, typically, by evangelical and pentecostal churches,¹⁶ homosexual acts are regarded as inconsistent with Christian moral conduct. Although often the issues are presented as being about discrimination on the grounds of sexual orientation, in traditional Christian teaching, homosexual orientation is no more of an issue than heterosexual orientation. Christian teaching on sexual ethics is concerned only with sexual acts, not inclinations. For example, Catholic Church teaching calls for respect, compassion, and sensitivity towards those with homosexual inclinations, and is opposed to any discrimination on the grounds of sexual orientation.¹⁷

However, within the Christian churches, there is no longer a uniform position on homosexual practice. Christians also differ on the extent to which they see their moral views as relevant to those who do not purport to live by the teachings of Christ. One might, for example, adopt a particular sexual ethic for oneself, while holding to the view that sexual morality is entirely a matter of personal belief and choice.¹⁸

The two British cases involved people who held beliefs, based upon their Christian faith, that caused them difficulties in providing particular kinds of services to same-sex couples in the course of their work. Should any

14 As Rutherford J observed in *Hall v Bull* [2011] EW Misc 2 (CC) (31 October 2007): 'The standards and principles governing our behaviour which were unquestioningly accepted in one generation may not be so accepted in the next': [7].

15 The Vatican, *Catechism of the Catholic Church* (2003) [2357], <http://www.vatican.va/archive/ENG0015/_INDEX.HTM>.

16 See, eg, R White, 'Homosexuality' in Walter A Elwell (ed) *The Concise Evangelical Dictionary of Theology* (Baker, 1991) 232–3.

17 The Vatican, above n 15, [2358]:

The number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

18 For evidence of a variety of approaches to these issues in religiously-based schools, see Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392.

accommodation be made for such beliefs and views and, if so, under what circumstances?¹⁹

II RELIGIOUS BELIEF, SEXUALITY AND THE PROVISION OF SERVICES

A *Ladele*

Ms Lillian Ladele, a committed Christian, was threatened with dismissal after more than 15 years of service with the London Borough of Islington ('Islington'), as a result of refusing to conduct civil partnership ceremonies for same-sex couples, thus breaching the Council's 'Dignity for All' policy. She had been employed by Islington since 1992 and became a Registrar of Births, Deaths and Marriages in 2002. Registrars in Britain conduct civil marriage ceremonies for those who do not want a wedding celebrated in accordance with a religious tradition.²⁰

The *Civil Partnerships Act 2004* (UK), which provided for same-sex couples a status equivalent to marriage, was passed in 2004 but did not come into force until December 2005. The legislation provided that registrars would conduct ceremonies to mark the registration of civil partnerships but did not automatically authorise all existing registrars to perform such functions. Instead, it was necessary for local authorities specifically to designate a registrar as a civil partnership registrar.

Ms Ladele made it clear that, because she saw a civil partnership as akin to marriage,²¹ she would have difficulty performing such ceremonies. There was no evidence that she discriminated against gays and lesbians in any other respect. She had no problem providing other services for lesbian, gay, bisexual, and transgender ('LGBT') clients. There were two other registrars who also objected to carrying out these duties. Despite knowing the genuinely-held religious objections of these individuals, Islington decided to designate all the existing registrars as registrars of civil partnerships and to require them to perform these functions as part of their normal duties.

For a short time, solutions were found that avoided a direct clash between the Council and the religious beliefs of the objecting registrars. One accepted an offer of different employment on the same pay, while another, a Muslim woman, left the Council's employment.

19 This issue is just one aspect of a larger question about the accommodation of conscientious objection in the workplace. For a range of national perspectives, see the special issue in volume 31(3) of the *Comparative Labor Law & Policy Journal* (Spring 2010).

20 The facts of this case are taken from the judgment of the Employment Appeals Tribunal: *Islington London Borough Council v Ladele* [2009] ICR 387.

21 There are in fact a few minor differences between civil partnerships and civil marriage in terms of the legislation. See Russell Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal* 157, 164–6.

Ms Ladele was offered the option, at one stage, of dealing simply with the signing process where a same-sex couple did not want a ceremony. However, this compromise, which had been acceptable to a Muslim colleague in another borough, was only offered as a temporary solution; Ms Ladele was warned that continuing to refuse to perform functions associated with civil partnerships could be treated as gross misconduct. Ms Ladele responded to this in a letter, emphasising that she was placed in a dilemma by being required to choose between honouring her faith and acceding to the demands of the Council. She asked the Council to try to accommodate her concerns so that she could combine her work with her Christian commitments. She also asked for sympathetic treatment as a member of a minority.²²

Ms Ladele was able for a while to swap rosters in order to avoid the problem, but relationships with colleagues became increasingly tense. Two gay registrars objected to her stance. She claimed harassment and discrimination by colleagues; the gay members complained that it was they who were being discriminated against by her views. They felt 'victimised'. The Council responded very sympathetically to the gay members' complaints, communicating matters to them that breached the Council's obligations of confidentiality towards Ms Ladele. It took no action to respond to Ms Ladele's complaints.

At the time, Ms Ladele was a statutory officer who held office during the pleasure of the Registrar-General under the *Registration Services Act 1953* (UK). Civil partnerships were not part of her original duties and not part of her contract of employment. The Council was advised that, for that reason, they could not take action against her. However, the position changed from 1 December 2007, when she became an employee of Islington pursuant to the provisions of the *Statistics and Registration Service Act 2007* (UK). Prior to this, she was warned that her refusal to celebrate civil partnerships was in breach of the Council's 'Dignity for All' policy and that, once it was in a position to do so, the Council would take disciplinary action against her which could ultimately lead to her dismissal. Eventually, Ms Ladele was held to have been guilty of 'gross misconduct' in a disciplinary hearing.

B *McFarlane*

The case of Gary McFarlane involved similar issues.²³ He made a complaint of wrongful dismissal against Relate Avon Ltd ('Relate'), an organisation which provides relationship counselling services. McFarlane is a former elder of a large multicultural church in Bristol. In 2003, he was employed by Relate as a counsellor. Initially, he worked in marital and couples counselling. While such counselling might cover sexual issues, it was not intended to deal with situations of specific sexual dysfunction or disorder. He counselled lesbian couples on a few occasions in this role, although he initially expressed some disquiet about

22 Ms Ladele is of black African ethnicity.

23 The facts of this case are taken from the judgment of the Employment Appeals Tribunal: *McFarlane v Relate Avon Ltd* [2010] ICR 507.

doing so because he believes, on the basis of Biblical teaching, that homosexual activity is sinful.

Subsequently, he decided to train in psycho-sexual therapy, which created the potential for a much greater degree of conflict with his Christian beliefs than was involved in general couples counselling. He sought to be exempted from offering this kind of therapy to same-sex couples, although he was quite prepared to continue offering general relationship counselling to same-sex couples.

Relate took the view that this request placed him in conflict with the organisation's equal opportunities policy, by which Relate was committed to ensuring that no person receives less favourable treatment on the basis of personal or group characteristics, including sexual orientation. Disciplinary action ensued and while Mr McFarlane did appear to indicate that he could and would provide psycho-sexual therapy to same-sex couples, the organisation formed a view, on the basis of a conversation between Mr McFarlane and his supervisor a few days later, that he did not in fact intend to comply. As a consequence, he was summarily dismissed for 'gross misconduct'.

C The Cases in the Employment Tribunal and Courts

The end result in both cases was that the employees lost their jobs, and complaints of discrimination on grounds of religious belief were rejected by the courts. While Ms Ladele's complaints of discrimination were initially upheld by the Employment Tribunal, these findings were overturned on appeal. The dismissal of her case was confirmed by the Court of Appeal.

The Court of Appeal affirmed the view of Elias P, giving judgment for the Employment Appeals Tribunal ('EAT'), that there was no direct discrimination. As Elias P wrote:

[Ms Ladele's] starting point is that she was directly discriminated against because of her religious beliefs when she was required to undertake civil partnership duties. ... The claimant's complaint on this score is not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been. The council refused to make an exception of her because of her religious convictions. That is a complaint about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference. The council has been blind to her religion, and she submits that they ought not to have been.²⁴

The Court of Appeal also affirmed the EAT in rejecting the claim of indirect discrimination. Lord Neuberger MR, with whom Dyson and Smith LLJ agreed, commented on this:

24 *Islington London Borough Council v Ladele* [2009] ICR 387, 401 [51]–[52].

There is no doubt but that Islington's policy decisions to designate all their registrars civil partnership registrars, and then to require all registrars to perform civil partnerships, put a person such as Ms Ladele, who believed that civil partnerships were contrary to the will of God, 'at a particular disadvantage when compared with other persons', namely those who did not have that belief. Accordingly ... the issue to be determined is whether Islington can show that these policy decisions represented 'a proportionate means of achieving a legitimate aim'.²⁵

Lord Neuberger MR agreed with the EAT that the Council's aim was not merely to provide an efficient system of registering civil partnerships. If that had been the issue, then there ought to have been no difficulty in accommodating the objections of just one registrar. Rather, he identified the Council's aim as being to ensure that none of its employees act in a way which discriminates against others. That was clearly a legitimate aim and, he considered, requiring all registrars to celebrate civil partnerships was a proportionate means of achieving it. For Lord Neuberger MR, this did not involve interference with Ms Ladele's religious beliefs: 'she remained free to hold those beliefs, and free to worship as she wished'.²⁶ He concluded his examination of the issue of religious discrimination by stating:

Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's 'Dignity for All' policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.²⁷

Lord Neuberger MR went on to hold that the jurisprudence on Article 9 of the European Convention on Human Rights ('ECHR') which guarantees freedom of thought, conscience, and religion, did not support the position that Ms Ladele's desire to have her religious views respected should be allowed 'to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community'.²⁸

In *McFarlane*, very similar arguments were canvassed. Mr McFarlane was clearly treated no differently from anyone else who felt unable to comply with the organisation's equal opportunities policy. In relation to indirect discrimination, the Employment Tribunal identified the legitimate aim as being 'the provision of a full range of counselling services to all sections of the community regardless ... of their sexual orientation'.²⁹ It held that dismissing Mr McFarlane was a proportionate means of pursuing that legitimate aim. In

25 *Ladele* [2010] 1 WLR 955, 967 [43].

26 *Ibid* 970 [51].

27 *Ibid* 970 [52].

28 *Ibid* 970 [55].

29 *McFarlane v Relate Avon Ltd* [2010] ICR 507, 518 [24].

reaching affirming these conclusions, the EAT applied its own earlier decision in *Ladele*.

The Court of Appeal refused permission for leave to appeal on the papers in January 2010, but lawyers for Mr McFarlane sought to canvas the issues again in a renewed application for permission that came before Laws LJ in April 2010. That application was supported by a witness statement from Lord Carey, a former Archbishop of Canterbury. Lord Carey expressed his dismay that holding to traditional Christian beliefs concerning sexual morality should be regarded as discriminatory. He wrote:

The description of religious faith in relation to sexual ethics as ‘*discriminatory*’ is crude; and illuminates a lack of sensitivity to religious belief . . . The vast majority of the more than 2 billion Christians would support the views held by Ms Ladele. The descriptive word ‘*discriminatory*’ is unbecoming.³⁰

Referring to other decisions of the Court of Appeal, Lord Carey went on to say:

This type of ‘reasoning’ is dangerous to the social order and represents clear animus to Christian beliefs. The fact that senior clerics of the Church of England and other faiths feel compelled to intervene directly in judicial decisions and cases is illuminative of a future civil unrest.³¹

Lord Justice Laws devoted a substantial portion of the judgment in *McFarlane* to a response to this witness statement. He stated that he did so because of Lord Carey’s seniority in the Church and because others might share his views.³²

D Lord Justice Laws and Lord Carey’s Intervention

One of Lord Carey’s concerns was what he perceived to be the pejorative meaning of the word ‘discrimination’ as being applied to people who simply want to affirm traditional Christian teaching on sexual ethics. Lord Justice Laws explained in response to this³³ that the legal meaning of saying something is ‘discriminatory’ is not pejorative. The law forbids discriminatory conduct not by reference to the actor’s *motives*, but by reference to the *outcome* of those acts or omissions. To describe conduct as discriminatory therefore says nothing about the motives for that discrimination, and indeed such discrimination may be justified. It follows that it is a non sequitur to condemn conduct as disreputable or bigoted just because it is discriminatory.

30 Extracts from the witness statement are given in Lord Justice Laws’ judgment: *McFarlane v Relate Avon Ltd* [2010] IRLR 872, [16]–[17].

31 *Ibid* [17]. Lord Carey concluded his witness statement by calling for a special panel of five judges to hear the *McFarlane* appeal and to reconsider *Ladele*. He also called for a specialist panel of judges, who have a proven sensitivity and understanding of religious issues, to be designated to hear cases concerning religious rights. Clearly, a call for an appellate bench to be appointed on the basis of criteria specific to the issues arising in a particular appeal could not be accepted. Any request of this kind is open to the interpretation that a litigant is seeking to empanel a bench of judges who are sympathetic to its position.

32 *Ibid* [16].

33 *Ibid* [19].

He went on to engage in a wide-ranging discussion of religion and law. He characterised Lord Carey's deeper concerns as being that 'the courts ought to be more sympathetic to the substance of the Christian beliefs ... than appears to be the case, and should be readier than they are to uphold and defend them'.³⁴ In response to this, Laws LJ emphasised properly that the law could not give effect to particular religious beliefs for no reason other than that they were religious beliefs. He stated:

In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. ... The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law: the prohibition of violence and dishonesty. The Judaeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy. And the liturgy and practice of the established Church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled.³⁵

He continued by saying that the promulgation of law for the protection of a position held purely on religious grounds could not be justified. It was irrational, divisive, capricious, and arbitrary, and 'our constitution would be on the way to a theocracy, which is of necessity autocratic'.³⁶ He wrote that 'the state, if its people are to be free, has the burdensome duty of thinking for itself'.³⁷

That statement, strongly expressed as it was, is entirely unexceptionable. However, it responded to an argument that Lord Carey did not make. He did not assert that the law should give effect to Christian beliefs, thereby establishing a theocratic form of government. His concern, essentially, was that the courts were insensitive to Christian beliefs, displayed ignorance of them and showed antipathy towards them. In the context of the *Ladele* and *McFarlane* cases, the argument was that the courts had not paid sufficient regard to the claims based upon religious belief when balancing those rights with other rights. This concern has been frequently expressed.³⁸ Indeed, at the beginning of 2011, it was a view supported publicly by the former Lord Chief Justice, Lord Woolf.³⁹

34 Ibid [21].

35 Ibid [22]–[23].

36 Ibid [24].

37 Ibid.

38 See, eg, the comments of Professor Julian Rivers:

'[A] new moral establishment is developing, which is being imposed by law on dissenters. Those filling public offices are well advised to avoid challenging it, and even the most measured and reasoned public questioning of its truth can trigger formal investigations. This new orthodoxy masks itself in the language of equality, thus refusing to discuss its premises and refusing to articulate its conception of the good. ... Churches and religious associations find themselves boxed in by its obligations, benefiting only from narrowly drafted exceptions narrowly interpreted by an unsympathetic judiciary.'

Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 *Ecclesiastical Law Journal* 24, 52.

Lord Carey's concern about judicial decisions was part of a broader concern about what he perceived as discrimination against Christians in modern British society. In a letter to the *Sunday Telegraph* in March 2010, Lord Carey, together with five other former or serving Bishops of the Church of England, wrote:

We are deeply concerned at the apparent discrimination shown against Christians and we call on the Government to remedy this serious development. In a number of cases, Christian beliefs on marriage, conscience and worship are simply not being upheld. There have been numerous dismissals of practising Christians from employment for reasons that are unacceptable in a civilised country.⁴⁰

Lord Justice Laws did not address these concerns. Instead, he answered the question of the place of Christianity within the legal tradition of a post-Christian age by affirming that, despite the historical contribution Christianity has made to that tradition, its beliefs and values should not be enshrined in law to govern the lives of non-believers for no reason other than that it is a Christian belief. In a multicultural and diverse society, it is hard to imagine anyone arguing to the contrary.⁴¹ Laws which govern the people generally must be justified on some basis other than subjective belief.

However, that does not answer the different question of the place of religion within the legal system of a secular society in the context of the issues that arose in *Ladele* and *McFarlane*. What Ms Ladele sought was not that her views on same-sex civil partnerships should become the law of the country, but that her personal and conscientious objection to celebrating civil partnerships based upon a devout and sincere belief should be respected by her employer and by the law. What she wanted was some reasonable accommodation for her religious beliefs in a secular age, a claim that was reasonably based upon respect for her human rights. In legal terms, it was an accommodation that could have been provided by a more sympathetic interpretation of the proportionality requirement in relation to indirect discrimination.⁴²

Lord Justice Laws, in a forthright judgment condemning an argument that had never been advanced, spectacularly missed the point.

See also Christopher McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 *Ecclesiastical Law Journal* 26, 31–2; Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 *Ecclesiastical Law Journal* 280.

39 See Christian Legal Centre, *Former Lord Chief Justice Comments on Anti-Christian Laws* (5 January 2011) <<http://www.christianlegalcentre.com/view.php?id=1225>>.

40 Lord Carey et al, 'The Religious Rights of Christians Are Treated with Disrespect' *The Telegraph* (London) (28 March 2010) <<http://www.telegraph.co.uk/comment/letters/7528487/The-religious-rights-of-Christians-are-treated-with-disrespect.html>>.

41 In *R (Johns) v Derby City Council* [2011] EWHC 375 (Admin) (28 February 2011) ('*R (Johns)*'), Munby LJ and Beatson J affirmed their agreement with the reasoning of Laws LJ on this issue: at [88].

42 Another approach to achieve this is legislative reform. In the US context, it has been argued that legislation concerning same-sex marriage should include a Marriage Conscience Protection clause: Robin Fretwell Wilson, 'Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws' (2010) 5 *Northwestern Journal of Law and Social Policy* 318.

III ACCOMMODATING MINORITY RELIGIOUS BELIEFS

There can be no doubt that both Islington and Relate had to make sure that their respective services were offered without discrimination. Both organisations had a very strong commitment to doing so in any event, and that commitment was supported both in law and public policy. Yet that stance could have been maintained and affirmed while respecting the conscientious objection of the individuals concerned.

There were really two issues for the courts in terms of proportionality. The first concerns an external aspect – the role of the organisation in providing goods and services to the general public. Was insisting that all staff perform the relevant service a proportionate means of ensuring – quite properly – that no member of the public is discriminated against in the provision of services?

To put the logistical issues concerning civil partnerships into perspective, in 2008 there were 7169 civil partnerships entered into in the United Kingdom.⁴³ There were 156 290 civil marriages.⁴⁴ Civil partnerships therefore represented nationally less than 5 per cent of the total workload for civil celebrants.⁴⁵ In 2009, civil partnerships declined by 12 per cent to 6281,⁴⁶ and this is a trend which is likely to continue as most of those who have had long-standing same-sex relationships that pre-date the introduction of the law have either entered into a civil partnership or decided not to do so. There is some evidence for this in the age profile of new civil partners. In 2009, the average age of men entering civil partnerships was 41 and 39 for women⁴⁷ – approximately ten years older than for men and women entering first marriages and about five years older than for men and women entering all marriages, including remarriages for one or both partners.⁴⁸

The demand for counselling services for same-sex couples in a general community service is also likely to be modest in comparison to the level of demand for heterosexual couples. The largest study ever conducted in Britain recently found that only 0.9 per cent of the population identified as lesbian or gay, and a further 0.5 per cent as bisexual.⁴⁹ The position is quite similar in Australia. According to the 2006 Census, 0.4 per cent of adults are in a same-sex relationship, although that might be an underestimate.⁵⁰ Other data from the

43 Office for National Statistics, 'Civil Partnerships in the UK: 2009' (Statistical Bulletin, 19 August 2010) 2.

44 Office for National Statistics, 'Marriages in England and Wales: 2008' (Statistical Bulletin, 11 February 2010) 2.

45 Combining civil marriages with civil partnerships in 2008, there were 163 459 such unions, and civil partnerships represent about 4.4% of the total.

46 Office for National Statistics, 'Civil Partnerships in the UK: 2009', above n 43, 2.

47 Ibid.

48 Office for National Statistics, 'Marriages in England and Wales: 2008', above n 44, 2.

49 Theodore Joloza et al, *Measuring Sexual Identity: An Evaluation Report – September 2010* (Office for National Statistics, 2010) 10. The findings were based on a survey of 238 206 respondents in 2009-10.

50 Australian Bureau of Statistics, *Australian Social Trends, March 2009: Couples in Australia* (23 December 2009)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009>>.

Australian Study of Health and Relationships indicates that of all couples living in the same household and aged 16-59, 1.3 per cent are male same-sex couples and 0.9 per cent are female same-sex couples.⁵¹

Given the small proportion of gay and lesbian clients to whom a service needed to be offered, it would have been entirely reasonable for the courts, both in *Ladele* and *McFarlane*, to hold that insisting that all employees had to be available to provide a service to such a small minority was a disproportionate means of fulfilling the objective of ensuring non-discrimination in the provision of services. There would have been no significant difficulties in terms of staffing and rostering involved in accommodating the small number of conscientious objectors, and indeed Lord Neuberger MR recognised this.⁵²

The second issue in terms of proportionality concerns an internal aspect: the effect of allowing conscientious objection on the life of the organisation. This was the issue on which Lord Neuberger MR focussed in *Ladele*. For the organisation, refusing to accommodate the deeply held, bona fide religious objections of a small number of staff might well be seen as an issue of principle – as it was in these cases. As an internal issue, consideration also had to be given to the feelings of other members of staff. Certainly, other colleagues may have felt uncomfortable about accommodation being made for religious objectors; in particular, gay colleagues may have felt that recognition of that objection would cause them symbolic harm.

However, it was open to the courts to hold that the stance adopted by these organisations failed to properly balance the competing human rights. Balancing competing rights requires an exploration of the middle ground between the different claims. That middle ground was available. Both Ms Ladele and Mr McFarlane had agreed to perform various services for gay and lesbian clients, and both had in fact done so. They had a conscience-based objection only to performing a particular professional role, while having no objection at all to colleagues doing so. That is, both of them appear to have recognised the competing human rights involved and proposed reasonable options for balancing them. That recognition that there were competing rights, both of which deserved respect, does not appear to have been shared by the courts.

It would be unreasonable, nonetheless, to be too critical of the English courts. They had to adjudicate on a dispute that ought to have been avoided in the first place, and they had to interpret English law in the light of a jurisprudence on religious freedom under the ECHR that has shown little recognition of conscience-based claims in the workplace.

A The Missed Pathways to Peace

Neither of these conflicts were inevitable. Both could have been resolved in a way that took account of the legitimate concerns of the employers and their staff,

51 David de Vaus, *Diversity and Change in Australian Families: Statistical Profiles* (Australian Institute of Family Studies, 2004) 83.

52 *Ladele* [2010] 1 WLR 955, 968 [44].

while demonstrating appropriate respect for the conscientious objections of the individuals at the centre of these disputes.

In relation to the *Ladele* case, the EAT observed that in other regions accommodation had been made to allow those with strong religious beliefs not to have to carry out civil partnership duties.⁵³ Because the legislation allowed for local authorities to decide who should be designated for civil partnership services, it was simple enough to exclude individuals who might have felt uncomfortable with it. Islington could have done this without administrative difficulties. The decision to designate all existing registrars to celebrate civil partnerships created a conflict that could have been avoided if the Council had shown proper respect for Ms Ladele's genuinely-held religious beliefs.

The case of Ms Ladele was a particularly appropriate one for a respectful compromise because she had come to the position at a time when celebrating civil partnerships was not part of her job description at all. The nature of the job changed subsequently as a result of a unilateral determination by her employer to which she objected. It was not a situation where she came to a job which would cause her difficulties and then sought to be exempted from part of her duties on religious grounds. In similar circumstances to Ms Ladele's, a claim to conscientious objection has been recognised in the Netherlands.⁵⁴

Mr McFarlane's case was different. He did come to a job where he signed, and was bound by, the organisation's equal opportunities policy, and he complied with that policy in relation to general couples counselling. His decision to train in psycho-sexual therapy placed him in a situation where the issues involved in counselling same-sex couples were likely to be more confronting. From a legal perspective, his case seems much weaker than Ms Ladele's given the existing jurisprudence on freedom of religion and conscience under Article 9 of the ECHR. As Lord Bingham said in *R (SB) v Governors of Denbigh High School*:

The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or inconvenience.⁵⁵

Yet in this case also, there may have been missed pathways for peace. He might, for example, have been allowed to go back to general couples counselling.

In both cases, it would have been both possible and legitimate to have characterised the issue as a problem involving something other than discrimination on the basis of sexual orientation. If a celebrant has a genuine discomfort with celebrating a civil partnership, he or she might not perform the job with the cheerfulness befitting the occasion. Even if the registrar acted with complete professionalism and hid any negative feelings about the matter, the same-sex couple might well have concerns about having their ceremony assigned

53 *Islington London Borough Council v Ladele* [2009] ICR 387, 393 [23].

54 Wilson, above n 42, 324.

55 [2007] 1 AC 100, 112 [22].

to that registrar if it became known (as it might well do in the local LGBT community) that the registrar is uncomfortable with the idea of civil partnerships.

Similarly, it is possible to imagine that a heterosexual sex therapist who disapproves of homosexual activity would not make a very good counsellor for same-sex couples. Indeed, beyond formal professional training, he or she may not feel well qualified to provide sex therapy to same-sex couples, in the same way that single and celibate priests may find themselves limited in their capacity to provide marriage counselling.

Managers in workplaces everywhere have to deal with the fact that, whatever the formal job description may be, individuals have strengths and weaknesses, aptitudes towards one aspect of a role and difficulties with another. As long as overall performance in a position is satisfactory, it is possible, and usually very sensible, to accommodate individual difficulties with particular tasks. Conversely, good managers may allocate tasks across a workforce in such a way that proper recognition is given to particular aptitudes and to take advantage of those strengths.

Characterisation involves choices. Consider, for example, a marriage celebrant whose maternal grandparents and other relatives were murdered in Auschwitz. Try as she might, she harbours negative feelings towards anyone who is German and asks to be excused from celebrating marriages involving Germans. If she were working in Munich, that would be a problem, but it would probably involve very little inconvenience to her employer if she worked in Manchester or Melbourne. An employer could choose to condemn the marriage celebrant's attitude as racial discrimination or accommodate it with the recognition that she would not be able to perform her job to the expected standard in the very small number of cases which might involve German participants.

The employers in each case could have chosen to characterise the issue as one of aptitude and suitability to perform a service which forms a very small part of the workload of the organisation and where those services could readily have been performed by many others. Both employers chose instead to characterise the issue as one of 'misconduct' and to confront rather than to accommodate.

B The Problem of Moral Monoculturalism

The law has to provide a framework for those who, for whatever reason, do not take the pathways to peace, who do not search out the reasonable compromises that can offer dignity to all. Too often, in the conflict between religious rights and the rights of LGBT people, the dispute is treated as a zero-sum game in which there is no room to live and let live, to agree to differ. On both sides, there can be fixed positions based upon irreconcilable claims to rights, rather than sensible compromise and accommodation.

One reason why these disputes end up as win-lose conflicts is because of an emerging policy of moral monoculturalism. The positions of *Islington* and *Relate* came very close to denying to their employees the right to hold moral positions on the issue of same-sex relationships that differed from the majority acceptance of them. That seems to be what was behind the unwillingness to find solutions

that would resolve the conflict. There is a similar dynamic of moral monoculturalism in recommendations for laws that will prohibit people from expressing even moderate and reasoned views about homosexuality for no other reason than that others find those views offensive.⁵⁶

This threatens, ultimately, to undermine the level of acceptance which has rightly been given to same-sex relationships. Australia, like all Western democracies, has engaged in a process over many years of first decriminalising homosexual practice and then gradually eliminating all differential treatment of homosexual couples.⁵⁷ These reforms to the law, together with prohibitions on discrimination against homosexuals, have been very important in creating a fairer and more tolerant society. Yet the movement to recognise and respect LGBT rights can turn into intolerance and oppression of a different kind if the new majority does not offer a reciprocal level of respect to those who hold different beliefs.⁵⁸

It need not be this way. Indeed, advocates for gay and lesbian rights have recognised the dangers in refusing to accommodate and respect the position of conscientious objectors. Professor Carl Stychin, for example, has written:

While the courts may rightly hold that the ability to act on one's religious beliefs is necessarily limited by the rights of others, it may well be that accommodation and tolerance have much to offer as a political strategy and a normative aspiration. Compromise and dialogue within a communitarian rights culture, it seems to me, have much to recommend them, as opposed to the 'winner take all' adversarial approach.⁵⁹

56 See, eg, in Victoria, the proposals of the Joint Working Group of the Attorney-General's and Health Minister's Advisory Committees on Gay, Lesbian, Bisexual, Transgender, and Intersex (GLBTI) Issues ('Joint Working Group'), which recommended that it should be 'unlawful to harass another person on the basis of their sexual orientation or gender identity'. It recommended defining 'harassment' as 'conduct that offends, humiliates, intimidates, insults or ridicules': Bronwen Gray, William Leonard and Marissa Jack, 'With Respect: A Strategy for Reducing Homophobic Harassment in Victoria' (Discussion Paper, 2009) 45–6. Harassment could be constituted by a single act. In the view of the Joint Working Group, there should be no exemption for the expression of views that a gay or lesbian person might reasonably find offensive even when it is an expression of religious teaching or a point of view about sexual morality.

57 See, eg, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth).

58 See, eg, the issue of policing 'hate speech' in Britain. Professor Ian Leigh has written:
[A]pplying a widely drawn Code of Practice, the police are now regularly responding to alleged homophobic 'hate incidents' where the harm involves no more than the public expression of disapproval of homosexual conduct, regardless of whether or not an offence might have been committed. On this basis, police investigations were launched following complaints from members of the public against the Anglican Bishop of Chester, the Secretary-General of the Muslim Council of Great Britain for broadcast remarks disapproving of homosexual conduct, and the Roman Catholic Archbishop of Glasgow for comments in a sermon observing that civil partnerships undermined the institution of marriage.

Ian Leigh, 'Hatred, Sexual Orientation, Free Speech and Religious Liberty' (2008) 10 *Ecclesiastical Law Journal* 337, 339. The relevant legislation, Pt 3A of the *Public Order Act 1986* (UK), now requires an intention to stir up hatred and includes a clause protecting free speech on sexual conduct: s 29JA.

59 Carl F Stychin, 'Closet Cases – "Conscientious Objection" to Lesbian and Gay Legal Equality' (2009) 18 *Griffith Law Review* 17, 35.

C Believing and Manifesting Belief

Stychin and other scholars have also noted the problems in the distinction between being free to believe something and the manifestation of those beliefs, which reflects the same problematic differentiations between identity and conduct, and between public and private, that have been used in the past to confine gays and lesbians to the closet.⁶⁰ That reasoning was, for example, evident in *Ladele*. Ms Ladele, according to Lord Neuberger MR, had no cause for complaint. Islington's policy did not impinge on her religious beliefs since she remained free to hold them, and free to worship as she wished.⁶¹ Her religion was relegated to the world of the private.

That, as Lord Neuberger MR indicated in *Ladele*, is consistent with the European jurisprudence. In *Pichon and Sajous v France*,⁶² the Strasbourg Court observed that 'the main sphere protected by Article 9 is that of personal convictions and religious beliefs', although it 'also protects acts that are closely linked to these matters such as acts of worship or devotion forming part of the practice of a religion or a belief'.⁶³ In *C v United Kingdom*,⁶⁴ the Commission indicated that Article 9 'primarily protects the sphere of personal beliefs and religious creeds, ie the area which is sometimes called the *forum internum*'.⁶⁵ One might have thought that for Ms Ladele, coercion to act contrary to her beliefs, at least to the extent that she might have to resign her job after a 15 year career, would constitute interference with the *forum internum*; but Lord Neuberger did not consider this point.

Confining freedom of religion to little more than freedom to believe certain things and to worship is a particularly narrow view of what religious belief involves. That degree of freedom was given in the communist countries of the old Soviet bloc and is given to believers in many other countries where people of faith are persecuted by being unable to work in certain kinds of employment or to express their faith freely in the public square. Lord Neuberger MR, in *Ladele*, not only took a very narrow view of religious faith in arguing that the Council's policy did not impinge on her beliefs; he also took a very narrow view of religious doctrine, arguing that her beliefs on marriage were not a core part of her religion.

It is unlikely that such a limited view of what constitutes a 'religious' belief and what it means to manifest one's religion, could be accepted in Australia. The courts in this country are not bound, as English courts are, by the European jurisprudence on the ECHR. To the extent that Australian courts might look to international human rights law, the starting point ought to be the decisions of the

60 Ibid. See also Carl F Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *Oxford Journal of Legal Studies* 729, 733; Chai R Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 *Brooklyn Law Review* 61.

61 *Ladele* [2010] 1 WLR 955, 970 [51].

62 (European Court of Human Rights, Chamber, Application No 49853/99, 2 October 2001).

63 Ibid 4.

64 (1984) 37 Eur Comm HR 142.

65 Ibid 147.

United Nations ('UN') Human Rights Committee on Article 18 of the International Covenant of Civil and Political Rights, which adopts a more generous approach to religious freedom.⁶⁶ The UN's guidance on the interpretation of limitation provisions ought also to be a primary source of reference.⁶⁷

Furthermore, the treatment of religion in the common law of Australia makes the narrow European approach untenable in the Australian context. Acting Chief Justice Mason and Brennan J noted in the *The Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)*:

Religious belief is more than a cosmology; it is a belief in a supernatural Being, Thing or Principle. ... Religion is also concerned, at least to some extent, with a relationship between man and the supernatural order and with supernatural influence upon his life and conduct...What man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of legal immunity, for his freedom to believe would be impaired by restriction upon conduct in which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.⁶⁸

They went on to note that freedom of religion has its limits, as it will have in any society. Nonetheless, confining freedom of religion to little more than freedom to believe and to worship, without recognition that faith has an influence upon people's life and conduct, is inconsistent with the High Court's understanding of what religious faith entails.

D Minorities v Minorities

The conflict in both *Ladele* and *McFarlane* involved minorities – not only LGBT people but racial and religious minorities within multicultural Britain. Both Lillian Ladele and Gary McFarlane are black, as have been other complainants about religious discrimination in Britain in recent years.⁶⁹ Perhaps that makes no difference, except that to force well-qualified, responsible and successful members of marginalised groups out of professional occupations in

66 Compare, for example, the treatment of religious dress by the European Court of Human Rights in *Sahin v Turkey* (European Court of Human Rights, Grand Chamber, Application No 44774/98, 10 November 2005), and by the Human Rights Committee in Human Rights Committee, *Views: Communication No 931/2000*, 82nd sess, UN Doc CCPR/C/82/D/931/2000 (5 November 2004) (*'Hudoyberganova v Uzbekistan'*). See generally, Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005).

67 UN Commission on Human Rights *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN ESCOR, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984), annex.

68 (1983) 154 CLR 120, 134–5. Similarly, Wilson and Deane JJ identified one of the indicia of religion as being that the ideas about the supernatural are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct: at 174.

69 Eg, the complainants in *R (Johns) [2011] EWHC 375 (Admin)* (28 February 2011).

the name of ‘equality’⁷⁰ is to exacerbate the sense of alienation of such minorities and to reduce levels of social inclusion overall.

Furthermore, when people insist on ‘diversity’, the outcome is sometimes to reduce diversity. Both Islington and Relate became less diverse organisations as a result of forcing their conscientious objectors out of their professional roles.

E Diversity, Anti-Discrimination Legislation, and Its Exceptions

The *McFarlane* case in particular has broader implications for the drafting of anti-discrimination laws. If counsellors who have religiously-based problems with counselling same-sex couples cannot work at national organisations like Relate, where can they work? Unless anti-discrimination laws provide room for conscientious objection, a counsellor in Mr McFarlane’s position might be held to be in breach of anti-discrimination laws in private practice as well. Exceptions in legislation for religious organisations may provide cover for counsellors who are employed by those organisations,⁷¹ but only if the definition of ‘religious’ employment within those organisations is not narrowly construed.⁷²

If conservative religious counsellors, who on religious grounds want to offer services only to heterosexual couples, are very limited in where and how they are permitted to practice, that makes it more difficult for people who need their counsel to find them and gain the help they need. This may be detrimental to devout Christians, Orthodox Jews, or Muslims who want help with their relationships and who prefer to go to religiously devout counsellors who share their conservative beliefs. Poorly drafted anti-discrimination laws may thus have the unintended consequence of reducing the availability of culturally appropriate services to certain minorities.

IV CONCLUSION: THE NEED FOR A NEW MULTICULTURALISM

What is the place of religion within the legal system of a secular society? Lord Justice Laws was correct to say in *McFarlane* that it cannot be a place of privilege. Yet it cannot be a place of invisibility either. Religious faith is profoundly important to many people in Australian society, and their right not only to believe but to manifest that belief in how they live is a fundamental human right. Employment is an important part of most people’s daily lives and cannot be entirely a faith-free zone. Like all rights, the right to manifest belief is subject to limitations but not to abnegation. A winner-takes-all approach to the

70 On the divergent meanings of ‘equality’ in the context of a public sector duty to promote it, see Lucy Vickers, ‘Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief’ (2011) 31 *Legal Studies* 135.

71 On this issue, see the debate about the extremely narrow exemptions originally proposed in Britain’s Equality Bill: Patrick Parkinson, ‘Christian Concerns About an Australian Charter of Rights’ (2010) 15 *Australian Journal of Human Rights* 83.

72 See Sandberg, above n 21, 173–80.

conflict between conservative religious belief and gay and lesbian rights would be a loss for human rights generally. No amount of soothing talk about 'balancing' can disguise when one right is allowed to eradicate another.

Australia has long respected the right of conscientious objection in the workplace. Apart from Victoria,⁷³ the issue has been handled sensibly for years in relation to health professionals who object to participation in abortions.⁷⁴ In NSW, there is even a provision concerned with religious objections to membership of a trade union.⁷⁵ In other areas of law in Western countries, exemptions from general laws, or other forms of accommodation, have been provided in the name of respecting the traditions, values and beliefs of people of faith.⁷⁶

Of course, any provisions on conscientious objection ought to have limits. There would need to be a genuinely held religious belief, and describing a belief to be 'religious' in character requires that it be a belief that has a reasonable degree of orthodoxy within the faith or denomination. Furthermore, only objections that can be readily accommodated within the organisation could be countenanced.⁷⁷

Making reasonable accommodation for conscientious objection on the grounds of religious belief is essential if Australia is to take its commitment to multiculturalism seriously.⁷⁸ It is also essential if it is to take its commitment to human rights seriously.⁷⁹ There are pathways to peace in the conflicts that erupt from time to time between religious faith and secularism, but to find them requires peacemakers who really do believe in dignity for all.

73 See the controversy about the *Abortion Law Reform Act 2008* (Vic) s 8, discussed in Frank Brennan, 'The Place of the Religious Viewpoint in Shaping Law and Policy in a Pluralistic Democratic Society: A Case Study on Rights and Conscience' (Paper presented at Values and Public Policy Conference: Fairness, Diversity and Social Change, University of Melbourne, 26 February 2009).

74 See, eg, *Health Act 1993* (ACT) s 84(1); *Criminal Law Consolidation Act 1935* (SA) ss 82A(5)–(6); *Criminal Code Act 1924* (Tas) ss 164(7)–(8); *Health Act 1911* (WA) s 334(2). See also Australian Medical Association, *AMA Code of Ethics – 2004* (November 2006) <<http://ama.com.au/codeofethics>>.

75 *Industrial Relations Act 1996* (NSW) s 212. For a review of the law across Australia on conscientious objection to union membership, see Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press, 1995) 173–210.

76 In Britain, see generally, Russell Sandberg and Norman Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 *Cambridge Law Journal* 302. See also the accommodations made for Muslims: Dominic 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.

77 On reasonable accommodation in this context, see Aileen McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 *Industrial Law Journal* 1, 24ff.

78 On the reinvigoration of multicultural policy, see Australian Multicultural Advisory Council, *The People of Australia: The Australian Multicultural Advisory Council's Statement on Cultural Diversity and Recommendations to Government* (2010); Chris Bowen, 'The Genius of Australian Multiculturalism' (Speech delivered at the Sydney Institute, 17 February 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb159251.htm>>.

79 See Parkinson, above n 71.