Cambridge Law Journal, **66(2)**, July 2007, pp. 302–312
Printed in Great Britain

RELIGIOUS EXEMPTIONS IN DISCRIMINATION LAW

RUSSELL SANDBERG AND NORMAN DOE*

INTRODUCTION

THE debate in January 2007, as presented by the mass media, concerning whether an exemption should be provided for Roman Catholic Adoption Agencies from new laws prohibiting discrimination on grounds of sexual orientation in the provision of goods and services, rested upon two erroneous assumptions. The first was an assumption that awarding exemptions on grounds of religion was novel; the second was that the debate concerned whether there ought to be a religious exemption at all.[1] This article seeks to engage with the real debate concerning the Equality Act (Sexual Orientation) Regulations 2007, which is not whether there ought to be a religious exemption (since one has been given) but rather the scope of the exemption. It also aims to show that religious exemptions are common in English law, including discrimination law, and to elucidate the various exemptions, paying particular attention to their beneficiaries and the basis on which discrimination is permitted. In short, this article seeks to understand the state of the law as a whole contextualising the recent moral panic.[2]

RELIGIOUS EXEMPTIONS

There are many examples within English law of exemptions from generally applicable laws made on grounds of religion. Most pre-date the Human Rights Act 1998 which incorporated a formal right to religious liberty under Article 9 of the European Convention on Human Rights (ECHR).[3] Many are well-known. For example, Sikhs

* Centre for Law and Religion, Cardiff Law School.

1 See, for example, the Radio Four Today Programme interview Dr. John Sentamu, Archbishop of York (24 January 2007); "Law to put gay rights ahead of religion", *Daily Mail* (7 March 2007); "Emboldened churches join forces to scupper new law on gay rights", *The Times* (2 December 2006).

2 For a classical treatment, see S. Cohen, *Folk Devils and Moral Panics* (London 1972), 9.

3 For a discussion of the effect of the Human Rights Act 1998 on religion, see M. Hill, "A New Dawn for Freedom of Religion" in M. Hill, *Religious Liberty and Human Rights* (Cardiff 2002); and for an analysis of recent developments, M. Hill and R. Sandberg, "Is Nothing Sacred? Clashing Symbols in a Secular World" [2007] *Public Law* (forthcoming).

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

are exempt from the requirement to wear a safety hat on a construction site and from the law relating to the wearing of protective headgear for motor cyclists.[4] Jews and Muslims enjoy exemptions from rules on animal slaughter methods.[5] In criminal law it is a defence to charge of having a blade in a public place if the blade is carried "for religious reasons", and consensual body modification, including ritual circumcision of males and religious flagellation, is an answer to a charge under the Offences Against the Person Act 1861.[6] Although there are examples where no exemption from the general law for religious reasons has been granted,[7] the general practice seems to have been the accommodation of religious liberty.[8] This has now been buttressed by the Human Rights Act 1998 not only because it incorporates Article 9 of the ECHR into English law but also by virtue of section 13 of the Act. Included as a result of religious lobbying,[9] section 13(1) provides:

> If 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.[10]

Although commentators seem divided as to the significance of the section, its presence alone shows willingness on the part of Parliament to give preferential treatment to religious groups.[11] The provisions of the Human Rights Act 1998 seem to perpetuate and develop the practice under English law of granting religious exemptions to generally applicable laws.

[4] Employment Act 1989, s.11; Road Traffic Act 1988, s.16; see S. Poulter, *Ethnicity, Law and Human Rights* (Oxford 1998), ch. 8.

[5] Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 1995/731, Reg 2.

[6] Criminal Justice Act 1988, s.139; *R.* v. *Brown* [1993] 2 All E.R 75; compare the Female Genital Mutilation Act 2003 and *Blake* v. *DPP* [1993] Crim L.R 556 (carrying out divine instructions not permitted as a defence to a charge of criminal damage).

[7] Typically the refusal to grant an exemption is on public health grounds: thus the law provides no special protection for Rastafarians for their use of cannabis on religious grounds (*R.* v. *Taylor* [2001] EWCA Crim 2263, [2002] 1 Cr. App. Rep. 519; *R.* v. *Andrews* [2004] EWCA Crim 947) and courts have accepted that parental religious beliefs are subordinate to the welfare of the child and may be overridden to save the life of a child (*Re O (A Minor) (Medical Treatment)* [1993] 2 F.L.R 149; *Re R (A Minor)* (*Blood Transfusion*) [1993] 2 F.L.R 757. See N. Doe and H. Payne, "Public Health and the Limits of Religious Freedom" (2005) 19.2 Emory International Law Review 539 and P. W. Edge, *Religion and Law: An Introduction* (Aldershot 2006), ch.3.

[8] For example, section 1 of the Adoption and Children Act 2002 recognises the right of children to have "due consideration" to be given to their "religious persuasion". See also S. Poulter, *Asian Traditions and English Law* (Stoke-on-Trent 1990), 1.

[9] See generally P. Cumper, "Religious Organisations and the Human Rights Act 1998", in P. W. Edge and G. Harvey (eds), *Law and Religion in Contemporary Society* (Aldershot 2000), 7 and P. W. Edge, *Legal Responses to Religious Difference* (The Hague 2002), 85.

[10] Section 13(2) provides that: "'court' includes a tribunal".

[11] See R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford 2005), 359 (s.13 is "rather mild"), and P. Cumper, "The Protection of Religious Rights under Section 13 of the Human Rights Act 1998" [2000] Public Law 265.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

Given the frequent accommodation of individual and collective religious liberty in other areas of the law, it is not surprising that religious exemptions from discrimination law have been granted both before and after the enactment of the Human Rights Act 1998. These exemptions have largely been uncontroversial, but recent attempts to accommodate religious freedom in laws prohibiting discrimination on grounds of sexual orientation have proved contentious. To understand this controversy, and the actual legal issue (which focuses on the scope of the exemption rather than its existence at all), it is necessary to examine current religious exemptions from other areas of discrimination law with particular reference to the beneficiaries of the exemption and the basis upon which the exemption may be exercised.

Sex Discrimination

Discrimination on grounds of sex is prohibited by the Sex Discrimination Act 1975 as amended by the Employment Equality (Sex Discrimination) Regulations 2005.[12] The Act outlaws direct and indirect discrimination, victimisation and sexual harassment against women and men on grounds of sex in relation to employment,[13] education, the provision of goods, facilities, services and premises, and discriminatory practices or advertisements.[14] Although the principles of the Act are of general applicability, exemptions have been included on the face of the statute.[15] In addition to general exemptions,[16] there is a specific exemption where "the employment is for purposes of an organised religion".[17] Section 19, as amended, provides that discrimination for such a purpose is lawful: a requirement may be imposed to require employees to be, for example,[18] of a particular sex provided that the requirement is imposed on one of the two bases given by the

[12] In SI 2005/2467, which implemented EU Directive 2002/73/EC.

[13] Discrimination against office-holders is now included: see section 10B.

[14] Discrimination on grounds of gender reassignment, against married persons and civil partners, and on grounds of pregnancy or maternity leave are also now prohibited.

[15] This is in accordance with EU law. See *e.g.* Article 2(2) of the Equal Treatment Directive 76/207/EEC: "This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature and of the context in which they are carried out, the sex of the worker constitutes a determining factor."

[16] Most notably the General Occupational Qualification provided by section 7.

[17] See L. Samuels, "Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights" (2005) 8 Ecclesiastical Law Journal 74.

[18] The list of possible requirements that could be imposed are now stated in section 19(3), namely: "a requirement not to be undergoing or to have undergone gender reassignment", "a requirement relating to not being married or to not being a civil partner", or "a requirement, applied in relation to a person who is married, or is a civil partner, that relates— (i) to the person, or the person's spouse or civil partner, not having a living former spouse or a living former civil partner, or (ii) to how the person, or the person's spouse or civil partner, has at any time ceased to be married or ceased to be a civil partner." Some of these additional requirements had been added by Regulation 5 of the Sex Discrimination (Gender Reassignment) Regulations 1999, which the 2005 Regulations revoked.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

Act. The first basis is where a normally discriminatory requirement is imposed "so as to comply with the doctrines of the religion"; the second is where the requirement is imposed "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 convictions of a significant number of the religion's followers".

The first basis can be used to protect those faiths which as a matter of doctrine limit ministry to one sex. Other faiths which only partially discriminate on grounds of sex by restricting women from certain posts will usually be unable to point to a doctrinal base for this policy and so will need to rely on the second basis in order to discriminate lawfully. Previously, the Church of England had greater protection than employers for purposes of "an organised religion" in that in addition to section 19 of the Sex Discrimination Act 1975, the established church could also rely on section 6 of the Priests (Ordination of Women) Measure 1993. However, this has been repealed by the 2005 Regulations.[19]

Religious Discrimination

The prohibition of religious discrimination is a fairly recent legal development.[20] Discrimination on grounds of religion or belief in employment and vocational training were outlawed by the Employment Equality (Religion or Belief) Regulations 2003,[21] whilst discrimination on grounds of religion or belief in the provision of goods, facilities and services was prohibited by Part 2 of the Equality Act 2006.[22] The Regulations and the Act both outlaw direct and indirect discrimination and victimisation on grounds of religion or belief but the Regulations alone outlaw religious harassment.[23] Both the Regulations and the Act

[19] According to the Explanatory Memorandum, section 6 was deemed not compatible with EU law since it allowed "those within the Church of England to discriminate in the ordination, licensing and appointment of women priests and [was] not specifically limited to reasons of religious conscience".

[20] Domestic law was driven by EU obligations. Under EU Directive 2000/78/EC, in addition to existing prohibition against sex and race discrimination, discrimination on grounds of sexual orientation, age, disability and religion or belief "should be prohibited throughout the Community".

[21] SI 2003/1660. See, generally, N. De Marco, *Blackstone's Guide to the Employment Equality Regulations 2003* (Oxford 2004) and R. Sandberg, "Flags, Beards and Pilgrimages: A Review of the Early Case Law on Religious Discrimination" (2007) 9 Ecclesiastical Law Journal 87.

[22] See R. Sandberg, "To Equality and Beyond: Religious Discrimination and the Equality Act 2006" (2006) 8 Ecclesiastical Law Journal 470.

[23] Clause 47 in the Equality Bill outlawing religious harassment was removed by the House of Lords. Their Lordships considered that the clause could have been used by religious groups to obtain an injunction to stop other religions staging events that they considered offensive (this has arisen in Australia where an Islamic association sought to obtain an injunction against an Evangelical Christian Church: *Islamic Council of Victoria* v. *Catch the Fire Ministries Inc* [2004] VCAT 2510). The harassment provision in the 2003 Regulations cannot be used to obtain an injunction: see N. Addison, *Religious Discrimination and Hatred Law* (Abingdon 2007), 111. On religious harassment under the 2003 Regulations, see L. Vickers, "Is All Harassment Equal? The Case of Religious Harassment" [2006] C.L.J. 579.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

provide an individual exemption on grounds of religion or belief implicit in their definition of direct discrimination:[24] although it remains unlawful for A to discriminate against B on the grounds of B's religion or belief even if A and B are of the same religion or belief, it is lawful for A to discriminate on grounds of *their own* religion or belief. This is recognition of A's right to manifestation of his own religion or belief. In terms of further exemptions for religious collectives, the 2003 Regulations and 2006 Act merit separate treatment.

Under the Regulations, in addition to general exemptions,[25] there is a specific exemption for employers who have "an ethos based on religion or belief". Regulation 7(3) provides that such employers can discriminate on grounds of religion or belief where being of a particular religion or belief is "a genuine occupational requirement for the job" and "it is proportionate to apply that requirement in the particular case". This exemption is broader than that found in section 19 of the Sex Discrimination Act 1975 in two respects: first, it can be exercised by all employers who have an ethos based on religion or belief rather than just organised religions; second, the exemption and the basis on which it can be exercised are simply extensions of the normal occupational requirement exemption. It is therefore not really an exemption for religious groups analogous to section 19 of the Sex Discrimination Act 1975.

In contrast, Part 2 of the Equality Act 2006 does provide an exemption for religious groups. In addition to numerous exemptions,[26] section 57 provides that an "organisation relating to religion or belief" or anyone acting on its behalf may lawfully restrict the provision of goods and services by that organisation and membership or participation in the organisation either "by reason of or on grounds of the purpose of the organisation" or "in order to avoid causing offence, on grounds of religion or belief to which the organisation relates, to persons of that religion or belief". This exemption is notable in that the category "organisations relating to religion or belief" seems wider than that of "organised religion" under the Sex Discrimination Act 1975. Furthermore, unlike the term "organised religion", the term "organisation relating to religion or belief" is defined by section 57 of the Act:

[24] R. Sandberg, "To Equality and Beyond: Religious Discrimination and the Equality Act 2006" (2006) 8 Ecclesiastical Law Journal 470.

[25] Most notably where there is a General Occupational Requirement as provided for in Regulation 7(2) which applies "whether or not the employer has an ethos based on religion or belief".

[26] Including exemptions for charities relating to religion or belief and faith schools. See R. Sandberg, "To Equality and Beyond: Religious Discrimination and the Equality Act 2006" (2006) 8 Ecclesiastical Law Journal 470 and S. Knights, *Freedom of Religion, Minorities and the Law* (Oxford 2007), 36.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

an organisation the purpose of which is -

(a) to practice a religion or belief,
(b) to advance a religion or belief,
(c) to teach the practices or principles of a religion or belief,
(d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion of belief, or
(e) to improve relations, to maintain good relations, between persons of different religions or beliefs.

But this section does not apply to an organisation whose sole or main purpose is commercial.

Sexual Orientation Discrimination

Exemptions for religious groups have proved to be more controversial with respect to discrimination on grounds of sexual orientation.[27] Direct and indirect discrimination, victimisation and harassment on grounds of sexual orientation in employment and vocational training were outlawed by the Employment Equality (Sexual Orientation) Regulations 2003,[28] whilst the Equality Act (Sexual Orientation) Regulations 2007 outlaw direct and indirect discrimination and victimisation but not harassment on grounds of sexual orientation in the provision of goods, facilities and services.[29] Both Regulations contain specific religious exemptions, but they differ substantially.

Under the 2003 Regulations, in addition to general exemptions,[30] there is a specific exemption for "organised religion". Under Regulation 7(3), if "the employment is for purposes of an organised religion", a requirement related to sexual orientation may be imposed provided that it is imposed on one of two bases.[31] The first basis upon which discrimination is lawful is if the requirement is needed in order "to comply with the doctrines of the religion"; the second basis is that the requirement is needed "because of the nature of the employment and

[27] The legal prohibition of discrimination on this ground is also fairly novel and like the new law on religious discrimination was triggered by EU Directive 2000/78/EC.

[28] SI 2003/1661. See H. Oliver, "Sexual Orientation Discrimination: Perceptions, Definitions and Genuine Occupational Requirements" (2004) 33 Industrial Law Journal 1.

[29] Made under section 81(1) of the Equality Act 2006. The exclusion of the harassment clause follows the House of Lords rejection of a similar clause in Part 2 of the Equality Act 2006 concerning harassment on grounds of religion or belief in relation to goods and services. However, a harassment clause is contained in the Equality Act 2006: Sexual Orientation Regulations (Northern Ireland) 2006. On which see House of Lords Hansard, 9 January 2007, column 179.

[30] Most notably where there is a General Occupational Requirement as provided for in Regulation 7(2) which applies "whether or not the employer has an ethos based on religion or belief".

[31] The requirement may simply be that employment is refused on grounds of sexual orientation or the requirement may constitute a special rule as to those of a certain sexual orientation (*e.g.* celibacy).

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers''. This exemption has more in common with section 19 of the Sex Discrimination Act 1975 than the broader exemptions in the law prohibiting discrimination on grounds of religion or belief.

Despite this, the exemption has proved problematic. In *R (Amicus MSF Section)* v. *Secretary of State for Trade and Industry*,[32] a number of provisions in the 2003 Regulations, including Regulation 7(3), were challenged because they did not fully incorporate the EU Directive in so far as the exemptions granted were too wide and were in breach of the ECHR. Although the application was dismissed on the grounds that the Regulations adequately incorporated the Directive, Richards J. seemed at pains to stress the narrow nature of the religious exemption. On the basis that the Regulations should be construed purposively so as to conform as far as possible with the Directive, Richards J. made extensive use of parliamentary statements to support the view that the exemption in Regulation 7(3) was intended to be very narrow, and, on its proper construction, was consistent with the original EU Directive. Richards J. contended that the term ''organised religion'' was narrower than ''religious organisation'' and gave the example that employment as a teacher in a faith school is likely to be ''for purposes of a religious organisation'' but not ''for purposes of an organised religion''.[33] 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''.

The issue of religious exemptions have proved to be more controversial in relation to the 2007 Regulations. Concern culminated in a letter written by Cardinal Cormac Murphy O'Connor, the head of the Roman Catholic Church in England and Wales, to the Cabinet in January 2007 focusing specifically on the need for an exemption which would allow the Catholic Adoption Agencies to lawfully refuse to place children with homosexual couples.[34] The Cardinal warned that such adoption agencies would close if they are not allowed such an opt out. Media briefings by several Ministers opposed to an exemption led to a statement by Prime Minister Blair that an exemption for Roman Catholic Adoption Agencies would not be permitted but that faith-based adoption and fostering agencies would be given a specified time to adapt to the new regime. This was widely interpreted as meaning that there would be no religious exemption. However, the text of the

[32] [2004] EWHC 860.
[33] At [116].
[34] The letter is available at the Diocese of Westminster Website <http://www.rcdow.org.uk/cardinal/default.asp?content_ref=1179>.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

2007 Regulations rebuts this and also illustrates why the Cardinal framed his objection narrowly.

Regulation 17 provides exemptions for "organisations relating to religion or belief". The definition is identical to that in Part 2 of the Equality Act 2006 (in relation to discrimination on grounds of religion or belief) but for two differences: first, the fifth purpose relating to improving or maintaining good relations between religions is omitted; second, it is also stated that the section does not apply to educational organisations.[35] These organisations may lawfully restrict the provision of goods and services by that organisation and membership or participation in the organisation on one of two bases. The first is "if it is necessary to comply with the doctrine of the organisation", the second is "so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers". The Regulation states that this does not apply in the case of discrimination by a responsible body of an educational establishment or where an organisation makes provision with and "on behalf of a public authority under the terms of a contract".

This explains why the Roman Catholic objection to the Regulations focused specifically on the need for an exemption which would allow the Catholic Adoption Agencies lawfully to refuse to place children with homosexual couples rather than whether there ought to be an exemption at all. Although Roman Catholic adoption agencies are entitled to the exemption in that they are "organisations relating to religion or belief", they lose that exemption when they contract with the State to provide their service. Regulation 15 explicitly states that a "voluntary adoption agency or fostering agency" that is, or acts on behalf of, an "organisation relating to religion or belief" is exempt from the new law until 31 December 2008.

This explanation is supported by reference to the equivalent Sexual Orientation Regulations (Northern Ireland) 2006. Despite one important difference,[36] the concerns expressed about the Sexual Orientation Regulations (Northern Ireland) 2006 equally apply to the 2007 Regulations for England, Scotland and Wales. On 9 January 2007, Opposition peer Lord Morrow, moving a debate on the Northern Ireland Regulations (which had already come into effect) praying (unsuccessfully) that they be annulled, outlined the main objection to the existing religious exemption:[37] namely, that the legal privilege enjoyed by an "organisation relating to religion or belief" is lost where the religious organisation contracts with the State to

[35] Equality Act (Sexual Orientation) Regulations 2007 Regulations 171(1)–(2); Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, Regulations 16(1)–(2).
[36] Namely that there is no harassment provision in the England and Wales Regulations.
[37] House of Lords Hansard, 9 Jan 2007, column 179.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

provide a particular service.[38] As Lord Morrow pointed out, the Regulations mean that "religious bodies providing a service on behalf of the state must fully comply with the new laws". If they wish to refuse to provide goods and services on the basis of sexual orientation they are faced with a stark choice: "defend legal actions or turn down state funding".

Conclusions

The current law provides a myriad of religious exemptions and a myriad of beneficiaries. While section 13 of the Human Rights Act 1998 refers to the particular importance of the Convention rights of a "religious organisation", this term is conspicuously absent from discrimination law exemptions. Both the Sex Discrimination Act 1975 and the Employment Equality (Sexual Orientation) Regulations 2003 address their exemptions to an "organised religion", while the goods and services provisions, in relation to discrimination on grounds of religion and sexual orientation, are intended for an "organisation relating to religion or belief".[39] Given that Parliament in enacting section 13 of the Human Rights Act 1998 has made it clear that particular regard be given to the rights of a "religious organisation", it is appropriate to ask why certain privileges have been afforded only to the narrower category where the beneficiary is an "organised religion". This may actually infringe not only section 13 but more importantly Article 9 of the ECHR.[40]

In terms of distinguishing these concepts, the term "organised religion" is undefined but for the parliamentary material quoted with approval by the Queen's Bench in *R (Amicus MSF Section)* v. *Secretary of State for Trade and Industry*[41] which illustrated that the term "organised religion" was narrower than "religious organisation". With regard to an "organisation relating to religion of belief", Parliament has provided a purposive definition of the term in every

[38] It should be noted that Lord Morrow's main objection to the Northern Ireland Regulations was that there is no exemption from harassment in relation to goods and services. He noted that whilst the exemption permitted a minister to refuse to provide a service for homosexuals, it "does not cover any subsequent explanations. If he quotes from the Bible, he could be in trouble". Such action could constitute harassment and there is no exemption on grounds of religion for this. The absence of a harassment provision means that these objections do not apply to the British Regulations.

[39] Equality Act 2006; Equality Act (Sexual Orientation) Regulations 2007. The exemption in the Employment Equality (Religion or Belief) Regulations 2003 is addressed to employers who have "an ethos based on religion or belief" but that exemption differs significantly from the others in terms of the basis upon which it can be exercised, suggesting that it ought to be seen as an extension of the general occupational exemption which just happens to cover religious groups, rather than an exemption specifically for religious groups.

[40] Privileging an "organised religion" but not a "religious organisation" runs contrary to the right to manifest religion or belief under Article 9. This is primarily an individual right.

[41] [2004] EWHC 860, [2004] I.R.L.R. 430.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

instance. However, there is no legal articulation of the difference, if any, between an "organisation relating to religion or belief" and an "organised religion". This is a matter of practical importance since with respect to discrimination on grounds of sexual orientation, for example, religious exemptions in relation to employment can be used for the purposes of an "organised religion" while religious exemptions in relation to the provision of goods and services are addressed to any "organisation relating to religion or belief". Although the Queen's Bench decision in *Amicus* predates the use of this new term, the parliamentary material quoted seems to suggest that the term "organisation relating to religion or belief" is narrower than the term "organised religion". Thus, it may be said 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". Although it follows as a matter of logic that an "organised religion" would share the characteristics of an "organisation relating to religion or belief", the law remains silent as to the extra ingredient that makes an "organisation relating to religion or belief" also an "organised religion". One such ingredient is that an "organised religion" relates to religion rather than belief;[42] perhaps another may be that rather than simply having one of the purposes of an "organisation relating to religion or belief", an "organised religion" is an entity which meets most of them. Under this suggestion, effectively, the word "or" in the definition becomes an "and".[43] At present, the relationship between these two terms is unknown.

Whilst the fact that religious exemptions from discrimination law are addressed to different beneficiaries leads to confusion, there is a degree of uniformity in relation to the basis upon which the addressee may lawfully discriminate. Apart from exemptions from laws prohibiting discrimination on grounds of religion or belief,[44] religious

[42] This means that it becomes vital to define the term "religion". As the House of Lords recognised in *R* v. *Secretary of State for Education ex parte Williamson* [2005] UKHL 15, [2005] 2 A.C. 246 (at paragraph [24] *per* Lord Nicholls and paragraphs [54]–[56] *per* Lord Walker), once protection is extended to "religion or belief" there is seldom need to articulate a definition of religion as there is no cause to distinguish religion from other beliefs. See R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford 2005), 110.

[43] For instance, one way of determining the matter is to examine the internal laws or other regulatory instruments of faith communities themselves. For example, a Parochial Church Council of the established Church of England meets most of the statutory tests and is therefore definitely an "organisation relating to religion or belief" and is also, we suggest, an "organised religion": its functions include promotion of "the whole mission of the Church, pastoral, evangelistic, social and ecumenical", and discussion of matters concerning the Church of England "or any matters of religious or public interest, but not the declaration of the doctrine of the Church on any question": Parochial Church Councils (Powers) Measure 1956, s.2(2); see N. Doe, *The Legal Framework of the Church of England* (Oxford 1996), 106 ff.

[44] As outlined above, the exemption for employers who have an ethos based on religion or belief in the Employment Equality (Religion or Belief) Regulations 2003 differs significantly from other religious exemptions. More surprisingly, the exemption from laws prohibiting discrimination on grounds of religion or belief in the provision of goods and services under Part 2 of the Equality

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press

exemptions can be exercised on two bases: the beneficiary may discriminate in order to comply with their doctrines or to avoid conflicting with the strongly-held religious convictions of a significant number of their followers. However, there is considerable confusion as to these tests. Richards J. in *R (Amicus MSF Section)* v. *Secretary of State for Trade and Industry*[45] made use of parliamentary materials to propose that these requirements imposed "very real additional limitations" and further suggested that both tests were objective.[46] To make use of the first basis, reference should not be made to the subjective "motivation of the employer", but rather to "an objective test whereby it must be shown that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion". Differing ideas concerning the interpretation and content of doctrine render this a complicated charge.[47] Although Richards J. conceded that the second basis is wider, he nevertheless claimed that it is "hemmed about by restrictive language" and requires "an objective, not subjective, test" which "is going to be a very far from easy test to satisfy in practice". Deciding 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:[48] if it is unclear how far membership extends, it surely becomes impossible to show offence on the part of a significant number.[49]

The Government's manifesto pledge to bring a single equality Bill this Parliament means that there is a real need to understand the current religious exemptions and an opportunity to harmonise the law.[50] The recent media furore indicates that the exemptions are widely misunderstood, and the provisions affording them reveal that the law is inconsistent.

Act 2006 also differs from other religious exemptions in relation to basis. Under section 57, the exemption can be used either "by reason of or on grounds of the purpose of the organisation" or "in order to avoid causing offence, on grounds of religion or belief to which the organisation relates, to persons of that religion or belief". The omission of references to doctrine under the first limb and to the need for a significant number of followers to be so offended under the second limb has not been explained and should probably be seen as an anomaly.

[45] [2004] EWHC 860.

[46] At [117].

[47] For instance, for discussion of the difficulties in determining the "doctrine of the Church of England", see *Clergy Discipline (Doctrine)*, Report of a Working Group of the House of Bishops (GS 1554, London 2004).

[48] For the Church in Wales, see N. Doe, *The Law of the Church in Wales* (Cardiff 2002), 179; see also P. Colton, "The Pursuit of a Canonical Definition of Membership of the Church of Ireland" (2007) Ecclesiastical Law Journal (forthcoming).

[49] For the absence of a clear canonical definition of membership in the Roman Catholic Church, see the findings of the Colloquium of Anglican and Roman Catholic Canon Lawyers in J. Conn, N. Doe and J. Fox (eds), *Initiation, Membership and Authority in Anglican and Roman Catholic Canon Law* (Rome 2005).

[50] Labour Party Manifesto 2005, *Britain Forward Not Back*, 112. The Department of Trade and Industry is reviewing the law "to assess how anti-discrimination legislation can be modernised, simpler and give a fairer legal framework". A green paper is expected shortly. See: http://www.womenandequalityunit.gov.uk/dlr/index.htm.

https://doi.org/10.1017/S0008197307000530 Published online by Cambridge University Press